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INDIAN CASES

CONTAINING

FULL REPORTS OF DECISIONS

OF

The PRIVY COUNCIL, the High Courts of ALLAHABAD, BOMBAY,

• CALCUTTA, LAHORE, MADRAS, PATNA and RANGOON,

the Courts of the Judicial Commissioners of

CENTRAL PROVINCES, OUDH,

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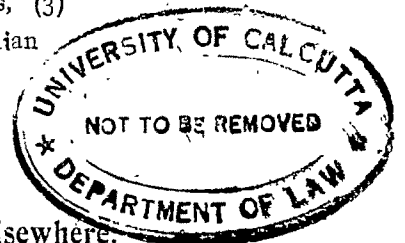
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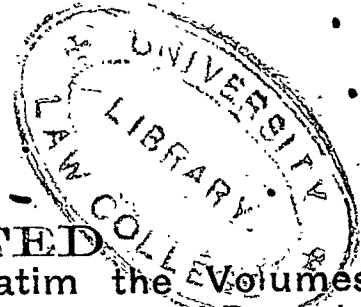


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23	Uttam Prasad v. Kodai	72	916	146	Chakkhan Lal v. Kanhaya Lal	69	921
27	Chhotay v. Emperor	69	457	150	Sheo Narayan v. Rala Rao	69	208
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31	Lal Bahadur v. Paspal Prasad	74	301	86	Yaqub Beg v. Rasul Beg	74 517
33	Nazir Khan v. Muhammad Abid Ali Beg	69	204	109	Mohammad Ali v. Hasan Jafar	74 480
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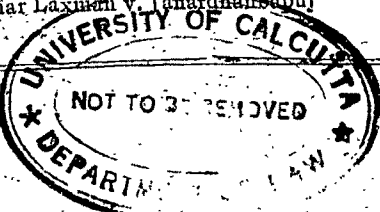
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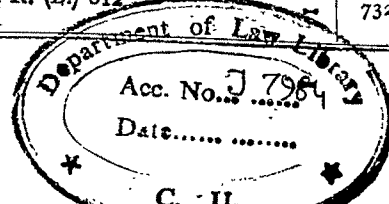
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348	Nasir Khan v. Fyaz Hossain	..	(1922) A. I. R. (C.) 57; 24 Cr. L. J. 348.
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381	Kottithoti Hamed Haji v. Emperor	..	44 M. L. J. 428; 17 L. W. 426; (1923) M. W. N. 288; 32 M. L. T. 195; 24 Cr. L. J. 381; (1923) A. I. R. (M.) 598.
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545	Raghavachariar v. Murugesu Mudali	..	(1923) M. W. N. 323; 32 M. L. T. 285; 44 M. L. J. 680; 17 L. W. 750; 46 M. 583; (1923) A. I. R. (M.) 635.
547	Hirasa v. Sheokuwar	..	*Nagpur Judicial Commissioner's Court
548	Vencatachella Pillai v. Arunthavathatchi	..	(1923) M. W. N. 225; 17 L. W. 755; (1923) A. I. R. (M.) 568
554	Jogendra Nath v. Khoda Bukhsa Biswas	..	*Calcutta High Court.
556	Hanmant v. Shidu Sambhu	..	25 Bom. L. R. 358; (1923) A. I. R. (B.) 300; 47 B. 692.
558	Subbeir v. Moideen Pitchai	..	(1923) M. W. N. 282; 44 M. L. J. 588; 32 M. L. T. 304; (1923) A. I. R. (M.) 562; 17 L. W. 582.
559	Parthasarathy Aiyar v. Subbaroya Gramony	..	(1923) M. W. N. 763; 45 M. L. J. 175

566	Chhajju Ram v. Neki	..	30 M. L. T. 205; 26 C. W. N. 69; 41 P. L. R. 192; 3 P. L. T. 435; (1922) A. I. R. (L. C.) 112; 16 L. W. 3; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (L. C.) 99; 36 C. L. J. 459 P. C.
569	Firm Raghbir Singh-Jaswant Singh v. Narinjan Singh	..	(1923) A. I. R. (L.) 48.
575	Munshi Ram v. Nauranga	..	*Lahore High Court.
576	Sarojini Debya v. Krista Lal Halidar	..	36 C. L. J. 406; (1923) A. I. R. (C.) 250.
582	Koonamvelli Unnara v. Koyiparambath	..	17 L. W. 322; 44 M. L. J. 443; 32 M. L. T. 146; (1923) A. I. R. (M.) 514.
586	Sher Singh v. Udham Singh	..	5 L. L. J. 307.
588	Bisai Nath v. Tara Nath	..	(1923) A. I. R. (C.) 385.
591	Wadhwa Mai v. Lachman Das	..	*Lahore High Court.
592	Banarsi Das v. Kishori Lal	..	(1923) A. I. R. (L.) 383.
593	Mul Singh v. Emperor	..	(1923) A. I. R. (L.) 163; 24 Cr. L. J. 433.
599	Kunhammad Haji v. Emperor	..	(1923) M. W. N. 94; 44 M. L. J. 450; (1923) A. I. R. (M.) 420; 46 M. 382; 24 Cr. L. J. 439.
609	Streenivasa Chetty v. Emperor	..	(1923) M. W. N. 274; 44 M. L. J. 585; 18 L. W. 80; (1923) A. I. R. (M.) 596; 24 Cr. L. J. 449.
611	Waryam Singh v. Emperor	..	(1922) A. I. R. (L.) 324; 24 Cr. L. J. 451.
612	Venkatagurunatha Sastri, <i>In re</i>	..	17 L. W. 580; 32 M. L. T. 234; (1923) M. W. N. 313; 45 M. L. J. 133; (1923) A. I. R. (M.) 597; 24 Cr. L. J. 452.
613	Newa Lal Rai v. Emperor	..	(1923) A. I. R. (Pat.) 368; 4 P. L. T. 552; 24 Cr. L. J. 453.
613	Garine Satyanarayana v. Emperor	..	17 L. W. 249; (1923) A. I. R. (M.) 375; 24 Cr. L. J. 453.
614	Bodh Kishen Goala v. Emperor	..	4 P. L. T. 608; 24 Cr. L. J. 454.
615	Ramaswami Thevan v. Emperor	..	44 M. L. J. 485; 17 L. W. 499; (1923) M. W. N. 314; 32 M. L. T. 297; (1923) A. I. R. (M.) 618; 24 Cr. L. J. 455.
616	Kanma Rondiah, <i>In re</i>	..	17 L. W. 546; 32 M. L. T. 365; (1923) M. W. N. 437; (1923) A. I. R. (M.) 608; 24 Cr. L. J. 456.
617	Khushi Ram v. Emperor	..	(1923) A. I. R. (L.) 525; 4 L. 224; 24 Cr. L. J. 457.
621	Bhawhala v. Duni Chand	..	24 Cr. L. J. 461.
622	Chakrakodi Shama Shastri v. Emperor	..	(1922) M. W. N. 476; (1922) A. I. R. (M.) 435.
623	Municipal Committee, Lahore v. Rattan Chand	..	44 M. L. J. 67; 24 Cr. L. J. 462.
624	Puniya Syamalo, <i>In re</i>	..	(1923) A. I. R. (L.) 31; 24 Cr. L. J. 463.
625	Mahabir Ram v. Rambahadur Dubey	..	(1922) M. W. N. 840; 17 L. W. 155; (1923) A. I. R. (M.) 275; 24 Cr. L. J. 464.
626	Shidappa v. Pandurang Vasudev	..	4 P. L. T. 305; (1923) A. I. R. (Pat.) 435.
627	Mathoor Graman v. Manukurisi Variath Lakshmi	..	25 Bom. L. R. 395; (1923) A. I. R. (B.) 385; 47 B. 696.
629	Rameshwardhari Singh v. Sadau Saran Singh	..	17 L. W. 514; (1923) M. W. N. 343; 32 M. L. T. 399; (1923) A. I. R. (M.) 572.
631	Bhau Abuji Deshpande v. Hari Ramachandra	..	4 P. L. T. 261; 2 Pat. 504; (1923) A. I. R. (Pat.) 354.
632	South Indian Industrials v. Alamelu Ammal	..	25 Bom. L. R. 411; (1923) A. I. R. (B.) 301.
634	Triloke Prasad Singh v. Umanand Lal	..	17 L. W. 495; (1923) M. W. N. 344; 45 M. L. J. 53; (1923) A. I. R. (M.) 565.
635	Ammakannu Ammal v. Narayanaswami Mudaliar	..	(1922) A. I. R. (Pat.) 447.
636	Broach City Municipality v. Gulam Rasul Haji Banubhai	..	17 L. W. 629; (1923) A. I. R. (M.) 633.
637	Sajjad Husain v. Sakai Raji	..	25 Bom. L. R. 395; (1923) A. I. R. (B.) 289; 47 B. 654.
638	Rarichan v. Damayanti	..	(1922) A. I. R. (Pat.) 448; 2 Pat. 7; 4 P. L. T. 575.
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640	Prodyot Kumar Tagore v. Umesh Chandra Saha	*Calcutta High Court.
643	Gopal Misser v. Partap Mandal	4 P. L. T. 652.
646	Kishori Mohan Pal v. Provash Chandra	*Calcutta High Court.
648	Chattrapat Pratap Bahadur v. C. G. Lees	4 P. L. T. 487; 1 P. L. R. 322.
651	Gonesh Ram v. Ganpat Rai	*Calcutta High Court.
653	Jhingur Ojha v. Meghnath Pandey	*Patna High Court.
655	Syam Lal v. Brindaban Chandra	*Calcutta High Court.
657	Adelaide Christiana Lish v. David Lish	1 P. L. R. 129; (1923) Pat. 12; (1923) A. I. R. (Pat.) 301.
659	Vithal Yeshwant v. Shivappa Mallappa Hosmani	25 Bom. L. R. 323; (1923) A. I. R. (B.) 265; 47 B. 637.
662	Mahadeo Saran v. Dharamnath Sahay	*Patna High Court.
663	Dina Nath Pal v. Sati Prasad	36 C. L. J. 220; 27 C. W. N. 115; (1923) A. I. R. (C.) 74.
668	Ram Narain v. Ramdhan Singh	4 P. L. T. 647.
669	Lakshminarayana v. Standard Oil Co. of New York	44 M. L. J. 488; 17 L. W. 627; 32 M. L. T. 296; (1923) A. I. R. (M.) 581.
670	Hirji Jivraj Baldeo v. Ramjas Agarwala	*Patna High Court.
670	Phillo v. Gopi	*Lahore High Court.
671	Mohammad Kunhi v. Packrichi Umma	46 M. 650; 18 L. W. 502.
680	Kailas Chandra Nag v. Bijay Chandra Nag	36 C. L. J. 434; (1923) A. I. R. (C.) 18.
683	Varada Reddy v. Srinivasa Mudaliar	(1923) M. W. N. 357; 18 L. W. 169; 45 M. L. J. 199.
686	Kali Krishna Roy v. Makhan Lal	36 C. L. J. 441; 27 C. W. N. 411; (1923) A. I. R. (C.) 160; 50 C. 233.
688	Hari Krishna Pillai v. Arur Pandithar	(1923) M. W. N. 354; 18 L. W. 105.
690	Sundararaja Chariar v. Ali Muhammad	44 M. L. J. 649
692	Guljar Mandal v. Sariman Mandalini	36 C. L. J. 228; (1923) A. I. R. (C.) 71.
696	Chairman, Serajgunj Municipality v. Chittagong Co.	36 C. L. J. 242; (1923) A. I. R. (C.) 32.
698	Lalit Mohan v. Manoranjan Ghosh	36 C. L. J. 208; (1923) A. I. R. (C.) 13.
703	Srirangan Municipal Council v. Bodi	18 L. W. 130; 45 M. L. J. 164.
705	Ram Dheyam Singh v. Bhulotan Singh	*Patna High Court.
714	Assam Bengal Railway Co. Ltd. v. Radhika Mohan Nath	(1923) A. I. R. (C.) 397.
719	Annadamoyi Debi v. Saudamini Dehya	27 C. W. N. 502; 37 C. L. J. 333; (1923) A. I. R. (C.) 559.
722	Kalipada Das v. Raja Sati Prasad	36 C. L. J. 234; (1922) A. I. R. (C.) 468; 27 C. W. N. 372.
727	Pothane Puthan Vittil v. Adrasseri Raru Nair	44 M. L. J. 527; 17 L. W. 547; 32 M. L. T. 372; 46 M. 478; (1923) A. I. R. (M.) 558.
732	Umrao Bakhsh v. Nur Mohammad Khan	(1923) A. I. R. (L.) 612.
735	Janu Sait v. Rama Swami Naidu	(1923) M. W. N. 335; 32 M. L. T. 330; (1923) A. I. R. (M.) 616; 18 L. W. 564.
742	Bhagwan Das v. Parbati	(1923) A. I. R. (L.) 569.
745	Maharajah of Jeypore v. Chetrucheria Gangaraju	(1923) M. W. N. 277; 17 L. W. 517; 32 M. L. T. 269; (1923) A. I. R. (M.) 604; 45 M. L. J. 8.
748	Bibi Kaniz Zainab v. Mobarak Hossain	*Patna High Court.
765	Khota Ram v. Nawaz	4 L. 76; 5 L. J. 238.
770	Kulandaivelu Pillai v. Ramasami Naicker	(1923) M. W. N. 235; 17 L. W. 448; 44 M. L. J. 495; (1923) A. I. R. (M.) 551.
772	Abdul Hakim-Muhammad Sadik v. Joho Jautzen	*Lahore High Court.
774	Kosalai Rama Pillai v. Polusthiam Pillai	17 L. W. 321; (1923) M. W. N. 86; (1923) A. I. R. (M.) 330.
775	Prem Singh v. Darbara Singh	(1923) A. I. R. (L.) 557.
777	Udho Ram-Chandi Ram v. Hem Raj-Tej Bhan	*Lahore High Court.
779	Great Indian Peninsular Ry., Co., v. Panna Lal Gopalji	(1923) A. I. R. (L.) 609.
781	Sheopratap Dubey v. Sheogulam Lal	*Patna High Court.
788	Jagan Nath v. Pir Mohammed	(1923) A. I. R. (L.) 287.
789	Jagga Row Bahadur Garu v. Gori Bibi	17 L. W. 521; (1923) M. W. N. 347; (1923) A. I. R. (M.) 545.
794	Lal Behary Basak v. Akhil Chandra Santra	27 C. W. N. 315; (1923) A. I. R. (C.) 469.
795	Javvadi Soorayya v. Tavvala Surya Rao Naidu	17 L. W. 555; 45 M. L. J. 41; (1923) A. I. R. (M.) 623.

797	Gurdit Singh v. Charan Das	..	(1922) A. I. R. (L.) 415.
798	Sami Gurukkal v. Thirupathia Pillai	..	18 L. W. 288.
803	Ajudhia Das v. Loku Malik	..	(1923) A. I. R. (L.) 131.
805	Doonadula Sriramulu v. Ponakavira Reddi	..	(1923) M. W. N. 306; 45 M. L. J. 105; 18 L. W. 42.
811	Stoney v. Stoney	..	4 P. L. T. 251; (1913) Pat. 130; 2 Pat. 508; (1923) A. I. R. (Pat.) 348.
815	Subbaroya Mudaly v. Thangavelu Mudali	..	45 M. L. J. 44.
820	Nachiappa Chettiar v. Subbier	..	44 M. L. J. 413; 17 L. W. 390; 32 M. L. T. 198; 46 M. W. N. 501; (1923) A. I. R. (M.) 505.
826	Parthasarathi Aiyanger v. Doraisami Naicker	..	44 M. L. J. 91; (1923) M. W. N. 148; (1923) A. I. R. (M.) 308.
832	Ram Ratan v. Binda	..	9 O. & A. L. R. 20.
833	Kottal Kunhalikutti Haji Karnavan v. Malikkaravidakottal Kunhamayan	..	44 M. L. J. 212; 17 L. W. 536; (1923) M. W. N. 247; 32 M. L. T. 366; (1923) A. I. R. (M.) 280; 46 M. 567.
836	Ramanathan Chettiar v. A. Venkatachellam Chettiar	..	(1923) M. W. N. 297; 17 L. W. 635; 44 M. L. J. 599; 32 M. L. T. 41; (1923) A. I. R. (M.) 619.
838	Pokkunuri Dasaratha Rao v. Chevuru Subba Rao	..	17 L. W. 346; 44 M. L. J. 382; (1923) M. W. N. 222; 32 M. L. T. 321; (1923) A. I. R. (M.) 481.
839	Nandigam Gangayya v. Madupalli Venkataramayya	..	16 L. W. 988; 31 M. L. T. 423; 44 M. L. J. 80; (1923) M. W. N. 51; (1923) A. I. R. (M.) 230.
842	Kishtappa Chetty v. Lakshmi Ammal	..	44 M. L. J. 431; 17 L. W. 467; (1923) M. W. N. 284; 32 M. L. T. 217 (1923) A. I. R. (M.) 578.
845	Najm-ud-Din v. Abdul Hamid	..	(1923) A. I. R. (L.) 175.
855	Laxmibai v. Devi	..	*Nagpur Judicial Commissioner's Court.
857	Parambil Saharabi v. Ali	..	44 M. L. J. 141; 17 L. W. 182; (1923) A. I. R. (M.) 295.
860	Grant v. Suraj Mal	..	(1923) Pat. 76; 1 P. L. R. 53; (1923) A. I. R. (Pat.) 134.
861	Sadagopa Aiyengar v. Sellammal	..	16 L. W. 758; 43 M. L. J. 761; 31 M. L. T. 463; (1922) A. I. R. (M.) 510.
862	Dharohar Singh v. Ram Prasad Narayan Sahi	..	1 P. L. R. 139.
865	Yellapragadda Sriramachandra Venkatanarayana v. Ruvvada Narasimha Row	..	17 L. W. 643; 44 M. L. J. 590; 32 M. L. T. 341; (1923) M. W. N. 474; (1923) A. I. R. (M.) 638.
868	Abdul Shaker Sahib v. Abdul Rahiman Sahib	..	44 M. L. J. 107; (1923) M. W. N. 11; 17 L. W. 216; (1923) A. I. R. (M.) 284; 46 M. 148.
873	Luttdar v. Bansi	..	(1923) A. I. R. (L.) 28.
874	Rukmani Ammal v. Ramachandra Thondaman Sahib	..	17 L. W. 67; 44 M. L. J. 122; (1923) A. I. R. (M.) 317.
875	Madahva Singh, <i>In the matter of Babu</i>	..	(1923) Pat. 42; 1 P. L. R. 36 Cr. (1923) A. I. R. (Pat.) 185.
877	Ram Singh v. Raghubansa	..	(1923) A. I. R. (O.) 3; 9 O. & A. L. R. 29; 26 O. C. 201.
879	Dori Lal v. Jamaga	..	(1923) A. I. R. (O.) 16.
881	Ramamma v. Gurunatham	..	32 M. L. T. 347; (1923) M. W. N. 402; 45 M. L. J. 36; 18 L. W. 111; 24 Cr. L. J. 465.
882	Ghulam Nabi v. Jamala	..	24 Cr. L. J. 466.
883	Kesho Singh v. Emperor	..	9 O. & A. L. R. 10; 24 Cr. L. J. 467.
883	Kidar Nath v. Jaleswar Ram	..	4 P. L. T. 248; (1923) A. I. R. (Pat.) 364; 1 P. L. R. 166 Cr.; 24 Cr. L. J. 467.
885	Venkatarama Aiyar v. Sundaram Pillai	..	44 M. L. J. 119; 17 L. W. 229; (1923) A. I. R. (M.) 439; 24 Cr. L. J. 469.
887	Ramgobind Ram v. Emperor	..	1 P. L. R. 17 Cr. 24 Cr. L. J. 471.
890	Dost Muhammad v. Asa Ram	..	(1922) A. I. R. (L.) 409; 24 Cr. L. J. 474.

891	Baldeo Dubey v. Emperor	..	1 P. L. R. 29 Cr.; 24 Cr. L. J. 475.
892	Maruthayee v. Appavu Pillai	..	31 M. L. T. 388; (1923) A. I. R. (M.) 2371 24 Cr. L. J. 476.
893	Padarath Kurmi v. Emperor	..	(1922) A. I. R. (Pat) 552; 24 Cr. L. J. 477.
894	Rahim v. Emperor	..	1 P. L. R. 45 Cr. 24 Cr. L. J. 478.
897	Rukan Din v. Hassan Din	..	(1923) A. I. R. (L.) 23.
898	Secretary of State for India v. Laxmibai	..	25 Bom. L. R. 527; 37 C. L. J. 464; 47 B. 327; (1923) A. I. R. (P. C.) 6; 17 L. W. 405; 44 M. L. J. 47; 32 M. L. T. 111.
900	Archakam v. Kathiramangalam	..	17 L. W. 579; 32 M. L. T. 316.
900	Khuda Bakhsh v. Ghulam Qadir	..	*Lahore High Court.
902	Ahmad Thambi Maricair v. Bavasa Maracayar	..	16 L. W. 898; (1922) M. W. N. 813; 44 M. L. J. 69; 1923 A. I. R. (M.) 254; 46 M. 123.
907	Sham Sundar Singh v. Mushaheb Lal	..	(1923) A. I. R. Pat 418.
909	Basdeo Singh v. Bhagwat Prasad	..	(1923) A. I. R. (O.) 29.
910	Najmunnissa v. Jagmohan Lall	..	4 P. L. T. 89; (1923) A. I. R. (Pat.) 433.
911	Radfey Shiam v. Mohammad Taqi	..	(1923) A. I. R. (O.) 35; 9 O. & A. L. R. 37.
912	Basanta Kumari Dasi v. Balmakund Marwari	..	(1923) Pat. 1; 2 Pat. 277; (1923) A. I. R. (Pat) 371; 1 P. L. R. 338.
916	Uttam Prasad v. Kodai	..	(1923) A. I. R. (O.) 38; 9 O. & A. L. R. 23; 26 O. C. 200.
916	Ranjit Sahi v. Qasim	..	4 P. L. T. 257; 2 Pat. 432; (1923) A. I. R. (Pat) 342.
918	Zamorin Raja Avergal of Calicut Estate v. Kula pura Veetil Kanan Nair	..	17 L. W. 445; (1923) A. I. R. (M.) 443.
920	Nittala Achayya v. Nittala Yellamma	..	43 M. L. J. 615; 16 L. W. 785; (1922) M. W. N. 834; (1923) A. I. R. (M.) 109.
924	Wali Muhammad v. Antoo Koeri	..	(1923) A. I. R. (A.) 117.
925	Perumall Chetty v. Kandaswami Chetty	..	44 M. L. J. 146; 17 L. W. 238; (1923) M. W. N. 160; 32 M. L. T. 122; (1923) A. I. R. (M.) 362; 46 M. 592.
927	Sham Das-Bhim Sain v. Kalu RamBasheshar Nath	..	*Peshawar Judicial Commissioner's Court.
930	Mohiuddin Chowdhury v. Aminuddin Chowdhury	..	*Calcutta High Court.
931	Dhanna Ram v. Chhabil Das	..	*Peshawar Judicial Commissioner's Court.
938	Triloke Nath Jha v. Bansaman Jha	..	(1923) A. I. R. (Pat) 22; 1 P. L. R. 6; 2 Pat. 249; (1923) Pat 300.
941	Ram Chand v. Ghulam Hasan	..	*Peshawar Judicial Commissioner's Court.
945	Gajo Chaudhury v. Debi Chaudhury	..	1 P. L. R. 97 Cr.; 24 Cr. L. J. 481.
948	Salim v. Emperor	..	9 O. & A. L. R. 165; 24 Cr. L. J. 484.
949	Akbar Ali v. Emperor	..	24 Cr. L. J. 485.
950	Raktu Singh v. Emperor	..	1 P. L. R. 28 Cr.; 24 Cr. L. J. 486.
951	Abdul Hamid v. Hasan Raza	..	4 P. L. T. 297; (1923) A. I. R. (Pat) 366; 1 P. L. R. 195 Cr.; 24 Cr. L. J. 487.
953	Baishnab Charan Das v. Amin Ali	..	50 C. 664; 38 C. L. J. 202; 24 Cr. L. J. 489.
954	Jairam Sahu v. Emperor	..	4 P. L. T. 171; 1 P. L. R. 68 Cr.; (1923) Pat. 111; (1923) A. I. R. (Pat) 338; 24 Cr. L. J. 490.
955	Durga Bhabathi v. Emperor	..	(1923) A. I. R. (O.) 37; 24 Cr. L. J. 491.
956	Jiblal Teli v. Gena Sahu	..	4 P. L. T. 15; (1923) A. I. R. (Pat) 229; 1 P. L. R. 164 Cr.; 24 Cr. L. J. 492.
957	Lal Chand v. Dasoudhi	..	(1923) A. I. R. (L.) 15; 24 Cr. L. J. 493.
958	Ram Lakham v. Emperor	..	(1923) A. I. R. (O.) 22; 24 Cr. L. J. 494.
959	Gajo Singh v. Emperor	..	4 P. L. T. 265; 1 P. L. R. 25 Cr.; (1923) Pat. 109; (1923) A. I. R. (Pat) 238; 24 Cr. L. J. 495.
961	Emperor v. Dewan Kahar	..	4 P. L. T. 186; (1923) A. I. R. (Pat) 13; 24 Cr. L. J. 497.
970	Charan Das v. Rodu	..	(1923) A. I. R. (L.) 36; 24 Cr. L. J. 506.
971	Lachmi Narain v. Mukhran	..	(1923) A. I. R. (Pat) 31; 24 Cr. L. J. 507.
973	Emperor v. Jhabbar Mull	..	49 C. 924; (1923) A. I. R. (C.) 179; 24 Cr. L. J. 509.
974	Ma E Shi v. U Aditsa	..	(1922) A. I. R. (U. B.) 15; 24 Cr. L. J. 510.
975	Karupiah Naidu v. Muthuswami	..	11 L. B. R. 418; (1923) A. I. R. (R.) 12; 24 Cr. L. J. 511.
977	Mulammadi v. Karam Bakhsh	..	*Lahore High Court.

978	Rasa Goundan v. Arunachellam Goundan ..	44 M. L. J. 513; 17 L. W. 613; (1923) M. W. N. 320; 32 M. L. T. 344; (1923) A. I. R. (M.) 577.
979	Nurul Huq v. Birendra Kishore ..	38 C. L. J. 121.
982	Parameswara Pattar v. Viyathan Mahadevi ..	(1922) M. W. N. 841; (1923) A. I. R. (M.) 272.
985	Sayeruddin Akonda v. Samiruddin Akonda ..	(1923) A. I. R. (C.) 378.
987	Bysani Madhava Chettiar v. Krishnaswamy Chetty ..	16 L. W. 743; (1923) A. I. R. (M.) 71.
989	Ghulam Hajdar Shah v. Bazid Shah ..	*Peshawar Judicial Commissioner's Court.
993	Shridhar Laxman v. Janardhanbapuji ..	(1923) A. I. R. (B.) 37.
996	Mir Ahmad Shah v. Musharrif Shah ..	*Peshawar Judicial Commissioner's Court.
1000	Shamsher Datt Singh v. Lalta Singh ..	9 O. & A. L. R. 259.
1003	Achut Sitaram v. Tarachand ..	(1923) A. I. R. (B.) 41.
1003	Puran Mall v. Dilwa ..	4 P. L. T. 54.
1006	Tarini Prashad Singh v. Nunu Prashad Singh ..	*Patna High Court.
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PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 273
OF 1921.

January 29, 1923.

Present:—Mr. Justice Ross.

MURLI MANOHAR AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

RAJA NAND SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 6—Bengal Cess Act (IX B. C. of 1880), s. 54, notice under—Presumption—Denial, specific, by defendant, whether necessary.

Notice under section 54 of the Cess Act is a condition precedent to the liability to pay cess. A defendant must, if he contends non-service of such notice, state this specifically in his pleadings, otherwise due service of the notice will be presumed. [p. 1, col. 2.]

Harris Calculating Machine Co., In re, Sumner v. Harris Calculating Machine Co., (1914) 1 Ch. 920; 83 L. J. Ch. 545; 110 L. T. 997; 58 S. J. 455, Gates v. Jacobs, (1920) 1 Ch. 567; 89 L. J. Ch. 319; 123 L. T. 238; 64 S. J. 425 and Ashanullah Khan v. Trilochun Bagchi, 13 C. 197; 6 Ind. Dec. (N. S.) 630, referred to.

Appeal from a decision of the Subordinate Judge, Saran, dated the 4th October 1920 reversing that of the Munsif, Siwan, dated the 7th August 1919.

Mr. S. N. Bose for Mr. S. N. Palit, for the Appellants.

Mr. Nirsu Narayan Sinha, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of Road Cess alleged to be payable by the defendants who are *Malikānādars*. The Munsif decreed the suit; but the Subordinate Judge, while agreeing with the Munsif, that cess had been assessed on the *Malikana* lands in suit, dismissed the claim on the ground

that the plaintiffs had failed to prove service of notice under section 54 of the Cess Act (Bengal Act IX of 1880).

The learned Vakil for the appellants contends, in the first place, that the effect of O. VI, r. 6, Civil Procedure Code, is that an averment of the giving of this notice must be implied in the plaint. He also contends that under O. VIII, r. 2, Civil Procedure Code, it was for the defendants to raise by their pleadings the new fact of non-service on which they relied to show that the suit was not maintainable. Order VI, r. 6, corresponds to O. XIX, r. 14 of the Rules of the Supreme Court and the decisions on that rule are applicable to this case. The rule has been stated in this way, that it is for the defendant, if he contends that there was a condition precedent and that it has not been duly performed, to state specifically what the condition was and to plead its non-performance, otherwise its due performance will be presumed (Annual Practice, 1922, page 342). In *Harris Calculating Machine Company, In re, Sumner v. Harris Calculating Machine Company* (1) where a demand for payment to be made at Lloyds Bank was a condition precedent and it was not pleaded that no such demand had been made, Astbury, J., said that he was not at all satisfied that O. XIX, r. 14, did not apply to the case, that the defendants had not given the slightest warning that they were going to take any such point in the pleadings; and that it should have been done if a point of that character was going

(1) (1914) 1 Ch. 920; 83 L. J. Ch. 545; 110 L. T. 997; 58 S. J. 455.

SHEIKH DENDOO v. SHAIKH SACHOO.

to be relied on. In *Gates v. Jacobs* (2) where there was a question of the service on a lessee of the notice required by section 14 of the Conveyancing Act, 1881, Lawrence, J., held that "the statement of claim must be read as if it contained an allegation that the plaintiffs had given the necessary notice under section 14 of the Act before the commencement of the action. These decisions are, in my opinion, applicable to the present case. And the terms of O. VI, r. 6, are explicit. It is no longer necessary for the plaintiff to plead the performance of a condition precedent. If the pleadings are silent they must be read as implying an allegation of performance. And there is no denial by the defence. That notice under section 52 of the Cess Act is a condition precedent has been held in *Ashan-ullah Khan v. Trilochan Bagchi* (3) and notice under section 54 must similarly be held to be a condition precedent to liability to pay cess. On this ground, therefore, it seems clear that the plaintiffs are entitled to succeed in this appeal.

A further ground was taken that section 54 of the Cess Act has no application, inasmuch as the lands are not lands held free of rent within the meaning of that section. The words used in the Record of Rights are *Mafi Malikana* and it is contended that this means that the rent is remitted as equivalent to the *Malikana* payable to the tenure-holder. If it were necessary to decide the point I should be inclined to hold that this is the correct view and that the lands are not lands held free of rent. But as the plaintiffs are entitled to succeed on the first point, I do not think it necessary to decide this.

The result is, that the appeal is decreed with costs, the decree of the Subordinate Judge is set aside and the decree of the Munsif restored. The plaintiffs will get the costs of the lower Appellate Court also.

W. C. A.

Appeal allowed.

(2) (1920) 1 Ch. 567; 89 L. J. Ch. 319; 123 L. T. 238; 64 S. J. 425.

(3) 13 C. 197; 6 Ind. Dec. (N. S.) 630;

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1040 OF 1920.

February 7, 1922.

Present:—Mr. Justice Greaves and
Mr. Justice Panton.

SHEIKH DENDOO—DEFENDANT NO. 1

APPELLANT

versus

SHAIKH SACHOO AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Appeal against several respondents—Death of one of them—Legal representative not brought on record—Abatement of appeal—Conflicting decisions.

Where in an appeal against several respondents one of them dies and his representatives are not brought on the record within time, the appeal abates in its entirety, if the success of the appeal would result in two conflicting decisions with regard to the same subject-matter.

Appeal against the decree of the Officiating Subordinate Judge, Third Court, Mymensingh, dated the 10th January 1920, affirming the decree of the Munsif, Second Additional Court at Eswargunj, dated the 30th January 1919.

Babu Birendra Kumar De, for the Appellant.—The first defendant is the appellant before your Lordships. The fact that the heir of defendant No. 6 was not brought on the record in time cannot operate to my client's prejudice. It is elementary law that no suit is to be defeated for defect of parties or non-joinder of parties. Refers to O. I, r. 9 and *Bastir Sheikh v. Fazle Karim* (1). *Kali Dayal v. Nagendra Nath* (2) is distinguishable from the facts of the present case. Refers to O. XXI, r. 35; clause (2) and O. XXII, r. 4.

Babu Prafulla Chandra Chakravarti, for the Respondent, refers to *Kali Dayal v. Nagendra Nath* (2) and O. XXI, r. 15.

Babu Birendra Kumar De in reply.—There will be no inconsistency as your Lordships seem to think. Shares can be ascertained even here. The dispute is among Muhammdans. O. XXI, r. 15 will not come into operation. Here it is a decree for joint possession.

JUDGMENT.—This is an appeal by the first defendant against a decision of the Subordinate Judge of Mymensingh who

(1) 28 Ind. Cas. 703; 19 C. W. N. 290.

(2) 54 Ind. Cas. 822; 24 C. W. N. 44; 30 C. L. J. 217

SHEIKH DENDOO V. SHEIKH SACHOO.

dismissed the appeal on the ground that even if the defendants were successful the decree would be infructuous by reason of the fact that the heirs of respondent No. 6 had not been brought on the record within the time allowed by law. The suit in respect of which this appeal arises was a suit for *khas* possession after evicting the defendants. The plaintiffs in the suit were Muhammadans—two being brothers, other plaintiffs being heirs of a deceased brother and the remaining plaintiff being the widow of another brother. They claimed joint possession of the whole of the land and the Munsif decreed the suit in respect of 10 annas $13\frac{1}{4}$ *gandas*, decreeing that the plaintiffs were to get joint possession with the defendants. Now respondent No. 6 died and, as already stated, his heirs were not brought on the record in time. Now, it is said that this case is distinguishable from the case of *Kali Dayal v. Nagendra Nath* (2) and from the other cases cited in that judgment on the ground, first of all, that the defendants are entitled to a five-annas and odd share and, secondly, on the ground that the plaintiffs being Muhammadans the share of the heirs of the respondent No. 6 is ascertained or capable of ascertainment, it being said that it is $1-32$ nd. It is said that this is the share to which a Muhammadan widow under the circumstances would be entitled. What is argued is this. It is said that the appeal will not necessarily be infructuous, that if the defendants succeeded they would then be entitled as joint owners with the heirs of respondent No. 6 to bring a suit for partition, and it is suggested that in this suit it would be possible to establish that the heirs of respondent No. 6 were only entitled to $1-32$ nd of the property with the result that the defendants might become entitled to 10 annas $13\frac{1}{4}$ *gandas* less $1-32$ nd thereof.

It seems to us, however, that this point is concluded by the authority to which I have already referred. The basis of the decision is this: that where there is a decree such as this in favour of one of the respondents who has died, which cannot be questioned by reason of the fact that owing to lapse of time any right of appeal has abated, if the appeal succeeded against the respondent who remained alive there might

be conflicting decisions of the Court, that is, to say, there might be the decision of the first Court in favour of the respondent who has died, a decision which cannot be questioned, and the decision of an Appellate Court contrary to the decision of the first Court which cannot be called in question owing to the abatement. That seems to us to be the *ratio decidendi* of the cases on the subject. The arguments urged by the learned Vakil for the appellant do not get over that difficulty. Suppose the appeal proceeded and the defendants were successful. They would then be forced to commence a partition suit, and if they succeeded to the extent to which we have stated there will then be a decision of the Court which cannot be questioned by reason of the abatement and possibly a decision in the partition suit that would conflict with the decision which cannot be called into question, with the result that there would be a conflict of decisions of two Courts with regard to the same subject-matter. In this view the judgment appealed against is correct and the case is governed by the decision above referred to and the cases therein cited. The appeal is dismissed.

The Vakil who has appeared for the respondents has not been able to file a properly executed *vakalatnamah*. If he files a properly executed *vakalatnamah* within a fortnight the respondents will get their costs, otherwise there will be no order as to costs inserted in the decree.

N. H.

Appeal dismissed.

MA GYI v. MA KHIN SAW.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL, NO. 48. OF 1922.

November 16, 1922.

Present.—Mr. Justice Pratt and Mr. Justice Heald.

MA GYI—APPELLANT

versus

MA KHIN SAW AND OTHERS, MINORS, BY THEIR GUARDIAN MAUNG BA TUN

—RESPONDENTS.

Burmese Buddhist Law—Inheritance—Half sister or brother v. maternal grandmother.

According to the Burmese Buddhist Law inheritance should not ascend if it can be helped. Consequently, brothers and sisters of the half blood will succeed in preference to the maternal grandmother where there are no full brothers and sisters.

Ma Hnin Bwin v. U Shwe Gone, 23 Ind. Cas. 433; 8 L. B. R. 1; 7 Bur. L. T. 105; 16 Bom. L. R. 377; 27 M. L. J. 41; 18 C. W. N. 1121; 16 M. L. T. 142; 20 C. L. J. 264; 41 C. 887; 1 L. W. 914; (1914) M. W. N. 449; 41 L. A. 121 (P. C.) and *Le Maung v. Ma Kwe*, 56 Ind. Cas. 681; 10 L. B. R. 107; 13 Bur. L. T. 3, relied on.*Maung Kyaw Sein v. Ma Min Yin*, 63 Ind. Cas. 841; 4 U. B. R. (921) 20, referred to.*Taung Mro v. Aung Nyun*, 58 Ind. Cas. 488; 12 Bur. L. T. 103, distinguished.

Miscellaneous appeal against an order passed by the Judge, Hanthawaddy District.

Mr. Halker, for the Appellant.

Mr. Charu, for the Respondents.

JUDGMENT.—Appellant's daughter, Ma Hta Sein, married Eng Wa and by him had a daughter Ah Nyun. After Ma Hta Sein's death Eng Wa married Ma Khin Saw by whom he had two children Maung Maung and Ma Than. Eng Wa died and his estate was divided between Ah Nyun and Ma Khin Saw and her children. Then Ah Nyun died, while still a minor, and appellant on the one side and Ma Khin Saw on behalf of her children on the other side claimed Letters of Administration. The lower Court held that Ma Khin Saw's children were Ah Nyun's sole heirs and excluded appellant, and accordingly granted Letters to Ma Khin Saw on behalf of her children.

Appellant now argues that because Ah Nyun had previously lived with her for some years and because she was Ah Nyun's own grandmother while Ma Khin Saw's children were only half brother and half sister of Ah Nyun, she ought to be regarded as Ah Nyun's sole heir and ought to exclude Ma Khin Saw's children.

The only cases cited before us were *Taung Mro v. Aung Nyun* (1) and *Ma Hnin Bwin v. U Shwe Gone* (2).

The first of these, according to the newspaper report to which we were referred by appellant, decided that where the only possible heirs were children of an elder half brother and grand-children of a younger full brother, the latter would exclude the former. There can, we think, be no doubt that if the contest were between an elder half-brother and a younger brother the latter would exclude the former, but in the present case there are only a half-brother and a half-sister on the one side and a maternal grandmother on the other.

The other case, on which the respondents rely, decides that younger sisters exclude a father at any rate where the sisters have lived separately from the father.

It is surprising that no reference has been made to the case of *Le Maung v. Ma Kwe* (3) where the contest was between a father, with whom the deceased son lived up to the time of his death, and a half-sister of the deceased whose mother had been divorced from the father and who after the divorce had always lived with the divorced mother. In that case a Bench of this Court said: "The learned District Judge is probably right in holding that the ruling in *Ma Hnin Bwin's case* (2) may properly be applied in favour of brothers and sisters of the half-blood when there are no full brothers and sisters. This would be in accordance with the fundamental principle that inheritance should not ascend if it can be helped."

We accept this "dictum" as being in entire accord with Burmese Buddhist Law.

(1) 58 Ind. Cas. 488; 12 Bur. L. T. 103.

(2) 23 Ind. Cas. 433; 8 L. B. R. 1; 7 Bur. L. T. 105; 16 Bom. L. R. 377; 27 M. L. J. 41; 18 C. W. N. 1121; 16 M. L. T. 142; 20 C. L. J. 264; 41 C. 887; 1 L. W. 914; (1914) M. W. N. 449; 41 L. A. 121 (P. C.).

(3) 56 Ind. Cas. 681; 10 L. B. R. 107; 13 Bur. L. T. 3.

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and we note that in *Maurg Kyaw Sein v. Ma Min Yin* (4) it has been extended to the case of a step-brother where there was no blood-relationship with the deceased.

In our opinion the fact that Ah Nyun had previously lived with appellant, although she was not living with her and was not under her legal guardianship at the time of her death, is entirely insufficient to warrant any departure from the ordinary rule that the inheritance shall not ascend, and we find that the District Court was right in holding that Ma Khin Saw's children were Ah Nyun's only heirs and that Letters were rightly granted to Ma Khin Saw on behalf of her minor children.

We accordingly dismiss the appeal with costs, Advocates' fee to be 3 gold mohurs.

N. K.

Appeal dismissed.

(4) 63 Ind. Cas. 241; 4 U. B. R. (1921) 25.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 207 OF 1922.

January 10, 1922.

Present.—Mr. Justice Phillips and
Mr. Justice Devadoss.

Srimathi DEVASIKAMANI NATARAJA DESIKAR DIED AND ANOTHER—DEFENDANT
AND HIS LEGAL REPRESENTATIVE—

APPELLANTS

versus.

Roa Bahadur M. R. GOVINDA RAO—

PLAINTIFF—RESPONDENT.

Cause of action—Incompetency to sue—Limitation, operation of—Limitation Act (IX of 1908), Sch. I, Art. 110—When arrears become due, meaning of—Function of landlord and tenant united in same person—Receiver, appointment of—Suit for arrears of rent—Limitation terminus a quo.

When there is no one competent to sue there can be no cause of action, and, consequently, limitation cannot run, because there is no one against whom it can run.

Where a person as trustee of a temple and a *mutt* unites in himself the function of landlord and tenant, the cause of action for a suit to recover arrears of rent arises when there is some one in

existence who can enforce payment of such arrears, as for instance, when a Receiver is appointed, at which time the arrears become due within the meaning of Art. 110 of Schedule I to the Limitation Act.

Murray v. East India Company, (1821) 105 E. R. 1167; 5 B. & Ald. 204; 24 R. R. 325. *Ranee Suyo Moyee v. Shoohez Mokhee Burmonig*, 12 M. I. A. 244; 11 W. R. P. C. 5; 2 B. L. R. P. C. 10; 2 Suth. P. C. J. 173; 2 Sar. P. C. J. 424; 20 E. R. 331; 1 Ind. Dec. (N.S.) 489. *Rangayya Appa Rao v. Bob'a Sriramulu*, 27 M. 143; 8 C. W. N. 162; 14 M. L. J. 1; 6 Bom. L. R. 241; 31 I. A. 17; 8 Sar. P. C. J. 617 (P. C.), followed.

Appeal against a decree of the Court of the Subordinate Judge, Sivaganga, in Original Suit No. 27 of 1918.

Messrs. T. V. Gopalaswami Mudaliar and A. C. Sampath Iyengar, for the Appellant.

Messrs. A. Krishnaswami Iyer and T. L. Venkatarama Iyer, for the Respondent.

JUDGMENT.—There is absolutely no evidence worth the name of the alleged custom or implied contract that the *devashanam* the *melwaramdar*, was responsible for collecting the *melwaram* from the sub-tenants, and that the *kudivaramdar*, i. e., the *mutt*, was not liable in any way. Failing proof of such a custom, the *mutt*, as *kudivaramdar*, is bound to pay the *melwaram* to the *devashanam*. This *melwaram* has only been paid in part as shown by the accounts kept by defendant himself, and, consequently, the balance is due from the *mutt*. It does not lie with the defendant to question the *quantum* of arrears shown in his own accounts.

The only other point with which it is necessary to deal is the question of limitation. Defendant, as trustee of the temple and of the *mutt*, united in himself the function of landlord and tenant, and consequently could not bring a suit for rent against himself, on the principle that when the hand that receives and the hand that pays is the same no suit will lie for payment. It is contended for appellant that a suit might have been brought by some of the temple worshippers, but, at any rate, no such suit could be brought unless sanction was obtained, and until such sanction was obtained no suit would lie, and no particular person would be in a position to sue. Until the defendant was removed from his trusteeship he could not sue for the rent and there was no other person, who was in a position to do so. When there is no one competent

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to sue there can be no cause of action and, consequently, limitation cannot run, because there is no one against whom it can run [*vide Murray v. East India Company* (1)]. Plaintiff, therefore, when he was appointed Receiver was the first person who had the right to sue and the question is, whether his right is barred (except in regard to three years' rent) under Art. 110, Limitation Act. Under that Article, the time for which period begins to run is "when the arrears become due." This time is usually the end of each *Fasli* year, but the meaning of the words has been considered by the Privy Council in *Ranee Surno Moyee v. Shooshee Mokhee Burmonia* (2) and *Rangayya Appa Rao v. Bobba Sriramulu* (3), and it has been held that a quite different time may in certain circumstances be the time from which limitation begins to run. In this case, the arrears became due, [applying the language in *Rangayya Appa Rao v. Bobba Sriramulu* (3)], as soon as there was some one to whom they were payable, who was capable of enforcing the obligation by suit. Holding as we do that defendant could not enforce the obligation by suit, it was not until plaintiff was appointed that there was any cause of action in existence. Plaintiff's claim is, therefore, not barred. The plea that the suit should have been brought in the Revenue Court is not supported by any evidence, and must be rejected.

The appeal is dismissed with costs.

V. N. V.

N. H.

Appeal dismissed.

(1) (1821) 106 E. R. 1167; 5 B & Ald. 204; 24 R. R. 325.

(2) 12 M. L. A. 244; 11 W. R. P. C. 5; 2 B. L. R. P. C. 10; 2 Suth. P. C. J. 173; 2 Sar. P. C. J. 424; 20 E. R. 331; 1 Ind. Dec. (N. S.) 489.

(3) 27 M. L. A. 143; 8 C. W. N. 162; 14 M. L. J. 1; 6 Bom. L. R. 241; 31 I. A. 17; 8 Sar. P. C. J. 617 (P. C.).

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 66 OF 1922.

December 8, 1922.

Present:—Mr. Justice Pratt.

MAUNG SHWE HMON AND OTHERS—
DEFENDANTS—APPELLANTS

versus

MAUNG THA BYAW AND ANOTHER.
—PLAINTIFFS—RESPONDENTS.

Agreement for sale—Consideration, payment of—Vendee already in possession—Conveyance not registered—Suit for possession by vendor—Vendee, position of.

When a person agrees to sell property to another who is already in possession and the latter pays the purchase-money but omits to take a registered conveyance the position is the same as if the document had been executed and the former person is not entitled to recover possession, even though the right to obtain specific performance of the agreement to sell has become time-barred. [p. 8, col. 1.]

Venkatesh Damodar v. Mallappa Bhimappa, 66 Ind. Cas. 868; 24 Bom. L. R. 242; (1922) A. I. R. (B) 9; 46 B. 722, relied on.

Akbar Fakir v. Intail Sayal, 29 Ind. Cas. 707 and *Karamiah Khan v. Latchmi Añhi*, 61 Ind. Cas. 675; 13 Bur. L. T. 119; 10 L. B.R. 241 (F. B.), referred to.

P mortgaged a plot of land to D (1) who assigned the mortgage by registered deed to M and his wife. Later P made over possession to M and made a report to the Revenue Surveyor that the land was sold outright. No conveyance was executed. M conveyed the land by registered sale-deed to D (2). P sued D (1) and D (2) for redemption and was granted a decree:

Held, that the sale was not valid, because no registered conveyance was executed but that the intention to sell was clear and, therefore, P could not be allowed to take advantage of his neglect to give conveyance in due form and fall back upon his mortgage and redeem the land. To give him a decree would be in effect to assist him in perpetrating a fraud on his vendee [p. 8, col. 1.]

Second civil appeal against the judgment of the Divisional Judge, Myaungmya, confirming the judgment of the Sub-Divisional Judge, Pyapon.

Mr. Anklesaria, for the Appellants.
Mr. Chifon, for the Respondents.

JUDGMENT.—Plaintiff sued for redemption of a house and site, and a piece of land.

The proved facts are that plaintiffs mortgaged the land on June 16th, 1913, to the

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first and second defendants, Maung Shwe Hmon and Ma Hnin E, for Rs. 1,000.

On the 14th December 1915, the mortgagees by registered-deed assigned the mortgage to one Maung Po Hlaing and his wife Ma Shwe Yi.

In 1918 plaintiffs made over possession of the land to Maung Po Hlaing and a report was made to the Revenue Surveyor and signed by both plaintiffs, to the effect that the land was sold outright for Rs. 1,600 (Exhibit A). No conveyance was executed. On the 20th June 1919, Maung Po Hlaing conveyed the land by registered-deed to Maung U Gyi, third defendant, for Rs. 1,500. Plaintiffs were granted a decree for redemption.

The appeal was dismissed by the Divisional Court.

The learned Judge pointed out that, as first and second defendants had assigned the mortgage, they were not necessary parties to the suit and that, on the other hand, Maung Po Hlaing and his wife might properly have been joined, but their omission was not fatal to the suit.

The proved facts are considerably at variance from the case set up in the plaint.

Plaintiffs alleged that the simple mortgage was converted into a usufructuary one and the land made over to first and second defendants. Subsequently, the land was transferred to the name of Po Hlaing *benami*.

The Divisional Court has discussed the question at length and come rightly to the conclusion that there was nothing *benami* about the transaction.

There is no proof that the simple mortgage was ever converted into a usufructuary mortgage and there can be no doubt that the learned Divisional Judge was right in holding that the intention of the plaintiffs was to make over the land outright to Maung Po Hlaing.

The evidence of the Revenue Surveyor together with the entry in his register signed by plaintiffs is conclusive proof that the transfer was intended to be an outright one. The evidence of promises to allow redemption can be disregarded and plaintiffs do not rely on a transfer with right to re-purchase.

Their case was that a simple mortgage was converted into an outright sale and this

allegation is not proved and is not in accordance with the proved facts.

There has been no valid sale, because no registered conveyance was executed but it is clear that there was an intention to sell for Rs. 1,600 and in pursuance of this intention Maung Po Hlaing has been put in possession.

The question for decision, therefore, is: having made over the land for consideration on an agreement to sell, can the plaintiffs now fall back on their mortgage and redeem the land, because they have not given Po Hlaing a legal conveyance?

In other words, can they be allowed to take advantage of their own laches?

The learned Divisional Judge held that, as the time for a suit for the specific performance had expired at the time of his judgment, Po Hlaing and consequently his vendee could no longer resist plaintiff's claim to recover possession.

The Judge's decision was based on the doctrine approved in *Akbar Fakir v. Intail Sayal* (1) that where in pursuance of an agreement for a lease or sale the intended transferee has taken possession, though the requisite documents have not been executed, the position is the same as if the documents had been executed, provided specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined.

In the above quoted case the Court held that plaintiff could not eject defendants, who had come into occupation by his leave and license under an agreement to sell.

The principle enumerated in *Akbar Fakir v. Intail Sayal* (1) was approved by a Full Bench of this Court in *Karamath Khan v. Latchmi Achi* (2).

In the present case limitation will only commence to run from the date when the vendee became aware that the vendor refused to complete the contract, that is to say, from the date of filing the suit.

I am unable to hold that specific performance was barred by limitation.

As a matter of fact, however, the doctrine enumerated in *Akbar Fakir's case* (1), has

(1) 29 Ind. Cas. 707.

(2) 61 Ind. Cas. 675; 13 Bur. L. T. 119; 19 L. B. R. 241 (F. B.).

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been extended in the recent Bombay case of *Vekampsh Damodar v. Mallapa Bhimappa* (3), in which it was held that when plaintiff agreed to sell certain property to defendants who were already in possession, and defendants paid up the purchase-money, but omitted to take a registered conveyance, plaintiff was not entitled to recover possession, even though the right to obtain specific performance of the agreement to sell had become time-barred.

With this conclusion I am in entire agreement. On behalf of plaintiffs it is contended that the report to the Revenue Surveyor is not admissible in evidence as it is not registered, and that it is not a contract or evidence of a contract.

I do not think there is any force in this contention.

The report is not intended to be or to take the place of a sale-deed, but it is admissible as evidence as to what was reported.

In similar circumstances, in *Ma Shwe On v. Maung Kywet* (4) it was held that a sale of land worth over Rs. 100 without registration is in law a mere contract of sale.

In the present case the position is that after the mortgagees had assigned the mortgage to Maung Po Hlaing, the mortgagors made over the land in suit to him under an agreement to sell for a fixed sum due under the mortgage.

Their intention clearly was by the transfer to extinguish that portion of the mortgage-debt.

They cannot now be allowed to take advantage of the fact that they neglected to give a conveyance in due form and redeem the land. To give plaintiffs a decree would be in effect to assist the vendors in perpetrating a fraud on the vendee.

As regards the house and the site the position is different. First and second defendant assigned the mortgage to Po Hlaing, who is not a party to the suit.

Po Hlaing did not transfer the house and site to Maung U Gyi.

I do not consider I should be justified in making Po Hlaing a party at this stage of the proceedings.

(3) 66 Ind. Cas. 868; 46 B. 722; 24 Bom. L. R. 242; (1922) A. I. R. (B) 9.

(4) 32 Ind. Cas. 536; 9 Bur. L. T. 45.

The appeal will, therefore, be allowed, the decrees of the lower Courts will be set aside and the suit dismissed.

Appellants will be granted costs throughout.

N. K.

Appeal allowed.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL NO. 980 OF 1920.

January 26, 1923.

Present :—Sir Grimwood Mears, Kt., Chief Justice, Justice Sir P. C. Banerji, Kt., Mr. Justice Piggott, Mr. Justice Waish and Mr. Justice Ryves.

FATEH SINGH AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

THAKUR RUKMINI RAWANJI

MAHARAJ—DEFENDANT—RESPONDENT.

Hindu Law—Widow—Gift in favour of son—Ratification by reversioner, effect of—Estoppel—Reversioner, suit by—Decision, binding effect of.

Where in respect of a gift by a Hindu widow of a portion of her husband's estate, a reversioner, during the lifetime of the widow, executes a deed renouncing whatever rights and relinquishing whatever interest he may possess under the Hindu Law in respect of the property covered by the gift, and expressly covenants not to set up any right or claim to the property, he cannot, when the succession opens in his favour, be permitted to challenge the validity of the gift. [p. 11, col. 2, p. 12, col. 2.]

Anril Narayan Singh v. Gaya Din, 44 Ind. Cas. 408; 45 C. 590; 23 M. L. T. 142; 22 C. W. N. 409; 27 C. L. J. 296; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 546; 45 I. A. 35 (P. C.), *Mahadeo Prasad Singh v. Mata Prasad* 63 Ind. Cas. 721; 44 A. 44; 19 A. L. J. 799; 3 U. P. L. R. (A) 134; (1922) A. I. R. (A) 297, *Bai Parvati v. Dayabhai Munchharam*, 58 Ind. Cas. 266; 44 B. 488; 22 Bom. L. R. 704, *Basappa v. Fakuappa*, 64 Ind. Cas. 214; 46 B. 292; 23 Bom. L. R. 1040; (1922) A. I. R. (B.) 102, *Bajrangi Singh v. Manoharnika Bakhsh Singh*, 30 A. 1; 9 Bom. L. R. 1348; 12 C. W. N. 74; 6 C. L. J. 766 17 M. L. J. 605; 5 A. L. J. 1; 35 I. A. 1; 11 O. C. 78; 3 M. L. T. 1 (P. C.); *Rangasami Goundan v. Nachiappa Goundan*, 50 Ind. Cas. 498; 42 M. 523; 17 A. L. J. 535; 36 M. L. J. 493; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.), *Bijoy Gopal Mukherji v. Krishna Maheshi Debi*, 34 C. 329; 11 C. W. N. 424;

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5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.), referred to and considered.

A decision in favour of one reversioner in a suit claiming a declaration that a transfer by a Hindu widow of her husband's estate is not valid beyond her lifetime, would, ordinarily, in the absence of fraud or collusion, bind the whole body of reversioners in respect of all matters actually decided in that litigation. [p. 10, col. 1.]

Kesho Prasad Singh v. Sheopargash Ojha, 64 Ind. Cas. 248; 19 A. L. J. 749; 3 U. P. L. R. (A) 117; 44 A. 19; (1922) A. I. R. (A.) 301 (F. B.). *Venkata-narayana Pillay v. Subbammal*, 29 Ind. Cas. 298; 38 M. 406; 17 M. L. T. 435; 28 M. L. J. 535; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 21 C. L. J. 515; 42 I. A. 125 (P. C.), relied on.

Second appeal from a decision of the District Judge Agra, dated 21st May 1920.

JUDGMENT.—This second appeal raises certain questions regarding the position of a reversioner, who has succeeded to immoveable property on the death of a Hindu widow, in respect of an alienation by way of gift or endowment made by the said widow. The essential facts may be stated as follows. The property with which we are concerned belonged to one Tulsi Ram, who died leaving a son, Daulat Ram. The latter died childless and was succeeded in the possession of the property, first, by his own widow *Musammal* Man Kunwar, and afterwards by his mother *Musammal* Munian, the widow of Tulsi Ram. On the 19th April 1905 *Musammal* Munian made a gift of certain immoveable property in favour of the family idol, who is impleaded as the defendant in this suit, which is contested by Mahant Puran Das, the manager of the temple in which the idol is installed. At the time of this transfer the nearest reversioners to the estate of Daulat Ram were the grandsons of one Daya Nand, who was the own brother of Sukh Deo, the father of Tulsi Ram. On the 12th May 1905 two of these reversioners, by name Fateh Singh and Sunder, executed a document which has been referred to in the pleadings and arguments as a deed of relinquishment. The third reversioner, by name Duli Chand, instituted a suit in the year 1907 claiming a declaration that the transfer effected in favour of the idol was not valid beyond the lifetime of *Musammal* Munian and would not bind the reversioner or reversioners who might succeed to the

estate on that lady's death. He obtained after contest a decree granting him the declaration sought for. It is not suggested that there was any kind of fraud or collusion in connection with the passing of this decree in favour of Duli Chand. *Musammal* Munian lived until the 12th December 1916. When she died the succession opened in favour of Fateh Singh and Duli Chand, Sunder having died in the interval. For some reason with which we are not concerned, Duli Chand has up to the present taken no effective steps to recover possession of any part of the property covered by the deed of gift of April 19th, 1905. The suit out of which this appeal arises was instituted by Fateh Singh on the 31st July 1918. The plaintiff asserts that he is actually in possession of some of the property covered by the deed of gift of April the 19th, 1905 but he claims to recover one-half share of the remainder admitting that the other half share has passed by inheritance to Duli Chand. The suit was resisted on various grounds with two of which only we are now concerned, it was contended on behalf of the plaintiff that the decree in favour of Duli Chand in Suit No. 163 of 1907 was conclusive as to the invalidity of the gift beyond the lifetime of *Musammal* Munian, so that the Court was bound to accept that decision and to decree the plaintiff's claim accordingly. On behalf of the defendant it was denied that the decree in favour of Duli Chand could operate as *res judicata* in favour of Fateh Singh in respect of any of the questions raised. It was further contended that in any event Fateh Singh was bound by the terms of his own deed of relinquishment of the 12th May 1905 and was, therefore, debarred from contesting the validity of the alienation.

The case was argued before a Bench of two Judges by whom it was referred to a Full Bench in order that the questions of law raised might be finally determined.

The question regarding the effect of the decision in favour of Duli Chand in Suit No. 163 of 1907 need not detain us long. Indeed, it was not argued before us. In the case of *Kesho Prasad Singh v. Sheopareash Ojha* (1) it was held that on the principles

(1) 64 Ind. Cas. 248; 19 A. L. J. 749; 3 U. P. L. R. (A) 117; 44 A. 19; (1922) A. I. R. (A.) 301 (F. B.).

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laid down by their Lordships of the Privy Council in *Venkatanarayana Pillay v. Subbammal* (2) a decision in favour of one reversioner in a declaratory suit such as that brought by Duli Chand would ordinarily, in the absence of fraud or collusion, bind the whole body of reversioners. We are satisfied that we could have treated the judgment in favour of Duli Chand as conclusive in respect of all matters actually decided in that litigation. The point is not really material so far as the result of the present appeal is concerned. By way of precaution, in order that the other point which we have to decide with respect to the deed of relinquishment of the 12th May 1905 might come before us as a definite question of law clear of all possible controversy as to matters of fact, we remitted certain issues for further investigation by the lower Appellate Court. One result of this has been a finding that the gift made by *Musammal* Munian in favour of the defendant idol covered about two-thirds of the estate in the possession of the said donor as a Hindu widow. We have no doubt that such an alienation for the purpose stated in this deed of gift could not be justified *per se* and that the suit brought by Duli Chand was rightly decided.

We are equally satisfied, however, that the decision in the Duli Chand's suit did not and could not determine the further question which arises in the present litigation, namely, whether Fateh Singh personally, by reason of the deed of relinquishment of May the 12th 1905, is precluded from raising the question whether or not *Musammal* Munian had exceeded her powers of alienation in making the gift in question. The Trial Court seems to have relied principally on certain *dicta* in the decision of their Lordships of the Privy Council in the case of *Amrit Narayan Singh v. Gaya Din* (3). Undoubtedly, this is authority for the proposition that when he joined in the execution

of this deed on the 12th of May 1905 Fateh Singh possessed no interest in the property therein referred to which he could assign or relinquish; his right became concrete only on the demise of *Musammal* Munian, until then it was a mere *spes successionis*. Without in any way questioning the correctness of this principle, we are nevertheless of opinion that the lower Appellate Court, the learned District Judge of Agra, was right in holding that Fateh Singh is so bound by the terms of his own deed of May the 12th, 1905, that he cannot successfully impugn the alienation to which he then gave his unqualified assent. We have examined this document and we find that it is drawn up in the strongest possible terms. The two executants, Fateh Singh and Sunder, purport to renounce whatever rights and relinquish whatever interest they might conceivably possess under the Hindu law in respect of the property covered by the deed of gift; but they do even more than this. They expressly covenant that at no time hereafter will either of them or their heirs, successors or representatives, set up any right or claim whatsoever to the property specified at the foot of the deed which is, of course, the property conveyed to the defendant idol by *Musammal* Munian in her deed of the 19th of April 1905.

One minor matter in controversy was, whether Fateh Singh and Sunder received any consideration for the execution of this deed of relinquishment. We have obtained a finding from the District Judge that no such consideration passed. We are not concerned with the question of the correctness of this finding. In the deed of relinquishment itself the executants state that their motive for executing the same is, that the gift was one in favour of the tutelary deity of the family and they purport to be actuated by pious and religious motives. We are content to deal with the matter on this footing.

On the question of law involved we were referred in the course of argument to a number of decided cases; we do not think it will be necessary for us to refer to more than a few of these. The latest decision of this Court is clearly in favour of the defendant idol. The learned Judges who decided the case of *Mahadeo Prasad Singh v.*

(2) 29 Ind. Cas. 298; 38 M. 406; 17 M. L. T. 435; 28 M. L. J. 535; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 21 C. L. J. 515; 42 I. A. 125 (P. C.).

(3) 44 Ind. Cas. 408; 45 C. 590; 23 M. L. T. 142; 22 C. W. N. 409; 27 C. L. J. 296; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 546; 45 I. A. 35 (P. C.).

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Mata Prasad (4) after a review of previous authorities held that a reversioner who had joined in making or had ratified a particular transfer by a Hindu widow could not in the event of the succession opening in his favour be permitted to question the validity of that transfer. We appreciate the fact that one of the reasons for the reference made to a Full Bench in the present case was to have the decision above quoted fully considered and discussed; but the respondent is clearly entitled to have it noted that the latest authoritative pronouncement of this Court on the question in issue is directly in his favour. Much of the argument before us has turned upon two cases of the Bombay High Court, *Bai Parvati v. Dayabhai Manchharam* (5) and *Basappa v. Fakirappa* (6). The first of these decisions may fairly be described as the sheet-anchor of the plaintiff-appellant's case and, at first sight, it is very much in his favour. It is a clear instance of a transfer made by a Hindu widow jointly with the reversioners entitled to succeed upon her death being set aside at the instance of the same reversioner after the succession had opened. In the later case, however, the learned Judges of the Bombay High Court themselves pointed out that the decision in *Bai Parvati v. Dayabhai Manchharam* (5) proceeded upon a peculiar and exceptional state of facts. The alienation there contested was made under a deed by which the widow purported to assign her life-interest only, while the reversioner purported to convey whatever rights belonged to her on the date of the execution. It was rightly held that the reversioner possessed no rights capable of assignment in the lifetime of the widow, and that it is not a correct proposition of law to say that the widow and the nearest reversioner between them represent the entire estate. These principles once recognised it becomes obvious that the widow herself having conveyed nothing but her life-interest nothing more than this could pass under the deed.

In the case of *Basappa v. Fakirappa* (6) the learned Judges of the Bombay High Court explained their earlier decision and held that gift by a Hindu widow of a portion of her late husband's estate in her hands as such widow if made with the consent of the nearest reversioner living at the time of the conveyance was valid as against the reversioner who has so consented in the event of the succession opening in favour of the said reversioner. The learned Judges there pointed out that, with the exception of their own previous decision, which they distinguished for the reason already explained, their attention had not been drawn to a single reported case in which a reversioner had been permitted after he had succeeded to the estate to challenge a conveyance made by the widow to which he had expressly assented before the succession opened. We find ourselves in the same position and it might almost be sufficient for us to say that the whole weight of authority is in favour of the respondent to this appeal. We were referred in argument to a number of cases of this Court, both reported and unreported, in which similar attempt by a reversioner, who had succeeded to an estate to set aside a conveyance by the widow to which he had assented or which had been ratified by him before the succession opened had been defeated. The argument before us really turned upon an attempt to define with precision some general principle of law upon which these decisions could all be based. We are of opinion that such a principle is to be found upon a consideration of two important decisions of their Lordships of the Privy Council, *Bajrangi Singh v. Manokarnika Bakhsh Singh* (7) and *Rangasami Goundan v. Nachiappa Goundan* (8). The former was a case from Oudh and it was an attempt to contest an alienation which had been made by a Hindu widow with the express concurrence of practically

(4) 63 Ind. Cas. 721; 44 A. 44; 19 A. L. J. 799; 3 U. P. L. R. (A) 134; (1922) A. I. R. (A.) 297.

(5) 58 Ind. Cas. 266; 44 B. 488; 22 Bom. L. R. 704.

(6) 64 Ind. Cas. 214; 46 B. 292; 23 Bom. L. R. 1040; (1922) A. I. R. (B.) 102.

(7) 30 A. 1; 9 Bom. L. R. 1348; 12 C. W. N. 74; 6 C. L. J. 766; 17 M. L. J. 605; 5 A. L. J. 1; 35 I. A. 1; 11 O. C. 78; 3 M. L. T. 1 (P. C.).

(8) 50 Ind. Cas. 498; 42 M. 523; 17 A. L. J. 536; 36 M. L. J. 493; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

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the entire body of reversioners living at the time. Their Lordships repelled this attempt, but in so doing made use of expressions about which considerable controversy arose in the Courts in India. For this reason their Lordships themselves, in the latter case above referred to, entered upon an elaborate review of the entire question of the legal effect upon the validity of transfers made by a Hindu widow of her deceased husband's estate held by her as such widow of the concurrence, consent or ratification of the nearest reversioners living at the time of the transfer. It is towards the close of their judgment that their Lordships laid down the principle upon which the controversy now before us ought, in our opinion, to be determined. After discussing various aspects of the question and explaining the decision in *Bajrangji Singh's case* (7), their Lordships entered upon this particular aspect of the question in an important paragraph which begins with the words, "No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hyper-criticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract. It is only voidable." For this last proposition express authority is quoted in the case of *Bijoy Gopal Mukerji v. Krishna Maheshi Debî* (9). Their Lordships go on to point out that if a reversioner who had actually succeeded to the estate thereupon did something which showed that he treated the alienation as good he would lose his right of complaint. "This may be spoken of, though scarcely accurately, as ratification. (In some cases it has been expressed as an election to hold the deed good." They then pointed out that a presumptive reversionary heir was not bound to challenge an alienation by the widow in possession of the estate as soon as it came to his knowledge, but was entitled to wait till "the death of the widow has confirmed his character." They added, "Of course, something might be done even before that time

which amounted to an actual election to hold the deed good." If these words are carefully considered with reference to their context, it seems to us quite beyond question that they refer to something done by the reversioner before the death of the widow has "affirmed his character." Applying this principle, the conclusion we arrive at is that no reversioner could well have done anything before the death of the widow which so clearly amounted to an actual election to hold good the transfer effected by the widow while in possession of the estate to which he had since succeeded as what Fateh Singh did when he executed the deed of May the 12th, 1905. Having made this election he cannot be permitted, now that the succession has opened in his favour in respect of half of the estate formerly in *Musammat Munia's* possession, to challenge the validity of the transfer which he had expressly bound himself to accept, whether his action be spoken of as a ratification of the transfer, or as an election to hold good the deed of April 19th, 1905. We are satisfied that it is binding upon Fateh Singh so that he personally is not permitted to challenge its effect.

For these reasons we are of opinion that the decision of the learned District Judge of Agra was in substance correct and that Fateh Singh's suit must fail.

We have before us another small matter with which it is necessary for us to deal. The respondent has petitioned this Court pointing out a small error in the decree of the lower Appellate Court, in which a sum of Rs. 100 paid on account of Pleader's fees has been omitted, apparently by mere oversight, from the schedule of costs incurred by the respondent. We order that this omission be made good by the insertion of the said sum of Rs. 100 in the schedule. Apart from this small rectification we affirm the judgment and decree of the lower Appellate Court dismissing this appeal with costs, including fees in this Court on the higher scale.

Walsh, J.—I entirely agree. In my judgment, the so called deed of relinquishment, which is not an accurate description of this deed of confirmation and consent, is an absolute bar to a suit by either Fateh Singh, or those who claim under him, for his share. It does not matter whether

(9) 34 C. 329; 11 C.W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 L. A. 87 (P. C.).

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it is called an estoppel, an election, or equitable bar; we have to give effect to the acts and intentions of parties as evidenced by their conduct, unless prevented by some Statute, or by some rule of law or equity. The proportion of the estate given by the widow's deed of gift, or endowment is exceptionally large, and could not stand *proprio vigore*. But it is an endowment for religious purposes, and, if within the limits as regards amount permitted by law, would be valid. The only question, as it seems to me, which arises in this appeal is whether Fateh Singh, in view of his conduct, could be heard to say that it was in excess of what was legally permissible. No question is raised as to the right of any other reversioner to challenge the propriety of the gift. Nor is it an adequate answer to the question propounded merely to show that there was no binding agreement under the Indian Contract Act. The District Judge in dealing with the issues referred by the Full Bench has, perhaps inevitably, confined himself to the question of a simple contract. But the clear terms of Fateh Singh's deed, the circumstance that it was almost contemporaneous with the deed of endowment, and with an attempt by donor to confer some benefit on Fateh Singh by Will, and, further, the fact that Fateh Singh's brother, Sunder, solemnly joined, all go to show that the three parties, from high motives, and for adequate reasons, approved of, and desired to encourage this religious endowment and that as a fundamental element in such mutual arrangement, Fateh Singh agreed not to claim his share of the reversion if he ever became entitled to one. The principle that, when such a course of conduct is clearly established, the person who has consented or elected to approve cannot afterwards make a claim inconsistent with his own solemn act, has been established by the Courts in India in a long series of cases. The distinction between such a case, and the attempt to transfer *à spes successionis* contrary to the provisions of section 6 of the Transfer of Property Act, is clearly marked by a comparison of *Bu. Parvath v. Dayabhai Manchharam* (5) with *Basappa v. Fakirappa* (6). The decision of the District Judge in this case has not been shown to conflict with any rule laid

down by their Lordships of the Privy Council, and was clearly right. The question of the effect of the decree in favour of Duli Chand does not, in my opinion, arise, and the point was conceded at the Bar during the hearing.

W. C. A.

Decree affirmed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 597 OF 1921.

January 16, 1923.

Present.—Mr. Justice Oldfield.

KALYANASUNDARAPPA AIYAR—

PETITIONER

versus

CHINNASAMI SERVAI alias CHINNASWAMY THEVAN—RESPONDENT.

Limitation Act (IX of 1908), ss. 4, 5—
Court holiday treated as working day by special permission—Last day for presentation of application—Application made next day if out of time—Delay, whether can be excused.

Where a Court holiday is treated as a working day and not a public holiday, and with the special permission of the High Court, a Court sits on that day, the Court cannot be held to have been closed on that day; an application, therefore, which ought to have been filed on that day but is filed on the next working day is out of time. [p. 14, col. i.]

Where, however, the publication of the order of the High Court was insufficient to put parties on notice, the delay in filing the application would be excusable under section 5 of the Limitation Act.

Section 4 of the Limitation Act is applicable only where the period of limitation expires on a day when the Court is closed. [p. 14, col. i.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise an order, dated the 1st April 1921, of the Court of Small Causes at Kumbakonam, in Interlocutory Application No. 283, of 1921, in S. C. No. 5690 of 1919.

Mr. T. R. Srinivasa Raja Gopala Aiyangar, for the Petitioner.

Mr. S. R. Mukhuswami Iyer, for the Respondent.

JUDGMENT.—In this case the petitioner's suit was dismissed for default on 20th January 1921. On 24th February 1921 he applied

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for its restoration. That application should *prima facie* have been made not later than 19th February 1921. But it was contended before the lower Court and is contended here that the time available was extended with reference to the occurrence of holidays on 19th, 20th 21st and 22nd February 1921. As regards 21st and 22nd February 1921 there is no doubt that the lower Court was closed under Government Notification for the *Mahamakam* festival. 20th February 1921 was a Sunday. The only question is then whether the Court was closed on 19th February 1921. That day was a holiday as a penultimate Saturday. But the Court sat and the day was treated as not a public holiday with the special permission of the High Court given in its order dated 4th February 1921.

It is urged first that the lower Court should have held that the petition to it was in time with reference to section 4 of the Limitation Act. Section 4 is applicable only when the period of limitation expires on a day when the Court is closed. It cannot be said that in the present case the Court was closed on 19th February 1921.

This failing, it has been suggested that the petitioner had sufficient cause for not making his application to the lower Court within the period allowed and that the delay in making it should be excused with reference to section 5, Limitation Act; and, in the circumstances of the case, the petitioner has been allowed to amend his petition in this Court accordingly. It is material that this Court's order permitting the lower Court to sit on 19th February 1921, though passed on 4th February 1921, was despatched to the lower Court only on 8th February 1921 and was presumably received there next day. It is not shown what publication of the order there was or that the petitioner who does not live in Kumbakonam itself could reasonably be expected to take notice of it. This being so, he had, in my opinion, sufficient cause for assuming that the Court would, as usual, be closed on 19th February 1921, the penultimate Saturday, and for postponing the presentation of his petition to the next Court day, 24th February 1921.

The result is, the lower Court's order must be set aside with a direction to it to restore the petition and deal with it on the merits

in accordance with law. Costs in this Court will follow the result of the proceedings on the restoration petition and be provided for by lower Court in its order thereon.

V. N. V.

Case remanded.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL, NO. 36 OF 1922.
September, 1922.

Present:—Mr. Justice Maung Kin.

MAUNG BA THAW—PLAINTIFF—

APPELLANT

versus.

MA HNIT AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Exp. I V—Suits for possession of property—Suit on ground of gift from father, dismissal of—Subsequent suit as orasa son, whether res judicata—Alternate claims, joinder of—Test.

A person claimed title to a plot of land as having been given to him by his father who, at the time of the suit, was dead. The suit was dismissed on the ground that the gift was invalid. He brought another suit in his capacity as the *orasa* son of his father but the Court held it to be *res judicata*.

Held, affirming the decision of the lower Court, that if the plaintiff had in the former suit put in the claim that he made in the subsequent suit as an alternative claim, there would have been no confusion and all questions relating to his title in the property would have been completely and finally determined. [p. 15, col. 2.]

Rameswar Pershad v. Rajkumari Ruttan Koor, 20 C. 79; 19 I. A. 234; 6 Sar. P. C. J. 241; 10 Ind. Dec. (N. S.) 53 (P. C.), *Guddappa v. Turkappa*, 25 B. 189; 2 Bom. L. R. 872, *Maslamania Pillai v. Thiruvengadam Pillai*, 31 M. 385, *Bheeka Lal v. Bhuggoo Lal*, 3 C. 23; 2 Ind. Jur. 173; 1 Ind. Dec. (N. S.) 607 and *Brojo Lal Roy v. Khetur Nath Mitter*, 12 W. R. 55, referred to.

The test whether a matter ought to have been made a ground of attack in a former suit is this: are the matters so dissimilar that their union might lead to confusion? [p. 15, col. 1.]

Second appeal from a decree of the Additional Divisional Judge, Prome, confirming that of the Sub-Divisional Judge, Thayetmyo.

Mr. Halker, for the Appellant.

Mr. Lambert, for the Respondents.

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JUDGMENT.—The point for determination is whether the present suit is *res judicata* by reason of a former suit.

Both the suits were instituted in the same Court and between the same parties, and the subject-matter is the same. In the former suit the plaintiff claimed title to three pieces of paddy lands, as having been given to him by his father who, at the time of that suit, was dead. It was held that the gift was not valid. In the present suit he sues as the *orasa* son of his deceased father and his mother, Ma Hnit, claiming a half share in the same three pieces of land.

Both the lower Courts have held that the present suit is *res judicata*.

If Explanation IV to section 11 of the Code of Civil Procedure applies to the case, the suit must be held to be *res judicata*.

The specific question to be determined is, whether in the former suit the plaintiff in the present case should, in the alternative, have made the claim he now makes.

Rameswar Pershad v. Rajkumari Ruttan Koer (1) is a Privy Council case. Jenkins, C.J., referred to it in *Gudaappa v. Tirhappa* (2) and said: "What is apparent, however, from the judgment is, that their Lordships considered that the case should be determined on the words of the section themselves; no authority is even cited. In reference to those words it is said 'That it *might* have been made a ground of attack is clear. That it *ought* to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word *ought* would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur, and it appears to their Lordships that the matter *ought* to have been made a ground of attack in the former suit, and, therefore, that it should be deemed to have been a matter directly and substantially in issue' in the former suit, and is *res judicata*." The learned Chief Justice pro-

ceeded to state:—"The test, therefore, proposed whereby to determine whether it ought to have been matter of attack is this: are the matters so dissimilar that their union might lead to confusion?"

The facts of the Bombay case are that the first suit was for the recovery of certain lands on the allegations that the plaintiffs were the surviving members of the joint family to which the former owner belonged. That suit was dismissed. Then the same plaintiffs brought a suit to recover the same land, alleging that, on the death of the widow of the former owner, they became entitled as reversioners. It was held that the latter suit was *res judicata*. Both the causes of action existed at the time of the first suit. It was pointed out that in the first suit the plaintiffs could have alleged, in the alternative, their title as heirs, and that they ought to have so alleged it, because it was forbidden by no rule of pleading, and, on the contrary, it was necessary for the complete and final disposal of all questions as to the plaintiff's title, and also because no confusion could have arisen by introducing the plea in the former suit.

In the case before me it is conceded that the plaintiff might have, in the former suit, put in the claim that he now makes as an alternative claim. If he did so, there would have been no confusion, and all questions relating to his title in the property would have been completely and finally determined. For this reason, he ought to have made the claim in the present suit as a ground of attack in the former suit. For this reason, the present suit must be held to be *res judicata*.

The case of *Masilamania Pillai v. Thiruvengadam Pillai* (3) is similar to the present case, and Wallis and Miller, J.J., (White, C. J., dissenting) held that the subsequent suit was barred by Explanation II to section 13 of the Code of 1882. A careful perusal of the learned Chief Justice's judgment shows that the question whether a matter ought to have been made a ground of attack within the meaning of the provision in question would depend on the facts of the each case.

(1) 25 C. 79; 19 I. A. 234; 6 Sar. P. C. J. 241; 10 Ind. Dec. (N. S.) 53 (P. C.).

(2) 25 B. 189; 2 Bom. L. R. 872.

(3) 31 M. 385.

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It has been argued that the cause of action in the present suit is not the same as that in the former suit, and that, therefore, Explanation IV to section 11 does not apply. But this is a case in which the plaintiff claims title to certain property, and, in proving his title to that property, he ought to have put forward all means of attack in his armoury; and it is to be pointed out that the rule, as enacted by section 11 of the present Civil Procedure Code, omits all references to the cause of action. Under the Civil Procedure Code of 1859 there was a conflict of opinion as to matters of the kind in question on this case. Section 2 of that Code says:—"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." It is to be noticed that these provisions do not contain any provisions like those of Explanation IV to section 11 of the present Code. Under the Code of 1859, the Madras High Court consistently held in several cases that a plaintiff was not bound to bring forward all his titles at once. See *Sadaya Pillai v. Chinmi* (4) and *Thyila Kandi Ummatha v. Thyila Kandi Cheria Kunhamed* (5) which expressly dissented from the decisions of the Calcutta High Court in *Denobundho Chowdhry v. Kristomonee Dossee* (6) and *Bheeka Lall v. Bhugoo Lall* (7). In *Brojo Lall Roy v. Khetur Nath Mitter* (8) it was held that the dismissal of a suit for certain land on the basis of a gift would bar a suit for the same land on the ground of heirship, as "a litigant cannot be allowed to keep back one of his titles, and then . . . to bring a fresh suit on the ground that he had still a right in reserve. He is bound to disclose all his titles at once". It was also pointed out that the Subordinate Judge appeared to have confounded the plaintiff's title and his cause of action together,

and to have considered that, because the plaintiff's title by inheritance was not decided by the former judgment it was open to trial now, and that a plaintiff's cause of action is a very different thing from his title; the one being something done contrary to a person's interest which obliges him to seek the aid of the Court, the other the proof that that something affords him a valid ground for relief.

In *Dudsar Bibee v. Shakir Burkundaz* (9) the decision was the same on facts similar to those of the last case cited above. Mitter, J., said:—"It is perfectly clear that the title on which the plaintiff has brought the present suit was in existence at the time when the former suit was brought, and she was bound to bring the latter suit on all the titles that were then in existence. She did not choose to do so; and it follows, therefore, that the decision in the former case, so far as it relates to the ownership of the *jote*, must operate against her as an estoppel in this case". These two cases were under the Code of 1859.

In the Code of 1877 a provision exactly the same as Explanation IV under consideration was inserted, besides other Explanations. It has been retained in the Code of 1882, which has now been superseded by the present Code. It seems clear to me that the insertion of the Explanation in the Code of 1877 was with the object of putting an end to the conflict.

The decision in the Privy Council case above cited is binding on all the Courts in the Indian Empire, and cases which were decided by the High Courts in India before that decision are not of any assistance at all.

For the above reasons, the appeal is dismissed with costs.

N. K.

Appeal dismissed.

(9) 15 W. R. 168.

(4) 2 M. 352; 4 Ind. Jur. 341; 1 Ind. Dec. (N. S.) 519.

(5) 4 M. 308; 5 Ind. Jur. 407; 11 Ind. Dec. (N. S.) 1050.

(6) 2 C. 152; 1 Ind. Dec. (N. S.) 393.

(7) 3 C. 23; 2 Ind. Jur. 173; 1 Ind. Dec. (N. S.) 607.

(8) 12 W. R. 55.

MARMADUKE PICKTHALL, *In re*.**BOMBAY HIGH COURT.**

CRIMINAL APPLICATION NO 113 OF 1922.

September 20, 1922.

Present:—Sir Lalubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.• *In re* MARMADUKE PICKTHALL.*Contempt of Court—Newspaper articles—Journalistic privilege—Imputation of dishonesty.*

• In determining whether an article published in a newspaper constitutes a contempt of Court, the point to be considered is the natural and probable effect of the article, and not only the avowed intention of the Editor. Where the article, as a whole, would leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done in the trial of a case, the publication of such an article would constitute a contempt of Court. [p. 19, col. 2.]

(Case-law considered.)

Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the King. It is a jurisdiction, however, to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt. [p. 18, col. 1.]

The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from Statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful, but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position. [p. 20, col. 2.]

A journalist may say that a Judge is wrong, or ignorant of law, but if he accuses a Judge of dishonesty or corruption he transgresses the limit. [p. 21, col. 1.]

Rule.

Mr. Kanga, Advocate-General, with him Mr. S. S. Patker, Government Pleader, for the Crown.

Mr. Jinnah, (with him Mr. Rattanlal Ranchoddas, instructed by Messrs. Maiti, Mody, Ranchoddas & Co.), for the Respondent.

JUDGMENT.

Shah, Ag. C. J.—This is a Rule issued on the application of the Government of Bombay against Marmaduke Pickthall, the Editor, Printer, and Publisher of the *Bombay Chronicle*, to show cause why he should not be committed for contempt of Court

in respect of the article headed "*The Malagaon Appeals*" published in the issue of the said paper of April 24th 1922.

The article in question relates to what may be briefly stated as the Malagaon riot cases. The original trial was held by the Sessions Judge of Nasik against one hundred and thirteen persons, out of whom sixty-six persons were convicted by him, and the rest acquitted. Sixty-four persons appealed to this Court. These appeals were heard by Marten and Crump, JJ., for several days and they delivered their judgments on April 18th. A few of the appellants were acquitted: and in the case of the remaining appellants the convictions were confirmed. On the whole, it may be said that, in the main, the conclusions of the Trial Court were accepted. The record was exceptionally heavy and the difficulty of handling the appeals unusual. The case was undoubtedly important and difficult. The article in question was written by way of criticism shortly after the judgments were delivered.

I may note, at the outset, the objection raised by Mr. Jinnah to any reference being made to the interlocutory judgment of Marten, J., when the Rule was granted, on the ground that it has the effect of prejudging the point which we have to decide. We have overruled the objection, it does not prejudice the issue in any sense; and, speaking for myself, it has been helpful to me in knowing the general features of the case without having to turn to the bulky record for the information. It is obvious that we have to decide the questions arising on the Rule, and the interlocutory judgment does not in the slightest degree affect that position.

In this case we are concerned with a contempt of this Court and not of any Subordinate Court; and no question of jurisdiction, such as arose in *Emperor v. Balkrishna Govind Kulkarni* (1), arises in this case.

The publication we are concerned with refers to the proceedings which had ended, and it will not be inappropriate to refer briefly to the considerations applicable to a publication of that kind. I take them as stated in the following extracts from

(1) 65 Ind. Cas. 753; 46 B. 592; 24 Bom. L. R. 16; 23 Cr. L. J. 177 (1922) A. I. R. (B.) 52.

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the judgment in *McLeod v. St. Aubyn* (2):—

"Committals for contempt of Court are ordinarily in cases where some contempt *ex facie* of the Court has been committed, or for comments on cases pending in the Courts. However, there can be no doubt that there is a third head of contempt of Court by the publication of scandalous matter of the Court itself...The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the Judge as a person...Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the Judge or the Jury are given over to criticism. It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases."

I may also refer to the following passages in the judgment of Lord Russell of Killowen, C. J., in *Reg. v. Gray* (3).

"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke, L. C., characterised as 'scandalising a Court or a Judge'. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this

(2) (1899) A. C. 549 at p. 561; 68 L. J. P. C. 137; 81 L. T. 158; 48 W. R. 173; 15 T. L. R. 487.

(3) (1900) 2 Q. B. 36 at p. 40; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484; 16 T. L. R. 305.

matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. It is a jurisdiction, however, to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt."

The questions that arise for our consideration are: first, whether the case of contempt is clearly made out against the opponent; and, secondly, whether, having regard to all the circumstances, it is necessary to take action against the opponent in the interests of the administration of justice.

As regards the first point, the materials that we have to consider principally are the article itself and the affidavit of the opponent. It is urged by the learned Advocate-General that the article attributes to the Judges of the High Court who decided the appeals an improper desire to uphold the convictions on evidence which would be ordinarily considered clearly insufficient to punish persons for their political views and activities rather than for the crimes committed by them and to give effect to the plea of exceptional times rather than to vindicate justice. It is also suggested by him that the article insinuates that the Judges were influenced by some outside agency in arriving at their conclusions. On the other hand, it is urged by Mr. Jinnah that the article suggests no such outside influence and it would be wholly unreasonable to read it in that sense. He contends that the writer suggests nothing more than an error of judgment in convicting some innocent persons, that the inaccuracies in the statement of the evidence and the charges are not intentional, that the article attributes at the most an unconscious political bias to the Judges in the appreciation of the evidence, and that it is a fair criticism open to his client to offer on a political case of importance. In other words, he has argued in favour of the plea put forward by his client in the affidavit in these words:—

"It is not the policy of the *Bombay Chronicle* to lower the dignity of this Honourable Court as the Government Pleader imagines it has done. But I say that after the conclusion of the trial and appeals I felt justified in criticising the decision and in doing so I did not mean to show any disrespect to this Honourable Court or to

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its dignity. The article in question is merely a criticism of the decision of the Judges concerned and expresses an opinion to the effect that the lower and the Appeal Courts committed an error of judgment in attaching importance to the political character of the trial."

We have considered the article and the affidavit in the light of the arguments urged before us. I am prepared to concede that the article does not constitute a personal abuse of the Judges such as we find, for instance, in *Keg. v. Gray* (3) or in *Narasinha Chinnaman Keikar, In re* (4), nor does the article contain such comprehensive condemnation of Courts including this Court and British justice, as is to be found in the recent case of *Satyabodha Ramchandra, In re* (5). I also pass over as immaterial or insignificant for our present purposes the mistakes pointed out by the Advocate-General in the statements in the article as to the charges and the evidence in the case against the several accused. Taking the article as a whole, and making due allowance for the style, the view point and the possible political bias of a journalist, I find it difficult to avoid the conclusion that the article does attribute improper motives and political bias to the Judges in upholding the several convictions. I reject, as wholly improbable under the circumstances, the suggestion that the writer meant to imply that some extraneous influence was at work. But the article begins by a clear expression that the cause of justice was not vindicated by the Bombay High Court, and a clear implication that the vindication of justice is possible only when persons are acquitted and not if they are convicted. It clearly suggests that some innocent persons have been convicted not on account of a mere error of judgment but because of their active association with the Knilarat movement, and that they were singled out for exemplary punishment and made to pay the penalty for a cause rather than for any crime they committed. The article ends with a clear implication that the Judges were influenced by the consideration of exceptional times not, of course, expressly urged by the pro-

(4) 2 Ind. Cas. 268; 33 B. 240; 10 Bom. L. R. 1040; 4 A. L. J. 339, 8 Cr. L. J. 426.

(5) 69 Ind. Cas. 84; 24 Bom. L. R. 928; (1922) A. L. R. (B.) 426; 23 Cr. L. J. 644.

secution but impliedly taken into consideration by the Court that upheld the convictions on the evidence which, according to the writer, ought never to be accepted as sufficient. The article, as a whole, would leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done on political grounds to some of the accused who were apparently innocent. In other words, it attributes judicial dishonesty to the Judges. I am unable to accept the contention that such an article does not constitute a contempt of Court. We have to consider the natural and probable effect of the article and not only the avowed intention of the Editor as indicated in his affidavit. I think that the publication of the article in question constitutes a contempt of Court.

The second question is more difficult. I am slow to hold that any unfair criticism of Courts or Judges constitutes such an interference with the administration of justice as should be punished. I am willing to act upon the view that the confidence of the public in Courts rests mainly upon the purity and correctness of their pronouncements and that such confidence is not lightly shaken by a mistaken or unfair criticism of this kind. At the same time, it is clear that the tendency of such criticism is to undermine the dignity of the Courts and in the end to embarrass the administration of justice. The faith of the public in the fairness and incorruptibility of Judges is a matter of great importance. On the other hand, I take into consideration the circumstance that the attitude of the opponent before us has not been unreasonable, particularly if due allowance is made for his natural partiality for the publication in question in his own paper, though the writer of it was a different person. I attach due weight to his statement that the policy of his paper is not "to lower the dignity of this Honourable Court." There is no allegation in the petition to suggest anything to the contrary. I also take into account that he has expressed his sincere 'regret' for the publication if it is held to constitute a contempt of this Court, as we hold it now. On the whole, I think that the ends of justice will be satisfied in this case if we order that he should pay a fine of Rs. 200 (rupees two hundred),

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Crump, J.—The short facts of this matter are as follows:—On April 18th, 1922, a Divisional Bench of this Court delivered judgment in Criminal Appeal No. 776 of 1921 and other connected appeals. These cases dealt with what may be called the Malagaon riots which took place on April 25th, 1921. The record was voluminous and the appeal was possibly the heaviest that has been heard on the Criminal Appellate Side of this Court. The hearing lasted thirteen days. Put shortly, the riots arose in consequence of the inflamed state of feeling among the Mussalmans of Malagaon and were of a serious nature. Two Police Officers were murdered, and many other persons were injured. Much damage was also done to property. These cases were thus important merely as criminal cases but, further, in the public eye, they were held to have a political aspect.

On April 24th, 1922, there appeared in a newspaper styled *The Bombay Chronicle* an article headed "The Malagaon Appeals." This article contains a criticism of the conduct of the Judges of this Court who heard the appeals. At the instance of the Government of Bombay the Government Pleader moved this Court to take proceedings for contempt. A Rule was issued and arguments were heard.

The affidavit put in by the Editor of the newspaper comes shortly to this. That the article is fair comment; that the liberty of the Press demands that there should be freedom to point out errors in judgments, and to criticise judgments after they are delivered, and that there was no contempt. In the final sentence regret is expressed "if this Honourable Court is of opinion that the article in question does constitute contempt."

It is not disputed that this Court has jurisdiction to take proceedings for contempt of Court: nor is it disputed that comments on a case after the hearing is completed may amount to contempt. As to the latter proposition it is sufficient to cite the case of *Reg. v. Gray* (3). The questions which arise are whether the language used in this article amounts to contempt, and, if so, whether this Court should take notice of it. The principle is clear enough. The Court will not act so much to protect the dignity of its Judges as in the interest

of the administration of justice. This Court may rightly hold itself to be above such criticism as this article contains but if the public confidence in the impartial administration of justice is in danger of being impaired, it may be the duty of the Court to exercise its powers.

The nature of the defence has been indicated, but with reference to paragraphs 3 and 16 of the affidavit the following remarks of their Lordships of the Privy Council are pertinent (page 169*) :—

"Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from Statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position."

"Upon the other side it would appear... that this false and dangerous doctrine may have been hinted at, that some privilege or protection attaches to the public acts of a Judge which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial Tribunals were outside of the range of such comment." *Channing Arnold v. Emperor* (6).

Though the case in which these remarks are to be found was not one of contempt, nevertheless they furnish a valuable guide in dealing with such matters as that which is here before the Court. No one, whether he be a Judge or not, ought to take exception to fair criticism, nor should any jour-

(6) 23 Ind. Cas. 661; 41 I. A. 149; 48 C. W. N. 785; 26 M. L. J. 621; 15 Cr. L. J. 309; 1 L. W. 461; 7 Bur. L. T. 167; (1914) M. W. N. 506; 16 M. L. T. 79; 12 A. L. J. 1042; 20 C. L. J. 161; 16 Bom. L. R. 44; 8 L. R. R. 16; 13 C. 1024 (P.C.).

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nalist be hindered from offering such criticism. Nevertheless, there is a limit which must not be passed. A journalist may say that a Judge is wrong, or ignorant of law, but if he accuses a Judge of dishonesty or corruption he transgresses the limit. And if it appears to this Court that such criticism must hinder the proper administration of justice, then it may be the clear duty of this Court to exercise its powers. The article in question must be considered from this stand-point.

The first paragraph of the article deals with the case of Wolfe Tone. The substance is that the Judges "who detested the rebels" nevertheless protected Wolfe Tone; and this was "a splendid assertion of the supremacy of the law." The second paragraph opens with these words: "We wish we could say of the Bombay High Court judgment that it was a splendid assertion of the supremacy of the law." The *innuendo* is that the Judges of this Court did not rise above political considerations. The point is made clear in paragraph 10 of the affidavit where it is said that Wolfe Tone's case is cited to show that "the administration of justice should be pure and not tainted with extraneous considerations." The writer then proceeds to deal with the facts of the case. There has been some question as to the accuracy of this recital, but it is not necessary to go into this beyond remarking that the writer deliberately ignores the largest and most important part of the evidence. Then follows this passage:—

"In a case like the one under notice to which the authorities apparently attached considerable political significance it was hardly likely that the defence of the accused, especially the 'tallest poppies among them,' would easily be accepted, even where it was sufficiently clear and emphatic."

The plain meaning is that the learned Sessions Judge convicted against the weight of the evidence.

The writer then points out that the majority of these convictions were confirmed by this Court. The passage which follows gives the reasons which, according to the writer, influenced the Judges of this Court:—

"Some of these may have undoubtedly been guilty of the charges brought against

them; but of the rest it is difficult to believe the same, and the impression in the public mind is that certain prominent people, because of their active association with the Khilafat movement, were singled out for exemplary treatment, and made to pay the penalty for the cause rather than for any crime they have committed. We have heard it said that Indian Judges are always out for convictions but it can hardly be the duty or the pleasure of the High Court to uphold them".

The plain meaning is this. The Sessions Judge convicted though the defence was clear and emphatic. The High Court confirmed the convictions contrary to "their duty and their pleasure." It was argued that nothing more was meant than that the Judges being human were swayed by some subconscious political bias. But the words mean more than this. A man so influenced does not act against "his duty and his pleasure." He believes that that which he does is right and he is not reluctant to do it.

The article closes with the following words:

"It was an eminent English Judge, Justice Buckland, who said that the administering of "pure unadulterated justice" is the only duty of the Courts and they have no right to take into consideration 'the plea of exceptional times' brought forward by the executive to secure convictions against the politically minded."

The ingenuity of Counsel has failed to discover where and in what context "that eminent English Judge, Justice Buckland," used these words. But here and in this context the meaning is plain. "Justice was not pure and unadulterated because the High Court gave effect to the plea of exceptional times." It is unnecessary to ascribe to these words the grosser meaning suggested by the Advocate-General. They do not fairly bear the construction that outside influence was brought to bear upon the Judges. It is enough to say that no plea of "exceptional times" was ever raised on behalf of the prosecution, nor would any such plea have been tolerated by this Court.

Such is the article and it is impossible to doubt that it charges the Judges of this Court with conscious dereliction of duty.

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But the further question remains whether it is necessary to act. Unfortunately, the effect of such writing as this cannot be ignored, and however unwilling this Court may be, "for indeed all Courts are unwilling to take proceedings in contempt unless compelled—it is impossible to permit the public to be poisoned with such calumnies as these. In a country such as this where more importance is attached to the printed words than it perhaps at times deserves, it would be difficult for the average reader to read the language used without conceiving grave doubts as to the integrity and impartiality of the Judges of the Court. Therefore, in the interests of the administration of justice the Court cannot overlook this contempt.

Something has been said as to the apology, set at the close of the affidavit, that expression of regret is conditional and such as the Judges of this Court declined to consider in the case of *Narasimha Chintaman Kelkar, In re* (4). The reasons assigned in that case are equally applicable here.

W. C. A. & N. H.

Order accordingly.

CALCUTTA HIGH COURT.

REFERENCE NO. 5 OF 1922, (UNDER THE LEGAL PRACTITIONERS ACT.)

July 17, 1922.

Present :—Justice Sir Asutosh Mookerjee Kt., and Mr. Justice Chotzner.

EMPEROR—PROSECUTOR

versus

RAJANI KANTA GHOSE.

Legal Practitioners Act (XVIII of 1879), s. 13 (b)—Legal Practitioner—Fraudulent conduct—Representation of conflicting interests.

A legal practitioner cannot represent conflicting interests or undertake the discharge of inconsistent duties. When he has once been retained and received the confidence of a client, he cannot accept a retainer from or enter the service of those whose interests are adverse to his client in the same controversy or in matter so closely allied thereto as to be in effect a part thereof. The rule is rigid and is designed not alone to prevent the dishonest practitioner from fraudulent conduct but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interests which he should alone represent. [p. 23, col. 2.]

Day v. Ponsonby, (1842) 5 Ir. Eq. Rep. 24, *All Muhammad v. Sham Lal*, 45 P. L. R. 1904, *Ugrt Bhoi v. Shridhar Kulta*, 1 N. L. R. 52, *Rai Durgapershad v. Baiwan Bai*, 12 C. P. L. R. 35, *Pallonji Merwanji v. Kallabhai Lallubhai*, 12 B. 85; 6 Ind. Dec. (N. S.) 543, *Ramlall v. Moonia Bibee*, 6 C. 79; 5 Ind. Jur. 583; 3 Ind. Dec. (N. S.) 52, *Reg. v. Bezonji Nowroji*, 12 B. 911; 6 Ind. Dec. (N. S.) 547, *Shire v. King*, (1603) Yelv. 32; 80 E. R. 24, *King v. Shore* (1603) Cro. Eliz. 914; 78 E. R. 1135, *Brokes case*, (1895) Moore (K. B.) 409; 72 E. R. 661, referred to.

Proceedings under the Legal Practitioners Act were taken against a Mukhtear on the ground that he, while acting on behalf of the prosecution in a criminal case, had drafted a written statement on behalf of two of the accused persons in that case. The Mukhtear pleaded that he had acted in good faith and that he had not realised that his conduct was improper :

Held, that the Mukhtear was guilty of an offence against professional propriety and was liable to be punished. [p. 24, col. 2.]

People v. Spencer, (1882) 61 Calif 128, referred to.

Reference by the District Judge and Sessions Judge, Midnapore dated the 11th May 1922.

Babu Surendra Nath Guha in support of the Reference:—The Mukhtear concerned is clearly guilty of an offence against professional propriety. As a legal practitioner he cannot undertake the discharge of conflicting duties. The Mukhtear pleaded ignorance and good faith. But ignorance of law is no defence to a charge of professional misconduct. Refers to *Jugal Chandra Mazumdar, In the matter of* (1).

Mr. J. C. Hazra, Counsel (with him Babus Gopendra Nath Das and Santosh Kumar Pal), for the Mukhtear :—The evidence does not support the charge under section 13 (a) of the Legal Practitioners Act. The evidence clearly established that the man from whom the Mukhtear took instructions had authority to look after the criminal case on behalf of the accused. So on the evidence the charge under section 13 (a) of the Legal Practitioners Act cannot stand.

JUDGMENT.—This is a reference under section 14 of the Legal Practitioners Act in the matter of Babu Rajani Kanta Ghose, Mukhtear. The facts proved by the evidence are narrated by the District Judge in his letter of reference. Babu Rajani Kanta Ghose was engaged as a Mukhtear on the side of the prosecution in a criminal

(1) 34 Ind. Cas. 645; 20 C. W. N. 1016; 17 Cr. L. J. 220.

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case in which there were four accused persons. Under instruction received from one Padlochan Das, who was looking after the case of two of these accused persons, namely Harihar and Nirubar, Babu Rajani Kant Ghose prepared a draft written statement on their behalf. It has been proved that neither Harihar nor Nirubar gave instruction direct to him to prepare the draft. The draft written statement was taken to the gentleman who was engaged as *Mukhtear* on behalf of the four accused persons. When he read the written statement he found that it would be impossible to file it in Court, inasmuch as it implicated the other two accused to their prejudice. The result was that Babu Nabakrishta Das Adhikary did not file the written statement. It is thus obvious that Babu Rajani Kanta Ghose, while engaged for the prosecution in the criminal case, did prepare a written statement for the use of two of the accused persons. In these circumstances the Sub-Deputy Magistrate took proceedings under the Legal Practitioners Act and framed a charge in the following terms: "Whereas it appears that you were retained by the prosecution in the case of *Pahul Mali v Sishir Kumar Das Mohapatra* and whereas it appears that you had drafted a written statement on behalf of accused Harihar and Nirubar and thereby acted contrary to the provisions of section 13 (a) of the Legal Practitioners Act, I charge you under the said section of the said Act." The *Mukhtear* filed a written statement in answer to this charge. Evidence was recorded in due course and this reference ultimately made by the District Judge as already stated.

It has been argued before us by Mr. Hazra that no case has been made out under section 13 (a) of the Legal Practitioners Act, inasmuch as the evidence establishes that Padma Lochan Das who approached Babu Rajani Kanta Ghose was authorized by Harihar and Nirubar to look after the Criminal case on their behalf. In our opinion, it is not necessary to consider whether the evidence does or does not establish this point. The reference need not be treated as one under section 13 (a) which provides for the case where a *Mukhtear* takes instructions except from the party on whose behalf he is retained or some person who is the recognised agent of such party within the

meaning of the Code of Civil Procedure or some servant, relative or friend authorised by the party to give such instructions. The facts stated in the notice issued by the Sub-Deputy Magistrate show that the case was really under section 13 clause (b) which includes a case where a legal practitioner is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty.

There is, in our opinion, no doubt as to what actually happened. It is plain upon the evidence and upon the admission of the *Mukhtear* that while he was acting on behalf of the prosecution, he drafted a written statement on behalf of two of the accused persons. An attempt has been made to support the theory that he might have forgotten the facts of the case and might not have realised that the written statement which he drafted related to the very case he was to conduct on behalf of the prosecution. We find from the record, however, that he accepted the *Mukhtear-nama* on the 14th June 1921 when the proceedings were instituted, and the written statement was not drawn up till the 16th February 1922 at the concluding stage of the trial. During the six months which had elapsed, he might be expected to have made himself familiar with the case for the prosecution. Indeed he does not allege that he was under a misapprehension. He pleads that he did not realise that his conduct was improper; in other words, he believed in good faith that, though he was *Mukhtear* for the prosecution, he was free to prepare the written statement for the accused.

As this has happened once and may happen again, it is desirable to state the well settled general rule that a legal practitioner cannot represent conflicting interests or undertake the discharge of inconsistent duties. When he has once been retained and received the confidence of a client, he cannot accept a retainer from or enter the service of those whose interests are adverse to his client in the same controversy or in matter so closely allied thereto as to be in effect a part thereof. The rule is rigid and is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where

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he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interests which he should alone represent. This is not the first instance in which the rule has been broken and reference may be made to the cases of *Davies v. Clough* (2), *Cholmondeley v. Clinton* (3); *Day v. Ponsonby* (4). Fidelity is required from all who hold fiduciary relations, they must not lightly enter upon such relationships, but if they do, they will not be permitted to be disloyal; and of all species of disloyalty, desertion and adherence to the enemy or to the opposite party in a suit is recognised as the worst. On these grounds it has been held that the attorney may be disbarred where he conducts a criminal prosecution against a person or assists therein, and thereafter appears for the defence, or while acting as attorney for the prosecutor in a criminal case he accepts money from the defendant in consideration of a dismissal. Reference may in this connection be made to the decision in *Ali Muhammad v. Sham Lall* (5), *Ugri Bhoi v. Shridhar Kulta* (6), *Rai Durgapershad v. Baivan Bi* (7), *Pallonji Mervanji v. Kallabhai Lallubhai* (8), *Ramlall v. Moonia Bibee* (9) and *Reg. v. Bezouji Nowroji* (10). We may observe that the conduct imputed to an attorney when it is said that he has received instructions from both sides in a cause is so disreputable that unfounded allegation to this effect is considered actionable without proof of special damage; *Shire v. King* (11) reported as *King v. Shore* (12) *Brokes case* (13).

The Mukhtear before us is not the first member of the legal profession who has

been under the delusion that it is open to a person to appear on behalf of the prosecution and at the same time to assist the defence. The case of *People v. Spencer* (14) shows that he has had a predecessor where the attorney concerned conducted the case for the prosecution and then looked after the case for the defence. When he was called upon to explain his conduct he stated in all innocence that he did not realise that his conduct was reprehensible. The Court thereupon made the following observations: "By appearing both for the plaintiff and defendant in the same action he was guilty of violation of his duty as an attorney for which it is our duty to remove or suspend him. Neither his ignorance of the laws nor the crudity of his notions of professional ethics, can excuse an offence against professional propriety by one whose duty it is to assist in the administration of justice. The degree of turpitude involved in the breach of his duty by an attorney, however, must appear in the circumstances of each case. The punishment which should follow an inadvertent or ignorant departure from professional propriety, no seriously evil consequences having resulted, should be less severe than where the offence is a deliberate or corrupt violation of official oath. The circumstances presented by the record, while they go towards showing an absence of intentional wrong, do not justify respondent. However innocent his motives, his conduct must be condemned, yet in consideration of the facts we are disposed to inflict a penalty which, while it shall satisfy the provisions of the Code and mark our disapprobation of his act, shall not forever debar the respondent from the further practice of his profession." The Court then suspended the attorney from practice for a period of three months. We are of opinion that in the case before us a similar order may be made. We direct accordingly that the Mukhtear be suspended for a period of three months from this date.

B. N. Suspension order passed.

(2) (1837) 8 Sim. 262; 6 L. J. (N. S.) Ch. 113; 1 Jur. 5; 42 R. R. 171; 59 E. R. 105.

(3) (1815) 19 Ves. 261; 2 Ves. & B. 113; S. Coop. 80; 13 R. R. 183; 34 E. R. 515.

(4) (1842) 5 Ir. Eq. Rep. 24.

(5) 45 P. L. R. 1904.

(6) 1 N. L. R. 52.

(7) 12 C. P. L. R. 35.

(8) 12 B. 85; 6 Ind. Dec. (N. S.) 543.

(9) 6 C. 79; 5 Ind. Jur. 583; 3 Ind. Dec. (N. S.)

52.

(10) 12 B. 912; 6 Ind. Dec. (N. S.) 547.

(11) (1603) Yelv. 32; 80 E. R. 24.

(12) (1603) Cro. Eliz. 914; 78 E. R. 1135.

(13) (1595) Moore (K. B.) 409; 72 E. R. 661.

(14) (1882) 61 Calif. 128.

EMPEROR V. NARAYAN KRISHNA GOGATE.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE NO. 23 OF 1922.

October 18, 1922.

Present.—Mr. Justice Marten: on difference between Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

EMPEROR—PROSECUTOR

versus

NARAYAN KRISHNA GOGATE—

ACCUSED.

Railways Act IX of 1890, s. 109—*Reserved accommodation—Railway Company, powers of—Reservation, nature of.*

By virtue of section 109 of the Railways Act, a Railway Company has a general power of reserving compartments for the use of passengers who have already booked their seats, or for prospective passengers who the Company anticipate will travel, and the Company are entitled to reserve either individual seats or whole compartments. But such power ought not to be exercised so as to give an undue preference or to cause an undue prejudice to any particular passenger traffic, whether individual or collective. [p. 29, cols. 1 & 2.]

Brijbasi Lal v. Emperor, 55 Ind. Cas. 342; 42 A. 327; 2 U. P. L. R. (A) 65; 18 A. L. J. 254; 21 Cr. L. J. 294. *Vishwanath Ganesh v. G. I. P. Railway Company*, 62 Ind. Cas. 1004; 45 B. 1324; 23 Bom. L. R. 809; *Komaran, In re*, 66 Ind. Cas. 520; 45 M. 215; (1922) M. W. N. 34; 15 L. W. 207; 30 M. L. T. 134; 42 M. L. J. 21; 23 Cr. L. J. 296; (1922) A. L. R. (M.) 35 and *Perth General Station Committee v. Ross*, (1897) A. C. 479; 66 L. J. P. C. 81; 77 L. T. 226, referred to.

Criminal reference made by the District Magistrate of East Khandesh.

FACTS appear from the following dissentient judgments of Sir Lallubhai Shah, Actg. C. J., and Crump, J., on October 5th 1922:—

Shah, Actg. C. J.—This is a reference by the District Magistrate of East Khandesh recommending that the conviction and sentence should be set aside. The accused was convicted by the First Class Magistrate of Jalgaon City, under section 109 of the Indian Railways Act, for having entered a compartment which was reserved for Europeans and Anglo-Indians in a passenger train. The accused had a third class ticket to travel from Pachora to Bhusaval by the down passenger train on February 17th, 1922; and he entered the compartment in question which was in fact vacant. The learned Magistrate was inclined to hold that the Railway Company had no power to reserve the compartment in that manner; but following the ruling in *Brijbasi*

Lal v. Emperor (1) he held that the Railway Company had the inherent right to reserve compartments in that manner and convicted the accused and sentenced him to pay a fine of Rs. 5.

The accused applied to the District Magistrate who has made a reference to this Court.

The point that we have to consider is whether the compartment such as was reserved in this case could be legally reserved for a class of passengers without reference to the question whether there were any actual passengers of that class travelling or known to be intending to travel by that train. I have stated the question in this form, though in this particular case we are concerned with the reserved accommodation provided in a third class compartment in a passenger train for Europeans and Anglo-Indians, as, in my opinion, that is the question underlying the reference.

It is not suggested that there is any statutory provision or any rule under section 47 of the Indian Railways Act which authorises this kind of reservation. It appears to have been done in pursuance of 'Working Instructions' issued by the Railway Company, a copy of which has been furnished to us by Mr. Binning appearing for the Company. I refer to it only for the purpose of showing that the Crown and the Company rely upon the inherent powers of the Company and not upon any statutory provision or rule.

I have considered the arguments urged before us on behalf of the Crown, the Company, and the accused: and I have also considered the decisions of different Courts on the point, which are opposed to the view which I take of this question. In the first place I feel quite clear that the powers of the Company are subject to certain statutory limitations and must be determined in the light of the scheme of the Act so far as it bears upon the point in question. A penal provision ought to be strictly construed: and it is for the prosecution to make out that the compartment could be legally reserved in the manner it was reserved on this occasion. The Company has full power to regulate its traffic within the limits allowed by law. Section 42 (2) provides the limitation in question; and

(1) 55 Ind. Cas. 342; 42 A. 327; 2 U. P. L. R. (A) 65; 18 A. L. J. 254; 21 Cr. L. J. 294.

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it is for the prosecution to establish that the limitation has not been transgressed in this case. I do not feel any doubt that the sect on refers to all traffic, which includes passenger traffic (see section 3 (II)). This point is, in my opinion, sufficiently dealt with in *Vishwanath Ganesh v. G. I. P. Railway Company* (2). It is true that no suit can be instituted or proceeding taken for any thing done or any omission made by the Railway Administration in violation or contravention of any provision of Chapter V. But I do not see how a Criminal Court is relieved of its obligation to consider this question so far as it is relevant in determining whether a particular offence is committed or not. In my opinion, it is a question of fact to be determined in each case whether the particular accommodation reserved for a section of the travelling public to the exclusion of the rest of the public involves any undue or unreasonable preference or advantage to or in favour of any particular person or description of traffic in any respect whatever or subjects any particular person or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever. I readily concede that the powers of a Railway Administration are very wide so long as it does not transgress the limitation which the Statute has imposed in the interests of the public. But where it exercises its powers in a manner which may appear to involve some kind of preference, it is open to the administration to have an appropriate rule under section 47 which would remove the doubt and difficulty to a large extent. For instance, if there were a rule authorising the Railway Administration to reserve accommodation for Europeans and Anglo-Indians travelling in the third class within such limits as may be prescribed the *onus* of proving that such a rule was inconsistent with the provisions of the Act, would lie heavily upon the party asserting it. When a rule is framed under section 47, it would imply that the Governor-General in Council is satisfied as to its need and propriety.

In the absence of such a rule, we have to consider it as a question of fact on the evidence in this case. In doing so it is

necessary to bear in mind the provisions relating to 'carriage of passengers' in the Act. It is provided in section 66 that "every person desirous of travelling on a Railway shall, upon payment of his fare, be supplied with a ticket specifying the class, the fare and the range of his journey". Section 67 (1) provides that "fares shall be deemed to be accepted and tickets to be issued subject to the condition of there being room available in the train for which the tickets are issued," and that in case a person to whom a ticket has been issued does not get accommodation the fare is to be refunded. Thus it appears to me that a person who purchases a ticket shows beyond reasonable doubt that he is desirous of travelling by the particular train and is anxious to secure accommodation. If he finds a compartment vacant and cannot travel by it, he is put to undue disadvantage if the vacant room is kept apart for any person who has not shown any similar desire to travel. The Trial Magistrate has remarked in his judgment with reference to third class passengers that they "are now-a-days getting little accommodation in crowded trains even though these reserved compartments are seen mostly empty". In fact the learned Magistrate goes so far as to think that even a rule, if framed, would probably be considered to be inconsistent with the Act. I am not concerned with the question whether a rule, if framed, would be consistent with the provisions of the Act, and I do not express any opinion as to that. It would be premature and improper to suggest any opinion in anticipation about a rule which does not exist. But as regards the question of fact his observation is entirely in consonance with the evidence in the case. The relevant evidence on this point is quoted in the letter of reference by the District Magistrate, and is contained in the cross-examination of the Railway Police constable and guard. It clearly establishes that the overcrowding is not a rare occurrence, while a compartment which would accommodate nearly twenty-five passengers remains practically vacant. What appears to me to be a probable result of this manner of reserving accommodation for one class of passengers is that a passenger outside that class would be unable

(2) 62 Ind. Cas. 1004; 45 B. 1324; 23 Bom. L. R. 809.

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to travel by a particular train for want of room on account of overcrowding whereas there would be room in the train for a person of that class who may not have expressed any desire to travel and who may not travel at all by that train. That is a result which according to the evidence is not uncommon. When a compartment is reserved in pursuance of general instructions leading to such results, it cannot be said to be legally reserved so as to constitute an entry therein an offence punishable under section 109. The accident that a particular train was not crowded and that there was room for the accused on that particular occasion elsewhere in the train does not seem to me to afford any answer to the real question in the case. If the evidence in this case is accepted, as it has been accepted, it shows that the exercise of this power involves the result that some passengers outside the class of passengers for whom the compartment is reserved would be left over without any accommodation in the train, whereas a passenger of that particular class at that station or any of the following stations would get accommodation, and if there be no such passenger the compartment would remain unoccupied.

It is also a matter for consideration that while the average space theoretically allowed to third class passengers would be and should be the same for all, the space in fact allowed to passengers of a particular class would be much greater, when a compartment is reserved for that class; for, according to the evidence, the average number of passengers of that class would be very small, and a compartment for twenty-five passengers would be practically reserved for that small number. This also indirectly but effectively introduces an element of preferential treatment. I desire to make it clear that I do not put any technical or narrow meaning upon the word 'passenger' as used in section 109. I include within its meaning a class of passengers; but I do not think that it could include within its scope any persons representing a class or section of the public without the slightest reference to their desire or intention to travel by that train previously expressed or known to the Railway Company. I think that a reservation of that kind is apt to involve a transgres-

sion of the limitation laid down in section 42 (2) and may be shown by evidence to involve that result in a particular case. That appears to me to have been shown in this case to the satisfaction of the Trial Magistrate; and the District Magistrate also takes the same view.

I have carefully considered the reported cases on this point; and I am unable to agree with the view that such reservation for a class or section of the public is necessarily legal. It may be illegal as transgressing the limits prescribed by section 42 (2), as it has been shown in this case.

I think, therefore, that the conviction and sentence ought to be set aside. I would order accordingly. Fine, if paid, to be refunded.

Crump, J.—This is a reference by the District Magistrate, East Khandesh, in the case of Narayan Krishna Gogate, who was tried by the Magistrate, First Class, Jalgaon City, for an offence punishable under section 109 of the Indian Railways Act (IX of 1890) and fined Rs. 5.

In making this reference the District Magistrate has relied on the decision of this Court in *Vishwanath Ganesh v. G. I. P. Railway Company* (2). That decision proceeded on the ground that the Court had no jurisdiction by reason of section 41 of the Indian Railways Act, and the remarks cited are, therefore, *obiter*. There is thus no decision of this Court precisely upon the point before us. There is, however, a decision of the Allahabad High Court, *Brijbasi Lal v. Emperor* (1), which on the facts is indistinguishable from the present case, and a decision of the Madras High Court, *Komaran, In re* (3), which is also directly in point though it deals with other questions with which we are not here concerned. The first of these decisions is no doubt open to question, as pointed out in the decision of this Court already cited, but in my opinion the decision of Oldfield, J. in the Madras case contains a clear and accurate exposition of the law on the point before us, and I am content to follow it.

Stated shortly the law is as follows:—

(3) 66 Ind. Cas. 520; 45 M. 215; (1922) M. W. N. 34; 15 L. W. 207; 30 M. L. T. 134; 42 M. L. J. 21; 23 Cr. L. J. 296; (1922) A. I. R. (M.) 35.

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The Railway Company can deal with their rolling stock as they please subject to any duties or restrictions imposed by the Legislature. We are here concerned with restrictions imposed by the Indian Railways Act, 1900; and section 42 of that Act is the only section which falls to be considered. The question is, whether there has been "undue preference" within the meaning of that term as used in section 42 (2). The term is familiar in England, but the English cases turn almost entirely on questions of differential treatment in the matter of rates. This much, however, may be said, that there is nothing illegal in showing 'preference' so long as it is not "undue preference". Further, that it is a question of fact in each case whether the preference shown is or is not 'undue'.

The accused entered this compartment knowing that it was reserved by the Railway Company for European and Anglo-Indian passengers. He did so, because he objected to racial distinctions (see his plea and examination, dated April 8th, 1922). *Prima facie* his act was an offence under section 109 of the Indian Railways Act. It is open to him to show in his defence that the preference shown to the class of passengers indicated was undue preference, but that was not the meaning of his plea. That plea in no way turned on the extent of accommodation reserved for this class. If, however, the plea of undue preference is made out by the evidence, effect may be given to it.

It is reasonable to assume that the Railway Company know their own business best, and that they will not reserve for any class accommodation beyond what is reasonable. Certainly I see no reason to suppose that Railway Companies are inclined to be over-liberal in the matter of accommodation. It would not pay them. The general instruction which the Company has issued in this case is: that one compartment shall be reserved for the class of passengers in question on all long distance trains. In order to determine whether with reference to this train the preference is undue, it would be necessary to know matters on which the record is silent. I take it that there is no undue preference to A unless there is prejudice to B. To determine this

question for this train, generally speaking, it would be convenient to know what is the total average number of passengers, what is the average number of this special class, and what is the accommodation reserved for this special class, and what is the accommodation available for other passengers. Here all that is known is that the compartment reserved would hold from twenty to twenty-five passengers. Without some such data as I have indicated it is (in my opinion) impossible to say that, generally speaking, there is any undue preference. As to this general aspect of the question, the evidence on the record gives little assistance. That this compartment is often empty does not go far unless it is shown that the other passengers have not sufficient accommodation. The only evidence of overcrowding is contained in the statement of the Guard which is as follows:— "Except on bazar days the passenger trains are not overcrowded."

With reference to the day of the alleged offence the evidence is against the plea set up. The accused did not complain that he was in any way prejudiced. The Guard says that the accused complained that the board indicating the reservation of the compartment was "an insult" to him. That view of the matter is quite understandable, but it has nothing to do with the question of undue preference. Indeed it shows plainly enough that the accused's grievance would have been equally acute, had the accommodation reserved been adequate for one passenger only. I fully appreciate that aspect of the question, but I am not concerned with it. It does not affect the legal aspect of the matter. For the rest both the Guard and Constable, Khandu, say that on this day there was ample accommodation elsewhere. This being so, I fail to see how the plea of undue preference can be made out. Had it been established that owing to this reservation the class indicated find accommodation while other passengers cannot find accommodation the case might be different but there is no evidence to that effect, nor indeed is there any evidence worth the name of overcrowding in general.

I would decline to interfere and direct the record and proceedings to be returned.

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Mr. P. V. Kane, for the Accused.

Mr. S. S. Patkar, Government Pleader, for the Crown.

Mr. Binning (instructed by Messrs. Little and Co.), for the Railway Company.

JUDGMENT.

Marten, J.—In this case I enjoy the advantage of having before me the judgments of my brothers Shah and Crump, as well as those of the two learned Magistrates. I will not, therefore, recapitulate the facts, but will state my own conclusions.

In my judgment it is clear that by virtue of section 109 of the Indian Railways Act, 1890, the Railway Company has a general power of reserving compartments for the use of passengers. I am further of opinion that this power of reservation may be exercised either for actual passengers who have already booked their seats, or for prospective passengers who, the Company anticipate, will travel. I further hold that the Company are entitled to reserve either individual seats, or whole compartments. Thus they may reserve compartments for females travelling first or second class, or for smokers or non-smokers; or for members of a theatrical company or for a cricket or football team. I say females travelling first or second class, because section 64 only makes it compulsory on the Company to reserve accommodation for females travelling in the lowest class of carriage in the train. So, too, they may, in my opinion, reserve compartments for a large particular traffic, expected at some particular station, whether it be a terminus or an intermediate station. For instance, they could reserve such accommodation for pilgrims or other passengers expected to visit a particular religious festival or fair. Or, again, for persons attending some large political or other gathering, or race meeting. The fact that the particular passenger traffic thus to be catered for may consist of some particular caste or section e.g., Hindu or Muhammadan pilgrims, is not, I think, a bar to the exercise of this general power of reservation. [See *Komaran, In re* (3).]

In short the general discretion in these cases must rest with the Railway Company, for they are the statutory managers of the Railway. As such managers it is for them to issue the requisite orders for the

reservation of passenger accommodation; and speaking generally it is for each passenger to obey those orders, believing that thereby he will best promote the general comfort of his fellow passengers, and also of the Railway staff, and incidentally of himself. If, on the other hand, each passenger is to be a law unto himself, chaos can be the only result. In this respect I cannot do better than quote from the judgment of Lord Halsbury in *Perth General Station Committee v. Ross* (4) some sentences, which are, I think, typical of the common sense which that learned Judge always showed. He says at page 483:—

"But I should be sorry to throw any doubt on the absolute right of the Railway Company in the first instance to regulate their own traffic in their own way... I do not believe that any actual inconvenience to the public can result from the recognition of the right of the Railway Company to carry on their business in their own way. Their own interest is the best security that their strict legal right will not be abused."

The above then being the general powers of the Railway Company in the matter of reservation of passenger accommodation, I further hold that under section 42 (2) they must not exercise such powers as to give an undue preference or to cause an undue prejudice to any particular passenger traffic, whether individual or collective. In this connection, and with all respect to the learned Judges of the Allahabad High Court who decided *Brijbasi Lal v. Emperor* (1) I find myself in agreement with the view which Sir Norman Macleod and Sir Lallubhai Shah expressed in *Vishwanath Ganesh v. G. I. P. Railway Company* (2) as to the effect of section 42. That being so, it is, in my opinion, a question of fact in each case whether the Railway Company has shown an undue preference. And, in my judgment, under the ordinary rules of evidence, the onus of proof will lie on the person who alleges such undue preference. [See Indian Evidence Act, section 102, Illustration (b); and section 103.]

What then are the facts here? The accused declined to call any evidence.

(1) (1897) A. C. 479; 66 L. J. P. C. 81; 77 L. T. 226.

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Consequently, all we have to go upon is the cross-examination of Khandu Vithu, the Constable on duty at Jalgaon station, and of W. B. Shaw, the Guard, of the train between Pachora and Jalgaon. Now, the train in question is the No. 11 North East Down Passenger, which is one of those very slow trains—happily not met with in England—which meanders through the country for hours and days at the stately average speed of about 15½ miles per hour. It leaves Bombay at 7 A. M. and reaches Pachora about 10 P. M. and Jalgaon about 11-30 P. M., Pachora being about 232 and Jalgaon about 261 miles away from Bombay. Its ultimate destination appears to be Delhi, some 957 miles away from Bombay, which it reaches in about two and a half days.

But as to what was the passenger traffic by this particular train on this particular day, or indeed on any other day during the 15 hours and 232 miles between Bombay and Pachora, we have no evidence whatever. Khandu Vithu, the Constable was only on duty at Jalgaon. Shaw, the Guard, was obviously not on continuous duty for 16½ hours, *viz.*, between Bombay and Jalgaon. I am entitled to presume this under section 114 of the Indian Evidence Act. But it also so happens that I have recently had to investigate closely the running of the two sister trains, *viz.*, the No. 13 N. E. Down Passenger and the No. 12 N. E. Passengers between Bombay and Pachora. I refer to the G. I. P. murder case (*Emperor v. Morris and Donnison*) which was tried before myself and a special Jury at the Bombay Criminal Sessions last November. There the two murders were committed in train No. 13 between Deolali and Manmad and discovered at Pachora; but the two murderers escaped back from Manmad to Deolali by train No. 12. Some of the Guards had then to give evidence, and to produce the way-bills. What they said in that case is not evidence in this, but the working knowledge I thus gained as to the particular portions of the line worked by the various Guards of these slow trains, and, consequently, as to the ordinary course of business of the Company in this respect, all goes to fortify the above presumption which I should draw apart from such working knowledge.

There being then no evidence as to the state of the passenger traffic between Bombay and Pachora, I hold that the accused has failed to discharge the *onus* of proof that there was any undue preference shown by the Railway Company in attaching this reserved compartment to the train at its start from Bombay, or in keeping it so attached. For all I know the compartment in question may have been full for many hours from Bombay of the class of passengers for whom it was intended. And for all I know it may have filled up again, or once more emptied many times during the remaining forty-two hours of its journey between Jalgaon and Delhi; for there is no evidence as to what happened after Jalgaon, any more than there is of the state of affairs before Pachora.

And even the evidence as to what happened between Pachora and Jalgaon is by no means conclusive. It is quite clear that there was ample room for the accused elsewhere in the train, if he had chosen to go there. Neither in his oral nor in his written statement does he even suggest that he would have been left behind if he had not entered this reserved compartment, or that he would have suffered any discomfort by over-crowding or otherwise if he had gone to an unreserved compartment. He really bases his defence—such as it is—on his alleged right to enter what compartment he pleases, and on the alleged inability of the Railway Company to reserve lawfully a compartment for any particular community, no matter what the actual condition of the passenger traffic may be.

In my judgment, he is wrong in both these contentions. And, as regards the evidence of Khandu Vithu, it at most amounts to this, that this compartment was generally empty between Pachora and Jalgaon, while other compartments were full. Shaw, on the other hand, says that except on bazaar days this train was not overcrowded. But this is not the sort of evidence on which I can find a Railway Company guilty of undue preference, for it only relates to some one and a half hours of the journey, while the total journey takes some two and a half days. Nor can one reasonably expect the Railway Company to be constantly detaching or attaching particular compartments at var-

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ious places on this long journey, merely because local conditions may happen to vary either generally or on any particular day.

The conclusion then which I have arrived at is that on the evidence in this particular case, the accused was rightly convicted by the Trying Magistrate. Not I do see any reason to interfere with the fine of Rs. 5 which he has been ordered to pay. If I could have spared this middle aged man this indignity of a conviction and a petty fine, I should have been glad to do so. But this is not the case of a passenger in an overcrowded and stalling compartment who ventures into an adjoining empty compartment which is apparently reserved for some non-existent person. In that case I can well understand the passenger feeling a natural irritation. The present case is nothing of that sort. The accused had ample time for reflection both at Pachora and Jalgaon, and in the view I take he was out to give trouble, and succeeded in doing so both at Pachora and Jalgaon. In my judgment the subordinate Railway Officials must be protected in the discharge of their duties to the general public from conduct such as this; and if the accused considers he had any grievance against their employers on the ground of undue preference, the remedy open to him under the Act is to apply to the Governor-General-in-Council under section 28 to have the complaint determined by a Railway Commission appointed under section 26. The accused's Pleader did indeed inform me that that course had already been adopted by some Association in Jalgaon, and that the matter was still under consideration by His Excellency in Council. If that is so, there was all the less reason for the accused to take the law into his own hands while the matter was being investigated by the proper authorities. It must be remembered that the proper running of a Railway requires expert and detailed knowledge of its traffic and its general requirements, and that is why both in India and in England the Railway Commission consists of one Law and two Lay Commissioners. Thus in England it is the Railway Company Commissioners who determine such disputed matters as alleged undue preference in the matter of rates, etc.,

and normally those matters would not come before the High Court, and much less so before a Police Court. So here, it is hardly a matter for the ordinary law Courts to determine matters of disputed Railway policy, and in the present case the requisite expert evidence is wholly wanting.

In conclusion I will again quote from *Perth General Station Committee v. Ross* (4) and this time I will cite what Lord Watson, another great Judge, said in that case at page 489* :—

“ But the Legislature has not committed to the ordinary Tribunals of the country the duty of determining whether the implied obligation of giving accommodation to the public has been duly fulfilled. When a member of the public having the right to use a Railway or a station has a reason, or without reason thinks fit, to complain that some facility which he ought to have, has been withheld from him, and that an undue preference had been shown to others in the same position, a Court of Law can give him no remedy. He must resort to the Tribunal which the Legislature has constituted for that purpose, the Railway Commissioners; and, until they have decided in his favour, he is not in a position to say, and no Court would be justified in holding, that he stands possessed of the right which he asserts.”

I agree that this was a finding in a civil suit, and in the present case I have to deal with a criminal prosecution. But with reference to the argument in the case just cited that the respondent ought to have been prosecuted before the Magistrates, Lord Watson observed at page 482* : “ To have this point decided by a Magistrate would have been most inconvenient.” What Lord Watson held was that the proper Tribunal was the Railway Commissioners; and that in fact was the decision of the House of Lords in that case.

I, accordingly, decline to interfere in revision in the present case, and I direct the record and proceedings to be returned.

W. C. A.

Order accordingly.

* Pages of (1897) A. C.—[Ed.].

JOYMANGAL SINGH v. KANTA GOPE.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 957 OF 1922.

January 30, 1923.

Present :—Mr. Justice Newbould and
Mr. Justice Suhrawardy.JOYMANGAL SINGH AND ANOTHER—
PETITIONERS

versus

KANTA GOPE AND OTHERS—OPPOSITE
PARTY.*Criminal Procedure Code (Act V of 1898), s. 145,
proceedings under—Police report, absence of—State-
ment of interested party—Magistrate, jurisdiction of.*Where in a proceedings under section 145 of the
Criminal Procedure Code, there is no Police report,
the statement of interested parties as to a probable
breach of the peace ought to be received with
great caution, but if the Magistrate has reason
to believe such a statement, he does not act without
jurisdiction in taking proceedings under the section.*Sreeman Kumara Tirumalraja Bahadur, Raja of
Karvetnagar v. Sowcar Lodd Govind Doss Krishna
Doss, 29 M. 561; 16 M. L. J. 419; 1 M. L. T. 405; 5
Cr. L. J. 91, followed.*

Rule.

Mr. K. N. Chowdhury, Counsel, Babus
Monmotha Nath Mukherjee, Panna Lal
Chatterjee, for the Petitioners.Babus Dasarathi Sanyal, Hemendra Nath
Sen and Nanda Gopal Banerjee, for the
Opposite Party.

JUDGMENT.—In this Rule the Deputy
Commissioner has been called on to show
cause why the order passed under section
145, Criminal Procedure Code, should not
be set aside. The Rule was issued on two
grounds only. The first was, that the order
is without jurisdiction, inasmuch as, accord-
ing to the Settlement papers, the land in
dispute is a joint property in which the
petitioners were co-sharers. It appears that
the dispute between the parties is as to
the possession of certain land on which
there are sal trees and this land is situated
in a jote in which the parties are co-sharers.
But the first party claims the sole possession
of the land about which the dispute has
taken place, and it has been found by the
Magistrate that he was in sole possession
of this land. That being so, the Court
had jurisdiction to make an order under
section 145, Criminal Procedure Code.

The second ground on which the Rule
was granted was, that the allegations of
the first party do not show such a dispute
as was likely to cause a breach of the peaceand the proceeding is, therefore, without
jurisdiction. It appears that the Magistrate
in this case acted on a petition filed by the
first party and that the first party was not
examined on oath nor was any Police report
called for. Our attention has been drawn
to the case of *Sreeman Kumara Tirumal-
raja Bahadur, Raja of Karvetnagar
v. Sowcar Lodd Govind Doss Krishna
Doss* (1). We agree with what is there
said that where there is no Police report
the statement of interested parties ought to
be received with great caution. But we
are unable to hold that, if the Magistrate
has reason to believe such a statement,
he acts without jurisdiction in taking pro-
ceedings under this section. In the present
case when this petition was filed by the
first party the Magistrate had already
some knowledge of the facts of the case
from the previous proceedings between
the parties with reference to the same
dispute. That being so, we think he may
have had good reason to believe the state-
ment that a breach of the peace was probable,
and we certainly cannot hold that he acted
without jurisdiction in acting on such
belief.

We, therefore, discharge this Rule.

W. C. A.

Rule discharged.

(1) 29 M. 561; 16 M. L. J. 419; 1 M. L. T. 405
5 Cr. L. J. 91.

JOYTUN BIBI v. SOLIMUDDIN.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO.

1494 OF 1920.

February 16, 1922.

Present:—Mr. Justice Newbould.

JOYTUN BIBI—PLAINTIFF—APPELLANT—
versus

SOLIMUDDIN CHOUKIDAR AND

OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Stranger in possession on behalf of one co-sharer—Adverse possession—Notorious exclusion.

In a suit for recovery of possession on declaration of title to a property belonging to a Mohamedan who had died 40 years before the date of the suit, the plaintiff and defendant No. 2 were his daughters and defendant No. 1 was the husband of defendant No. 2. The plaintiff was out of possession since a few years after her father's death and the defendants were in possession for over 12 years before suit. The question was whether the principle that possession by a co-sharer is not ordinarily adverse to the other co-sharers applied to the facts of the case:

Held, that though defendant No. 1 was not a co-sharer with the plaintiff, before he could be treated as a stranger it must be shown that he was possessing the land asserting his own right. If he was in possession openly asserting his own right and not that of his wife for a period of 12 years in such a manner as to amount to what is called notorious exclusion, then the plaintiff's case would fail. But if this defendant possessed the land without any such assertion of title in himself and the facts were such that the plaintiff could not be expected to know that he was not possessing it on behalf of the plaintiff's sister, then the plaintiff's suit would not be barred by limitation.

Appeal against the decree of the Additional Subordinate Judge of Backergunj, dated the 26th of February 1920, reversing the decree of the Munsif 7th Court at Barisal, dated the 24th of May 1919.

Moulvi A. K. Fuzul Huq, for the Appellant.—The plaintiff claims one-third share in four plots of land. The possession by the defendant No. 1 cannot be regarded as adverse to the plaintiff, as there is no finding that the defendant No. 1 was possessing it in assertion of his own right. This defendant possessed the land without any assertion of the title in himself. So, in the absence of the findings of the Court below to clear up the situation, how can the plaintiff's suit for declaration of title fail. It is a settled rule of law that possession by a co-sharer is not ordinarily adverse. And on this principle my client takes her stand.

Babu Sures Chandra Talukdar, for the Respondent.—I beg to submit that the finding of the lower Appellate Court is clear

and cannot be attacked in this Court. The plaintiff has been out of possession of the land for many years, and the defendant No. 2 has been in possession for upwards of twelve years. The learned Subordinate Judge has come to a distinct finding that the defendant No. 1 is not a co-sharer of the plaintiff. Defendant No. 1 was openly in possession of the land.

Mr. Huq briefly replied.

JUDGMENT.—The plaintiff and the second defendant in this suit are the daughters of one Kalamaddi. The first defendant is the husband of the second defendant. The plaintiff brought the suit for declaration of her title to $\frac{1}{3}$ rd share in four plots of land and for recovery of possession thereof claiming as one of the heirs of Kalamaddi. In the First Court the plaintiff got a decree declaring her title to $\frac{1}{3}$ rd share of plots Nos. 1 and 4 and her suit was dismissed as regards plots Nos. 2 and 3. On appeal by the defendants her suit has been dismissed entirely.

The findings are that the plaintiff has been out of actual possession of the land in suit since a few years after the plaintiff's father's death which took place about 40 years ago and that the second defendant has been in possession of the land for over 12 years.

The appeal turns on the question whether the principle that possession by a co-sharer is not ordinarily adverse applies to the facts of the present case. Though, as the learned Subordinate Judge points out, defendant No. 1, the husband, is no co-sharer with the plaintiff, before he could be treated as a stranger it must be shown that he was possessing the land asserting his own right. The finding of the Munsif was that he must be held to have possessed the land as a manager for the whole of the family. The finding has been reversed on appeal, and I must accept that finding that he was not the manager on behalf of the plaintiff as well as his wife. But the fact that he was looking after the land would not be adverse to the plaintiff unless it is found that he was possessing the land asserting his own right and not as a manager of his wife's property. If defendant No. 1 was in possession openly asserting his own right and not that of his wife for a period of 12 years in such a manner as to amount to what is called notorious exclusion, then the plain-

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tiff's case would fail. But if this defendant possessed the land without any such assertion of title in himself and the facts were such that the plaintiff could not be expected to know that he was not possessing it on behalf of the plaintiff's sister, then the plaintiff's suit would not be barred. The findings of the learned Subordinate Judge are not sufficiently clear to ascertain whether his decision on the question of limitation is right or not.

The appeal is accordingly decreed and it will be remanded to the lower Appellate Court for a fresh decision having regard to the above remarks.

Costs will abide the result.

B. N.

Appeal allowed.

LOWER BURMA CHIEF COURT,

SECOND CIVIL APPEAL, NO. 246 OF 1921.

July 4, 1922.

Present:—Mr. Justice Maung Kin.

C. CHAING KYWAN—PLAINTIFF—

APPELLANT

versus

MA OO AND OTHERS, LEGAL REPRESENTATIVES OF MAUNG SAN IN, DECEASED—
DEFENDANTS—RESPONDENTS.

Construction of document—Sale of land—Agreement to re-transfer—Mortgage—Registration—Registration Act (XVI of 1908), s. 17.

A plot of land was sold by a registered sale deed. On the very day of the sale, the purchaser executed a document which after referring to the previous sale-deed. "There are terms the parties wished to include in the said deed, but which they left out. They are as follows:—That the creditor shall receive and enjoy the profits, rent and crops, and shall pay the land revenue in full satisfaction annually; that the creditor shall transfer with outright possession, if the owners of the lands redeem them for the principal sum within three years; and that if the owners of the lands could not redeem the same at the expiration of three years, they shall have no further right to possession and enjoyment, and forfeit the same to the creditors." This document was unregistered. The seller sued for specific performance of the agreement embodied in the document:

Held, that the intention of the parties was that the transaction should be a mortgage and that, therefore, the document required registration.

[p. 36, col. 1.]

Bhagwan Sahai v. Bhagwan Din, 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.) 992; distinguished.

Kinuram Mondol v. Nitye Chand Sirdar, 11 C. W. N. 400; 6 C. L. J. 208, *Balkishan Das v. W. F. Leggs*, 22 A. 149 (P. C.); 4 C. W. N. 153; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130; referred to.

Second appeal against the judgment of the Divisional Judge, Hanthawaddy, confirming a decree passed by the Sub-Divisional Judge, Twante.

Mr. *Vertannes*, for the Appellant.

Mr. *Maung Lat*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for specific performance of an agreement in writing to sell the land in suit to plaintiff's assignor. The agreement is Exhibit A.

Maung San Min and Ma Lun were the original owners of the land in suit. On the 10th March 1920 they conveyed the land to Maung San In by a registered deed of sale for consideration stated therein, *viz.*, Rs. 500. That deed is marked Exhibit B. On the same day San In by the agreement, Exhibit A, agreed to let Maung San Min and Ma Lun have the land back if, within three years, they paid Rs. 500.

The plaintiff is the assignee of the rights under these two documents.

San In admitted Exhibit B, but denied Exhibit A.

Both the lower Courts held that the document, Exhibit A, created a mortgage of the land, and, therefore, required registration. The document not being registered, the suit was dismissed.

The plaintiff appeals to this Court, and contends that Exhibit B, read with Exhibit A, shows that Exhibit A gave San Min and Ma Lun a right to purchase the land, and that in that view of the matter, Exhibit A did not require registration.

On behalf of the respondents it is contended that the Exhibit A made the whole transaction a mortgage by conditional sale, but not a sale with a right of re-purchase, and that, even if Exhibit A only gave San Min and Ma Lun a right to re-purchase the land, it would still require registration, inasmuch as it must be held that it created an interest in immoveable property.

Exhibit B is an ordinary conveyance showing an outright sale.

The material portions of Exhibit A are as follows:—

"Under registered deed
... .. a peice of paddy land
... .. has been conveyed with outright possession by Maung San Min and Ma Lun to Maung San In for Rs. 500."

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"There are terms the parties wished to include in the said deed, but which they left out. They are as follows:—That the creditor shall receive and enjoy the profits, rent and crops, and shall pay the land revenue in full satisfaction annually; that the creditor shall transfer with outright possession, if the owners of the lands redeem them for the principal sum of Rs. 500 within three years; and that if the owners of the lands could not redeem the same at the expiration of three years, they shall have no further right to possession and enjoyment, and forfeit the same to the creditors."

Plaintiff's Counsel placed reliance on *Bhagwan Sahai v. Bhagwan Din* (1). This is a Privy Council case. There were two documents. The first was an outright conveyance, and under that the property passed into the possession of the vendors. In the second document the following passage occurs:—

"However, I have as a matter of favour, mercy, kindness and indulgence executed the deed, and do hereby stipulate that, if all these vendors will within a period of ten years from the date of this deed pay in a lump sum and without interest the whole amount specified above, I shall accept the same and cancel this valid sale. During the aforesaid term I shall remain in possession, collect the rent and enjoy the profit and be liable for loss; the vendors shall have no concern whatever. I shall not claim interest from the vendors, nor will they demand profits from me after the expiry of the term. In case the whole of the principal is not paid according to the terms of this document, the vendors shall not be able to cancel the sale by payment of the principal." The Allahabad High Court held that, on a proper construction of the two documents read together, the relationship of the mortgagor and mortgagee existed between the vendors and the vendee. On appeal their Lordships of the Privy Council held that it was clear that this case was not one of mortgagor and mortgagee, but one of an absolute sale with a right of re-purchase within a period of ten years. For the

contention that it was a case of mortgagor and mortgagee, reliance was placed upon the presence of the term "principal" in the second document.

In *Kinuram Mondol v. Nitye Chand Sirdar* (2) there were two contemporaneous documents, one of which purported to be a deed of sale, and the other provided that on the vendor re-paying the purchase-money mentioned in the deed of sale with costs within a fixed period, the vendee would return the land, and, in case he did not do so, the vendor would deposit the money in Court and take possession. It was held that the two documents together did not constitute a mortgage. In that case the Privy Council case already cited, and another Privy Council case *Balkishen Das v. W. F. Legge* (3) were referred to, and it was contended that, by reason of the second Privy Council case, the authority of the first had become somewhat weaker. But the learned Judges distinguished the two cases by saying that in the latter case there were terms clearly showing that the intention of the parties was a mortgage, and not an out-and-out sale with a right of re-purchase. The learned Judges observed that such indications were lacking in the case before them, and that on the contrary they were in the opposite direction. In particular they said:—"The money was paid by the grantee, and it was a proper value of the property at the time. The purchaser was let into immediate possession; he received the rents. There is no provision as to the payment of any interest, and the purchaser was to pay the expenses of preparing the deeds. These features indicate that the intention of the parties was that the transaction should be an out-and-out sale with a right of re-purchase within seven years." Although they said that it was not necessary to decide it finally as there was no "certain date" of payment within the meaning of the definition of a mortgage by conditional sale, they expressed their opinion that it is an essential element of a mortgage by conditional sale.

(2) 11 C. W. N. 400; 6 C. L. J. 208.

(1) 12 A. 387 (P. C.); 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.) 992.

(3) 22 A. 149 (P. C.); 4 C. W. N. 153; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130.

HAFIZAN U. AKHALESWARI PRASAD,

In the first Privy Council case cited the only term used as indicating a loan was the word "principal," and in the second document in that case this word came last. In itself it was not sufficient to indicate that the intention of the parties was to create a mortgage and it was stated that the length of time allowed for taking the land back militated against the intention being to effect a mortgage.

In the Calcutta case there was not a single term used indicating a loan in the second document. In *Balkishen Das v. W. F. Legge* (3) there were terms in the second document indicating the redemption to be for principal and interest.

In the case before me the terms "creditor," "principal" and "redemption" are used. The term "interest" is not used. The reason for that is obvious. The land had gone into the possession of the vendee under Exhibit B, and it is stated in Exhibit A that he was to enjoy the profits until the redemption is made within three years. Therefore, it was not necessary to mention any interest, for it might well have been that the parties intended that the interest should come out of the profits of the land. The only thing that is lacking in Exhibit A is the statement that, though Exhibit B purports to be a deed of sale, it was intended really as a mortgage. If there was that statement, there would, of course, be no difficulty in construing these two documents. In my opinion sufficient has been said in Exhibit A to indicate that the intention of the parties was that the transaction evidenced by Exhibit B was not really what it purported to be, but a mortgage.

The case before me is clearly distinguishable on the facts from the Privy Council case first cited. In the view I have taken of the point involved, Exhibit A must be held to require registration, and the lower Courts were, therefore, right in dismissing the suit.

This appeal is dismissed with costs.

Appeal dismissed.

N. K.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 257
OF 1921.

January 29, 1923.

Present :—Mr. Justice Ross.

Musammât HAFIZAN—PLAINTIFF—
APPELLANT

versus

BABU AKHALESWARI PRASAD
NARAIN SINGH AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Minor—Lease—Benefit.

A lease granted to the guardian of a minor acting on behalf of the latter which is proved not to be for the benefit of the minor, is not binding on the minor. [p. 37 col. 1].

Mir Sarwarjan v. Fakhruddin Mahomed, 11 C. W. N. 207 and *Murgesam Pillai v. Gnana Samhanda Pandara Sannadhi*, 39 Ind. Cas. 659; 21 C. W. N. 761; 21 M. L. T. 288; 32 M. L. J. 369; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 759; 40 M. 402; 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487; 44 I. A. 98 (P. C.), cited and distinguished.

Appeal from a decision of the Subordinate Judge, Second Court, Patna, dated the 6th October 1920, reversing a decision of the Munsif, Bihar, dated the 31st July 1919.

Mr. Ragho Prasad, for the Appellant.

Mr. Sivanandan Rai, for Mr. Gangadhar Das, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against the decree of the Subordinate Judge of Patna, reversing the decree of the Munsif of Bihar, in a suit brought by the plaintiff for rent from 1323 to 1326 in respect of a share in *Mauza* Naubatpur Lotan. This share was in lease to the father of defendant No. 1 for a number of years. After his death defendant No. 2, mother and guardian of defendant No. 1, took a fresh lease of the share from 1312 to 1318. In 1319 the lease was renewed verbally for one year and there was a further registered lease from 1320 to 1326. Rent has been paid up to 1322 only.

The suit was contested by defendant No. 1, who alleged that he attained his majority on the 9th of May 1918, that he had no concern with the property in suit, that the lease was not taken for his benefit and that he had derived no advantage from it, and the leasehold property was not in his possession. The Munsif decreed the suit but the Subordinate Judge held that it has not been shown that the lease was

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for the benefit of the minor and he, therefore, dismissed the suit.

It was contended on behalf of the appellant that the Record of Rights shows that the defendant No. 1 was the lessee of the share and that, as he had not repudiated the lease on attaining his majority, the suit ought to have been decreed; and that there ought to have been a decree, if not against the defendant No. 1 personally, at all events against the leasehold property. It was further contended that as the suit was not defended by defendant No. 2 there ought to have been a decree against her. On the finding that the defendant No. 1 was the lessee, and as the lease was taken by the defendant No. 2 not on her own behalf but as guardian of her minor son, the defendant No. 1, it is clear that there could be no decree against defendant No. 2 in this case. The Subordinate Judge has held that the lease was not for the benefit of the defendant No. 1; consequently, he cannot be bound by it. A decree against the leasehold property would be of no advantage to the plaintiff and could not be given, because the finding in effect is that in law there is no lease; and, therefore, there can be no leasehold property to proceed against. Reference was made on behalf of the appellant to the decisions in *Mir Sarwarjan v. Fakhraddin Mohamed* (1) and *Murugesam Pillai v. Gnana Sambanda Pandara Sammadhi* (2), but these decisions have no bearing on the present case. The appeal is dismissed with costs.

W. C. A.

Appeal dismissed.

(1) 11 C. W. N. 207.

(2) 39 Ind. Cas. 659; 21 C. W. N. 761; 21 M. L. T. 288; 32 M. L. J. 369; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 759; 40 M. 402; 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487; 44 I. A. 98 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 934 OF 1920.

May 17, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

GORA CHAND HALDAR AND ANOTHER
—PLAINTIFFS—APPELLANTS
versusRAKHAL CHANDRA GOPE AND OTHERS
—DEFENDANTS—RESPONDENTS.*Bengal Tenancy Act (VIII of 1885), s. 40—Commutation of rent—Notice, absence of—Order commuting rent—Civil Court, whether bound.*

An order under section 40 of the Bengal Tenancy Act commuting rent in kind to cash rent cannot justly be made without notice to the party affected and if so made, must be regarded as *ultra vires*.

An order under section 40 of the Bengal Tenancy Act, made by a Revenue Officer without jurisdiction does not bind a Civil Court.

Appeal against a decree of the District Judge, Birbhum, dated the 13th November 1919, reversing the decree of the Munsif, Second Court at Rampurhat, dated the 14th February 1919.

Babu Mohesh Chandra Banerjee, for Babu Pramatha Nath Banerjee, for the Appellants.—The plaintiff is the appellant. The appeal arises out of a suit for rent in kind. The defence was that rent had been commuted under section 40, Bengal Tenancy Act, and is payable in cash. First Court held that the commutation was bad. On appeal it has been held that the rent has been validly commuted. My point is that the commutation was *ultra vires*, inasmuch as all the landlords had not been served with notice. No reasons were assigned for the order commuting the rent. Refers to section 40 (5), Bengal Tenancy Act, *Chowdhry Raghu Nath Saran Singh v. Dhodha Roy* (1), *Jadu Nath Manna v. Pran Krishna Das* (2).

Babu Brojo Lal Chakraborty (with him Babus Kshiltish Chandra Chakraborty and Panchanan Ghosal), for the Respondents.—The application did not contain all the names of the landlords. There was a previous suit for rent and this question was raised. I submit that decision would operate as *res judicata*.

Babu Mohesh Chandra Banerjee replied in brief.

(1) 18 C. 467; 9 Ind. Dec. (N. S.) 311.

(2) 46 Ind. Cas. 455; 27 C. L. J. 569; 45 C. 769.

REILY V. GOLAP KHAN.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of arrears of rent on the allegation that the rent is payable in kind. The tenant defendants urged that rent was payable not in kind but in cash, and in support of this contention they relied upon a mutation order made by an Assistant Settlement Officer on the 17th July 1922, and amended on the 2nd September 1922. The plaintiffs thereupon assailed the validity of the mutation order on a variety of grounds. The Court of first instance came to the conclusion that the order was *ultra vires* and afforded no defence to the claim. Upon appeal the District Judge has held that rent has been validly commuted by an order under section 40 of the Bengal Tenancy Act, which cannot be successfully impeached by the appellants. On the present appeal, we are invited to consider which of these conflicting views is correct.

It is plain from the materials on the record that no notice of the application for commutation was served upon the plaintiffs who are some of the landlords of the tenants defendants. The plaintiffs contend accordingly that the mutation order is not operative as against them. Section 40, sub-section (2), provides that an application may be made to one of the Revenue Authorities mentioned therein for commutation. In the present case, such an application was made by the tenants. Although the section does not state explicitly that no order for commutation is to be made till opportunity has been afforded to the party liable to be affected thereby to appear and contest the application, it is obvious on first principles that no order should be made till notice of the application has been served. The object of the application for commutation is to secure an alteration of the most essential element of the tenancy, namely, the rent. It is of the utmost importance to the party whether the rent is to be paid in kind or cash and if the rent is to be paid in cash, what sum should be taken as the proper amount payable in lieu of rent previously paid in kind. An order of this description cannot justly be made without notice to the party affected. We must consequently hold that the order was made without jurisdiction. This is not a case where proceedings properly initiated have been notified

to the parties concerned, but there has been an irregularity in the service of notice. Here the Revenue Authorities assumed jurisdiction over persons who would be affected by their order without any notice served upon them. In such circumstances, the order must be regarded as *ultra vires*. As was observed by Willes, J., in *Cooper v. Wandsworth Board of Works* (3), "a Tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; that rule is of universal application and founded upon the plainest principles of justice." There can be no dispute that an order under section 40 made by a Revenue Officer without jurisdiction does not bind the Civil Court; see *Jadu Nath Manna v. Pran Krishna Das* (2).

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the lower Appellate Court.

B. N.

Appeal allowed.

(3) (1863) 14 C. B. (N. S.) 180; 32 L. J. C. P. 185; 9 Jur. (N. S.) 1155; 8 L. T. 278; 11 W. R. 646; 143 E. R. 414; 135 R. R. 643.

CALCUTTA HIGH COURT,

CIVIL RULE NO. 258 OF 1922.

July 25, 1922.

Present.—Sir N. R. Chatterjea, Kt.,
Chief Justice, and Mr. Justice Panton.

MAJOR A. Y. REILY,

—DEFENDANT—PETITIONER

versus

GOLAP KHAN—PLAINTIFF AND ANOTHER

DEFENDANT NO. 2—OPPOSITE PARTIES.

Execution of decree—Satisfaction out of Court—Satisfaction not certified—Suit to restrain decree-holder from executing decree, maintainability of—Execution, if can be stayed—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 2 (3), 29.

When a decree is satisfied by an agreement out of Court and such satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable having regard to section 47 and O. XXI, r. 2 (3) of the Civil Procedure Code, if the object of the suit is to restrain the decree-holder from executing his decree in contravention of the agreement. Whatever other relief may be granted by the Court in such a suit, it cannot restrain the decree-holder from executing the decree. The

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Court also cannot stay execution of the decree under O. XXI, r. 29 of the Civil Procedure Code, for a period during which the suit may be pending. [p. 39, col. 2; p. 40, col. 1.]

The provisions of O. XXI, r. 29 of the Civil Procedure Code, apply to cases not coming under O. XXI, r. 2 (3) read with section 47 of the Code. [p. 40, col. 2.]

• Rule against an order passed by the Munsif, Second Court, Khulna, in Title Suit No. 229 of 1922 and Rent Execution Case No. 721 of 1921.

• Babu Surendra Chandra Sen (with him Babu Sachindra Sen Prosad Ghosh) for the Petitioner.—The defendant is the petitioner. The facts out of which this matter arises are shortly these. I obtained a decree against the opposite party. In execution of the decree there was satisfaction of the decree out of Court which was not accepted by the Court. Thereupon the opposite party brought a suit for a declaration that the decree had been fully satisfied and also for injunction. The lower Court has refused injunction but has stayed execution of the decree on taking security from the plaintiff opposite party. I submit O. XXI, r. 29 is controlled by section 47 of the Code of Civil Procedure. The suit is not maintainable. See *Azizan v. Matuk Lal Sahu* (1); and *Deno Bundhu Nundy v. Hari Mati Dassee* (2). I submit the Court below having no power in law to grant either perpetual or temporary injunction, was wrong in staying execution of my decree which amounted to an injunction.

Babu Benoyendra Nath Ganguli (with him Babu Probodh Chandra Chatterjee), for the Opposite Party.—The order under O. XXI, r. 29 is appealable under section 47, Civil Procedure Code. Supposing this order is set aside, the order in the execution case will remain. They admit having received the decretal amount. Our case in the plaint is that they agreed that this amount should be paid off in satisfaction of the decree. They have credited the amount to rents for subsequent periods. I submit it is competent for a Court to stay execution of decree in a case where the judgment-debtor has brought a similar suit against the decree-holder.

Babu Surendra Chandra Sen in reply :—
[CHATTERJEE, J.—What is meant by

"holder of a decree of such Court" in O. XXI, r. 29.]

It means a decree of the same Court in which the subsequent suit is brought. See *Kassa Mal v. Gopi* (3). O. XXXI, r. 1 has no application. The only question is whether I have right to execute the decree. That question has no concern with their suit.

JUDGMENT.—This Rule was directed against an order passed under O. XXI, r. 29, Civil Procedure Code. The petitioner obtained a decree against the opposite party and in execution realized a part of the decretal amount. He again applied for execution of the decree and the opposite party, therefore, set up an agreement for satisfaction of the decree. The alleged satisfaction of the decree, however, was not notified to the Court of execution within the time allowed and that Court accordingly refused to recognise the satisfaction of the decree. A suit was, therefore, instituted by the opposite party for declaration that the rent-decree had been fully satisfied and for a perpetual injunction restraining the petitioner from executing the decree and also for a temporary injunction. There was a further prayer that it might be declared that the petitioner was bound to refund a certain amount deposited by the plaintiff.

The Court below has held that a suit for perpetual injunction restraining the defendant from executing the rent-decree and for a declaration that the decree had been adjusted, was not maintainable and that, therefore, the prayer of the plaintiff-opposite party for a temporary injunction could not be granted. The learned Judge, however, held that he could under O. XXI, r. 29, Civil Procedure Code, stay execution of the decree on taking security from the plaintiff.

In the case of *Azizan v. Matuk Lal Sahu* (1), it was held by Pigot and Macpherson, J.J., Banerji, J., differing, that "section 244 is not limited by section 258 and that the suit was not maintainable. Where a decree is satisfied by an agreement out of Court and such satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable if the object of the suit is to restrain the decree-holder from

(1) 21 C. 437; 10 Ind. Dec. (N. S.) 922.

(2) 31 C. 480; 8 C. W. N. 395.

(3) 10 A. 389; A. W. N. (1888) 51; 6 Ind. Dec. (N. S.) 261.

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executing his decree in contravention of the agreement." Piggot, J., observed. "Section 244, Civil Procedure Code, does not absolutely bar a suit, but prohibits in a separate suit between the same parties to a decree any relief being granted which interferes with the conduct of the execution proceedings by the Court executing the decree." See also the case of *Dino Bundhu Nundy v. Hari Mati Dassee* (2).

That being so, whatever other relief may be granted by the Court in such a suit, it cannot restrain the decree-holder from executing the decree.

O. XXI, r. 29 provides that "Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person, against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided."

The language, no doubt, is very wide and if the rule stood alone, the Court would have the power to stay execution of a decree, as provided in the rule. But section 47 of the Code lays down that all questions relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit: and under O. XXI, r. 2 (3) the Court cannot recognise any uncertified payment or adjustment of a decree.

We must give effect to the provisions of section 47 and O. XXI, r. 2 (3) as well as to O. XXI, r. 29, Civil Procedure Code.

Now, if the Court has no power to make a declaration that the decree has been satisfied by an uncertified adjustment or payment out of Court and if the Court cannot grant, a permanent injunction restraining the decree-holder from executing the decree, we do not see how the Court can stay execution of the decree for a period during which the suit may be pending, although it cannot grant the same relief by its final decree. The Court below also has held that a temporary injunction cannot be granted. But the stay of execution of a decree practically stands on the same footing as a temporary injunction; and, as stated above, the Court cannot grant relief for a temporary period which it cannot decree by its final judgment. The pro-

visions of O. XXI, r. 29 must, therefore, apply to cases not coming under O. XXI, r. 2 (3) read with section 47 of the Code. We think, therefore, that the provisions of O. XXI, r. 29 are inapplicable to a case like the present.

The order of the Court below must be set aside and we direct accordingly.

The Rule is made absolute with costs one gold mohur.

Let the record be sent down without delay.

B. N.

Rule made absolute.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 263 OF 1921.

January 29, 1923.

Present :—Mr. Justice Ross.

Babu KUNJ BEHARY CHAUDHURY

—PLAINTIFF—APPELLANT

versus

CHARAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 147 A—Compromise decree—Provisions of section not complied with—Decree, whether nullity.

A compromise decree passed in a suit between a landlord and a tenant without compliance with the provisions of section 147A of the Bengal Tenancy Act is a nullity and no effect can be given to it.

Surjug Saran Lal v. Dukhit Mahto, 18 Ind. Cas. 809; 17 C. W. N. 496, referred to.

Appeal from a decision of the Subordinate Judge, Patna, dated the 8th October 1920, confirming that of the Munsif, Bihar, dated the 5th May 1920.

Mr. D. N. Sirkar, for the Appellant.

Mr. S. N. Rai, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against the decree of the Subordinate Judge of Patna, confirming a decision of the Munsif of Bihar, in a suit brought by the plaintiff for rent. The rate of rent claimed was Rs. 5-4-0 a *bigha* for 2 *bighas* 2 *kathas* and 18 *dhurs*. This is a part of the defendants' original holding of 10 *bighas* 2 *kathas* and 18 *dhurs* falling to the plaintiff's share on partition which is

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recorded in the Record of Rights as held at a rental of Rs. 27-13-6. The plaintiff relies for proof of the rate of rent claimed upon a compromise decree passed in Suit No. 49 of 1911. This suit was instituted by the plaintiff for *bhowli* rent and was compromised on the terms that the rent of the defendants' holding should be Rs. 5-4-0 a *bigha*. The Courts below have decreed the suit at the rate of rent admitted by the defence and the plaintiff takes three points on appeal.

The first is, that by the compromise there was not an unlawful enhancement of rent; the second is, that as the compromise is embodied in a decree of the Court which has not been set aside, it must be given effect to; and the third is, that the provisions of section 147-A and of section 29 do not apply, because the rent of the holding was a produce rent. On the first point reliance was placed on the decisions in *Sheo Sohay Panday v. Ram Rachia Roy* (1) and *Nath Singh v. Damri Singh* (2). These decisions are authorities to show that "an agreement embodied in a *kabuliyat* to pay a certain amount of rent agreed upon by the parties in settlement of difference between them as to what had been the amount and character of the rent, and to avoid further litigation, is not within section 29 clause (b)". These decisions were distinguished in the later case of *Probat Chandra Gangapadhya v. Chirag Ali* (3) where it was held that "the *ratio decidendi* in these cases was, that there was no certainty as to the initial rents; there were disputes as to what the initial rents were," and, therefore, the settlement was good. In the present case the rent was recorded in the Record of Rights as a cash rent of Rs. 27-13-6. The learned Vakil for the appellant lays great stress on the fact that there is no express finding by the Courts below that this was the true rent. He says that the plaintiff claimed produce rent; that there was a *bona fide* dispute which was settled by the compromise. Now, the entry in the Record of Rights must be taken to be correct until it is disproved and the Courts below went on this assumption.

It is true that they have not expressly stated that the rent of the holding was a cash-rent, but this is implied in the decisions of both the Courts. The Munsif, after stating that the defence in Suit No. 49 of 1911 was that the rent was a cash-rent, says that the judgment does not show that the agreement was arrived at in *bona fide* settlement of any dispute. The Subordinate Judge also says that, "it does not appear that the parties were on fighting terms during the Survey operation and that (it was) in order to settle their long-standing *bona fide* dispute" that they came to terms. He points out that, "the mere statement in the petition that in order to avoid dispute and having regard to the quality of the land and its out-turn the *jama* of Rs. 44-8-0 was considered to be fair and equitable, will not be considered as sufficient ground for holding that the rent was settled on account of a *bona fide* dispute." It is clearly implied in both the judgments that the rent was a cash-rent and that there was no *bona fide* dispute as to settlement. The Munsif puts it in this way that there was enhancement under the cloak of compromise. If the rent was as stated in the Record of Rights (and it must be taken to have been so until this was disproved) then it necessarily follows that the compromise was not good.

As to the second argument, it has been found by both the Courts below that provisions of section 147-A were not complied with. The result of that is, that the compromise decree is a nullity, as was held in *Surjug Saran Lal v. Dukhit Mahto* (4), and no effect can be given to it. The fact that the rate of rent recorded in the compromise was also recorded in the partition proceedings, which is relied upon as showing that the compromise was acted upon, can make no difference. The rate of the rent is now in dispute and unless it is on a legal basis the plaintiff cannot get a decree at the rate claimed.

As to the last point, that sections 147-A and 29 do not apply, this rests on the assumption that the rent was *bhowli*. If the rent was *bhowli* there can be no question that the

(1) 18 C. 333; 9 Ind. Cas. (N.S.) 223.

(2) 28 C. 90.

(3) 33 C. 607; 4 C. L. J. 320; 11 C. W. N. 62;

(4) 18 Ind. Cas. 809; 17 C. W. N. 496.

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whole compromise was good, but it has not been shown that the rent was *bhowli* and, therefore, this argument is without any substance.

The appeal is dismissed with costs.

P. D.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 21 OF 1922.

December 21, 1922.

Present:—Mr. Justice Phillips and Mr. Justice Devadoss.

BAPPU alias VENKATARAMIER AND
ANOTHER—DEFENDANTS—APPELLANTS
versus

V. A. ANNAMALAI CHETTIAR AND
ANOTHER—PLAINTIFF AND
DEFENDANT NO. 3—RESPONDENTS.

Specific Relief Act (I of 1877), s. 27—Hindu Law—Joint family—Agreement by manager to purchase immovable property—Specific performance, whether can be enforced against surviving co-parceners—Minor, specific performance against—Necessity—Proof.

The Specific Relief Act is an exhaustive Code and section 27 thereof defines every class of persons against whom specific performance may be enforced, and under that section contracts for purchase are not included among the contracts which can be enforced against persons other than the contracting party himself. [p. 43, col. 1.]

An agreement for purchase of immovable property entered into by the manager of a joint Hindu family cannot, after his death, be specifically enforced against the surviving co-parceners, inasmuch as the latter do not, in such a case, fall within the class of persons defined in section 27 of the Specific Relief Act. [p. 44, cols. 1 & 2.]

Venkateswara Aiyar v. Raman Namhudri, 33 Ind. Cas. 696; 3 L. W. 435; 19 M. L. T. 329, distinguished.

Shummugam Chetty v. Subba Reddi 31 Ind. Cas. 1, *Ramachandra Aiyar v. Sundaramurthi Mudali*, 4 M. L. J. 9, *Krishna Aiyar v. Shamanna*, 17 Ind. Cas. 497; 23 M. L. J. 610; (1912) M. W. N. 1188 and *Rangayya Reddy v. Subramayna Aiyar*, 40 Ind. Cas. 429; 40 M. 365; 32 M. L. J. 575; 5 L. W. 797; 21 M. L. T. 385 (F.B.), referred to.

Bhagwan v. Krishnaji, 58 Ind. Cas. 355; 22 Bom. L. R. 997; 44 B. 967, dissented from.

A Court will not decree specific performance against a minor unless it is satisfied that such act is for the benefit of the minor. It is not sufficient to show that it is not detrimental to him; if there is any possibility of there being a

detriment, the Court will require to be satisfied that the possibility no longer exists before it takes action. [p. 45, col. 1.]

Under the Hindu Law there is no presumption that every purchase of immovable property is for the benefit of the family. It is a question of fact in each case which must be proved by evidence by the party relying upon it. [p. 44, col. 1.]

A member of a joint Hindu family does not inherit under his father but takes by survivorship, for on his birth he obtains a right in the whole family property and not merely in a portion of it. No doubt, when one member of the co-parcenary dies, his share passes to the others, but it is more a question of lapse of the title of the deceased person rather than an acquisition of title in the survivors, for even before the death of the deceased co-parcener they had a right in the whole of the property, including the share of the deceased member. [p. 43, col. 1.]

Appeal against a decree of the Court of the Second Additional Subordinate Judge, Madura, in Original Suit No. 12 of 1921.

Mr. A. Krishnaswami Iyer, for the Appellant.

Mr. K. Rajah Iyer, for the Respondents.

JUDGMENT.

Phillips, J.—In this case the plaintiff entered into a contract with the first defendant for the sale of his lands and brought this suit for specific performance of the agreement. The first defendant, who agreed to purchase the property, pleaded that the contract had been rescinded, but died shortly afterwards, and his sons, defendants Nos. 2 to 4, the fourth defendant being a minor, were impleaded, and a decree for specific performance was prayed for as against them. These defendants adopted their father's written statement so far as it was not opposed to their interests, and also pleaded that the suit was not maintainable against them. The Subordinate Judge has found that the contract was not rescinded and this finding is accepted in appeal. He has also found that defendants Nos. 2 to 4 are liable to perform the contract entered into by their father. He has come to this conclusion on broad grounds which he sums up as follows: "The price is not inadequate. The assent was not obtained by questionable means. Plaintiff has a clear and marketable title. It would cause no hardship on the defendants. Plaintiff has gained no unfair advantage by the transaction. Viewed from any aspect, the contract for specific performance can be

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enforced against defendants Nos. 2 to 4, who are bound to execute the contract in place of their father who is now dead." In coming to this conclusion, he has made no reference to section 27 of the Specific Relief Act, which specifies the persons against whom specific performance of a contract can be enforced. The Specific Relief Act is an exhaustive Code, for it is an act "to define and amend the law relating to certain kinds of specific relief obtainable in civil suits," and, consequently, we must read this section 27 as defining every class of persons against whom specific performance may be enforced. Unless, therefore, defendants Nos. 2 to 4 can be brought under this section, there will be no right to enforce specific performance against them. The plaintiff in this case has not claimed damages for breach of covenant, and consequently we need not consider against whom he can bring such a suit for damages.

It is argued for the appellants that the defendants, who are members of an undivided Hindu family, do not come under any of the definitions in section 27. The two clauses of the section which it is contended for respondents are applicable are (b) and (c). Clause (b) reads as follows:—

"Any other person claiming under him by a title arising subsequently to the contract." Here it is suggested that the sons, defendants Nos. 2 to 4, do claim under their father, first defendant, by a title arising subsequently to the contract. It is, however, well settled that a member of a joint family does not inherit under his father but takes by survivorship, for, on his birth he obtains a right in the whole family property and not merely in a portion of it. No doubt when one member of the co-parcenary dies, his share passes to the others, but it is more a question of lapse of the title of the deceased person rather than an acquisition of title in the survivors, for even before the death of the one co-parcener they had a right in the whole of the property, including the share of the deceased member. It is, therefore, difficult to hold that, even as regards their father's share defendants Nos. 2 to 4 claim under him by a title arising subse-

quently to the contract. No doubt in *Venkaleswara Aiyar v. Raman Nambudri* (1) Courts-Trotter, J., appears to have accepted the contention that a co-parcener in a joint Hindu family does come under the definition in section 27 (b) and treated the matter as a question of Hindu Law without discussing the meaning of the words of the section, but he also held that, in order to enforce a contract against a co-parcener, it must be shown to be beneficial or necessary and this principle has been adopted in all cases of necessity, in which cases the co-parcener would probably come under clause (c), because the contracting party has a right to displace his title in cases of benefit or necessity.

Coming to the definition in section 27(c), we find that it includes, "any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant." This clause undoubtedly would apply, as suggested above, to the many cases in which a decree for specific performance has been given even against a minor member of an undivided family when the contract was for sale of land for family necessity. In such a case, the manager of the family has a right to displace the title of the other members in the family property when it is requisite to do so for purposes of family necessity. Cases of this kind are reported as *Shunmugam Chetty v. Subba Reddi* (2), *Ramachandra Aiyar v. Sundaramurthi Mudali* (3) and *Krishna Aiyar v. Shamanna* (4) and there are many others. The Courts have not in all cases referred in terms to section 27 (c) as covering the case, but have based their decision on the proposition that, if a contract when executed would be binding on the minor members of the family, it is incumbent on them to fulfil it after the contracting party's death. However, in all these cases the co-parceners come within the definition in clause (c).

It is now contended for the plaintiff that the same principle must be applied

(2) 31 Ind. Cas. 1.

(3) 4 M. L. J. 9.

(4) 17 Ind. Cas. 497; 23 M. L. J. 610; (1912) M. W. N. 1188.

(1) 33 Ind. Cas. 696; 3 L. W. 435; 19 M. L. T. 329.

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to the present case and that, this being a case of purchase of immoveable property, the contract can be enforced against the co-parceners, because the purchase must be deemed to be for the benefit of the family. This argument is based on an alleged presumption that every purchase of immoveable property must be for the benefit of the family, for no evidence has been let in on this point. There is no such presumption in law, and if we look on it as a presumption of fact, it must depend upon the circumstances of each case. Here the defendants are a trading family whose interests might be better served by the investment of any surplus cash in their trade rather than in purchase of immoveable property. There are many other conceivable circumstances in which a purchase of land would not be for the benefit of the family. We cannot, therefore, in the absence of evidence, make any such presumption, and consequently it is necessary for plaintiff to prove this benefit by evidence, if he claims a decree on that ground.

Returning to the question of whether defendants Nos. 2 to 4 come within the definition of clause (c), we have to consider what is the title under which they can be said to claim. It is, I think, clear that the title referred to there is title to the property, which is the subject-matter of the contract. Here the property is merely a sum of money which the father had promised to pay. It is not in evidence that there was any definite sum of money lying in his hands nor the manner in which the father was going to obtain it. He might have intended to obtain the money by begging, borrowing, or even stealing, in which case these co-parceners could not possibly claim under a prior title. It is argued that the purchase money must eventually come out of the family property, or at least out of the father's share of the property and that, therefore, the title in question is the title to the family property. As I pointed out above, it is not necessary that the money should come out of any family property but might have been obtained by the father from some outside source. In this view defendants Nos. 2 to 4 would not claim under any title to it. If that is so, it would appear that these defendants do not come within the defini-

tion in clause (c). Looking broadly at section 27, it would appear that contracts for purchase are not included amongst the contracts which can be enforced against persons other than the contracting party himself. Section 23, which specifies the persons who can enforce specific performance, includes "the representatives-in-interest of the parties to the contract, and is consequently very much broader than section 27 which makes no mention of such representatives. As regards contracts for purchase, it is not difficult to suggest a reason for their exclusion from contracts of which specific performance can be decreed, for it is of no special benefit to the vendor to get his money from the contracting party rather than from some one else, and, even though the price from the other persons may be less than the agreed price, he always has his remedy against the contracting party in damages, so that he will suffer no loss from the reduction in price. On the other hand, when the property to be transferred is land, nothing else can adequately be substituted for it, and consequently a suit for the specific performance of a contract to sell land is more freely allowed, as no other remedy would be adequate. However this may be, I think it is quite clear that we cannot bring defendants Nos. 2 to 4 within the definition in section 22 (b) or 27 (c). If that is so, no decree for specific performance can be given against them. I now refer to some cases cited, firstly, to the Full Bench decision reported as *Rangayya Reddy v. Subramanya Aiyar* (5). There the real question at issue was not identical, but Wallis, C. J., and Sadasiva Iyer, J., were both of opinion that co-parceners could not be compelled to perform a contract entered into by another co-parcener. There is a case in *Bhagwan v. Krishnaji* (6), in which a Bench of the Bombay High Court has held that section 27(c) does include the members of a joint Hindu family, and this decision appears to be based not on the language of the section itself, but from the illustrations to clause (c), the reason given being that, unless those illustrations

(5) 40 Ind. Cas. 429; 40 M. 365; 32 M. L. J. 575; 5 L. W. 797; 21 M. L. T. 385 (F. B.).

(6) 58 Ind. Cas. 335; 22 Bom. L. R. 997; 44 B. 967.

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are to be made applicable to a joint Hindu family, the large majority of Hindus would be excluded from the benefits of the section. With all respect I am unable to agree with this view, as it seems to me impossible to bring co-parceners within the definition in either clause, except in the cases I have referred to, namely, when the contract is by a manager as such for necessity or for the benefit of the family.

It is next argued for the plaintiff that defendants Nos. 2 to 4 are liable under the pious obligation imposed by Hindu Law to re-pay the father's debts, and that the father's liability to pay the purchase-money must be considered to be a debt. Even if the obligation undertaken by the father can be said to be a debt, and I do not think it can, for it was at best a potential debt, we are not here concerned with their liability to re-pay it, but with the question whether they can be made to perform a particular contract, for this suit is not one for damages, in which other circumstances might possibly have to be considered.

There is yet another broad principle of equity upon which the refusal to allow specific performance can be based, and that is that when one of the parties is a minor a Court will not compel him to do anything unless it is satisfied that such act is for the benefit of the minor. It is argued that it has not been shown that this contract would be detrimental to the minor, but that is not sufficient, for, if there is any possibility of there being any detriment, the Court will require to be satisfied that the possibility no longer exists before it takes action. For this reason also, I think, the contract could not be enforced against the fourth defendant.

In this view the appeal must be allowed and the suit dismissed with costs throughout.

Devadoss, J.—I concur.

z. k.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 402-B OF 1921.

January 19, 1923.

Present.—Mr. Kotwal, A. J. C.

BHAGERATHIBAI AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

KESHO GANPATRAO AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Suits for village profits—Limitation.

Limitation for a suit by a person claiming to be a joint owner against the managing proprietor for his share of the village profits is six years.

Appeal against a decree of the District Judge, Amraoti, in Civil Appeal No. 77 of 1921, dated the 24th October 1921.

Mr. M. B. Kinkhede, R. B., for the Appellant.

Mr. M. Gupta, for the Respondents.

JUDGMENT.—It is not disputed that the plaintiffs would be entitled as co-sharers to sue for village profits and claim them for six years but it is argued that, as a matter of fact, they have not sued for village profits but only for mesne profits. Reference is made to *Amritrao v. Govind* (1) and it is argued that a suit for mesne profits does not lie until the plaintiffs have got possession and further that the suit is governed by Art. 109, First Schedule, Limitation Act.

The contention that the suit is one for mesne profits is based on certain expressions in paragraphs 2 and 3 of the plaint. The plaintiff's title is based upon a Will. They have brought a suit for partition and possession of the property bequeathed and obtained a decree on the 28th June 1912. This suit is for the profits of 1914-15 to 1919-20. In paragraph 2 of the plaint the plaintiffs state:—

"Accordingly, 25 acres of home-farm and of the *izara* was to be partitioned, but defendant No. 1 did not partition the same and wrongly cultivated it and enjoyed the produce thereof."

In paragraph 3 the plaintiffs estimate the profits of their share for six years at Rs. 3,400 and state:—

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"Accordingly, the defendants should have paid the amount of the plaintiffs' share to them, but they did not pay it and wrongfully appropriated it to themselves."

Stress is laid on the use of the words 'wrongly' and 'wrongfully' and it is contended that the claim is made against the defendants as trespassers.

I am not inclined to agree with this contention. The suit is in substance one by a person claiming to be a joint owner against the managing proprietor for his share of the village profits. In the passages quoted above all that the plaintiffs mean to assert is that the defendant No. 1 refused to effect a partition and put the plaintiffs in possession of their share and withheld their share of the profits which she had no right to do. In this view of the plaintiffs' claim, neither of the two contentions of the appellants can prevail.

Ground 5 puts forward an argument based upon an interpretation of the ruling in *Bakwant v. Deorao* (2) which is not justified. The argument is something like this. The three years' limitation period prevailing in Berar was altered to six years by the ruling in order to bring the Berar law in conformity with the law in the Central Provinces. Therefore, now that the period in the Central Provinces is curtailed to three years, the three years' period which prevailed in Berar before the ruling should be restored. It is needless to state that the ruling could not, and did not, profess to alter the law in Berar but only declared what it actually was.

The appeal fails and is dismissed with costs.

G. R. D. *Appeal dismissed.*
(2) 41 Ind. Cas. 848; 13 N. L. R. 127.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 357 OF 1921.
November 14, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

K. M. SHEIK MUHAMMAD ROWTHER—
PLAINTIFF—DECREE-HOLDER—APPELLANT
versus

SUBBA NAICKER—PETITIONER—
RESPONDENT.

Limitation Act (IX of 1908), s. 18—Civil Procedure Code (Act V of 1908), O. XXII, r. 90—Execution sale—Application to set aside sale—Fraud—Limitation.

Where a decree-holder fraudulently contrived not to serve the judgment-debtor with notice of the execution sale and kept him in ignorance of the sale itself, and the latter came first to know of the fraud only when an application was made for delivery of the property:

Held, that the judgment-debtor in seeking to set aside the sale was entitled to the benefit of section 18 of the Limitation Act for the whole period during which the fraud continued.

Pasumaythi Payidanna v. Ganti Lakshminarasamma, 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J. 325; *Beeju Bee v. Moorthiya Sahib*, 53 Ind. Cas. 905; 11 L. W. 150 at p. 155; 37 M. L. J. 627; 26 M. L. T. 419; 43 M. 214 (F. B.), distinguished.

Appeal against an order, dated the 21st March 1921, of the Court of the Subordinate Judge, Dindigul, in E. R. No. 102 of 1920, (Execution Appeal No. 341 of 1919, in Execution Revision No. 136 of 1917, in Original Suit No. 52 of 1914 on the file of the Court of the Subordinate Judge, Madura).

Messrs. B. Sitarama Rao and S.R. Muthusami Iyer, for the Appellant.

Messrs. K. V. Krishnaswami Iyer and A. Ramaswami Iyer, for the Respondent.

JUDGMENT.—We have considered the evidence and find no reason to disturb the learned Subordinate Judge's finding that the petitioner was kept in ignorance of the sale of his property which took place on the 25th October 1917, till application was made by the counter-petitioner for possession to be delivered to him in December 1919.

The want of resemblance between the signatures on Exhibits 1 (a) and 1 (b) and the petitioner's admitted signatures and the counter-petitioner's failure to explain how the figures of Rs. 2,500 in Exhibit A was arrived at and how certain words came to be struck out and others put in, confirms the conclusion which the rest of the evidence leads to on the question of fraud. This finding does not necessarily involve a finding that the process-servers were parties to the fraud in serving notices on the petitioner.

It is argued that fraud anterior or subsequent to the act complained of will not save limitation. In the present case there was a continuing fraud which commenced with the counter-petitioner's failure to serve judgment-debtor with the notice of the intended sale and was kept up after the sale by the execution of Exhibit A. This justifies the application of section 18 of the Limitation Act, the active concealment from petitioner of the knowledge of his right to object

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to the sale having continued till the fraud first became known to him when an application was made for delivery of the property that was the subject of the sale.

The application was thus in time and the circumstances of *Pasurmarti Payidanna v. Ganth Lakshminisaraamma* (1) and *Beeju Bee v. Moorthiya Sahib* (2) are distinguishable.

The civil miscellaneous appeal fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

(1) 29 Ind. Cas. 314; 38 M. 1076, 28 M. L. J. 525.

(2) 53 Ind. Cas. 905; 11 L. W. 150 at p. 155; 37 M. L. J. 627; 26 M. L. T. 419; 43 M. 214 (F. B.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2810 OF 1920.

July 19, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

SHEIKH KARIM—DEFENDANT—
APPELLANT

versus

SOBEDAR SHEIKH—PLAINTIFF—
RESPONDENT.

Mesne profits, suit for—Plaintiff's failure to establish right to immediate possession, effect of.

In execution of a decree for recovery of possession of a land on declaration of the plaintiff's title thereto it was held on objection by the judgment-debtor that the decree was incapable of execution on the ground that it was so vague that it could not be determined what the land was of which possession was to be given to the plaintiff. There was no appeal against the order of the Executing Court with the result that the plaintiff was never put in possession. Thereafter the plaintiff decree-holder instituted a suit against the judgment-debtor for recovery of mesne profits in respect of the land:

Held, that the plaintiff must show that he was entitled to possession of the land which had yielded the mesne profits that he claimed and as he was unable to do that in view of the decision in the execution proceedings, he was not entitled to a decree for mesne profits. [p. 48, col. 2.]

Appeal against the decree of the Subordinate Judge, Second Court, Howrah in *Zillah Hooghly*, dated the 7th of October 1920, affirming the decree of the Munsif First Court, Howrah, dated the 4th August 1919.

Dr. Jadu Nath Kanji Lal (with him Babu

Narendra Nath Chaudhury), for the Appellant.—The defendant is the appellant. Plaintiff at first sued for establishment of title and recovery of possession. He claimed a portion of the entire land. He gave the boundaries of the entire lands. The decree being incapable of execution, possession was not given. He then brought the present suit for recovery of mesne profits of the lands which he could not take possession of. I submit he cannot claim mesne profits of unascertained lands. The decree must be self-contained. It was to the effect that plaintiff was entitled to one *bigha* out of a two *bigha* plot. Refers to *Kangal Chandra Ruj v. Kanye Lal Ruj* (1). In the execution case the Appellate Court had held that the decree was incapable of execution. Refers to *Lep Singh Khasia v. Nimar Khasia* (2). Unless he gets possession he is not entitled to mesne profits.

Babu *Gopendra Nath Das*, for Respondent.—The appeal is concluded by findings of fact. Title being with plaintiff, he is entitled to possession, and hence to mesne profits also. My title was found in the suit. The decree is sufficiently clear. The judgment of the Execution Court, of course, merely holds that I cannot enforce the decree. Refers to *Elahi Buksh Mandal v. Ram Narayan Ghose* (3). I submit the present suit is maintainable, although I got no possession. The decision in *Lep Singh Khasia v. Nimar Khasia* (2) is clearly distinguishable. There the title of the plaintiff was not found nor was he in possession. I submit possession has not got to be looked into where plaintiff has title. See *Dwarkaram Misser v. Jogessur Lal* (4).

Dr. Kanji Lal replied in brief.

JUDGMENT.

Walmsley, J.—This appeal arises out of a suit for mesne profits. The story is rather a curious one. It appears from the Munsif's judgment that the defendant, who is now the appellant, brought a suit for partition of his land against the predecessor of the present plaintiff-respondent.

(1) 4 C. 69; 2 Ind. Dec. (N. S.) 45.

(2) 21 C. 244 at p. 247; 10 Ind. Dec. (N. S.) 795.

(3) 10 Ind. Cas. 117; 16 C. W. N. 288.

(4) 21 W. R. 276.

SADASIVA MUDALIAR v. HAJEE FAKKEER MAHOMED SAIT & SONS.

He failed on the ground that the area in the occupation of the defendant was distinct and separate from the land claimed by the present plaintiff. Then there was a proceeding under section 145, Civil Procedure Code, which ended in favour of the defendant. This was followed by a suit instituted by the plaintiff in which he asked for his title to be declared to a piece of land measuring one *bigha* 10 *cottas* odd out of a larger plot measuring two *bighas* seven *cottas* odd. He gave the boundaries of the larger plot but did not give the boundaries of the smaller plot. He asked also for recovery of possession. He obtained a decree in both Courts, then proceeded to put his decree into execution. On objection by the judgment-debtor, that is, the present defendant, the lower Appellate Court held that the decree was incapable of execution on the ground that it was so vague that it could not be determined what the land was of which possession was to be given to the plaintiff. There was no appeal against that order of the lower Appellate Court with the result that the plaintiff has never been put in possession. Thereafter, the plaintiff instituted the suit from which this appeal arises asking for mesne profits for a period of some three years. The Courts below have given the plaintiff a decree for mesne profits amounting to Rs. 308 odd and, in the judgment of the Court of first instance, the details are given. The point which is pressed before us on behalf of the defendant is that the plaintiff was not entitled to a decree for mesne profits on the ground that he was not entitled to immediate possession of the land during the period for which mesne profits were claimed. The learned Pleader on behalf of the plaintiff-respondent has endeavoured to meet this argument by showing that the Courts below have been able to determine what particular trees were on the portion of the land claimed by the plaintiff. But to do this is to go behind the judgment of the Appellate Court in the execution proceedings. He has further tried to argue that, as the plaintiff's title has been declared, he is qualified to maintain a suit for mesne profits. The fallacy of this argument, I think, lies in this that the identity of the land is not established.

The plaintiff must show that he is entitled to possession of the land which yielded the mesne profits that he claims and, in view of the decision of the Appellate Court in the execution proceedings, he is unable to do that. The result is that effect must be given to the argument advanced on behalf of the appellant and the appeal decreed and the plaintiff's suit dismissed but without costs in any Court in view of the peculiar circumstances of the case.

Ghose, J.—I agree.

B. N.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 24, 1922.

Present :—Lord Buckmaster, Sir John Edge, Kt., Sir Lawrence Jenkins, Kt., and Lord Salvesen.

P. M. SADASIVA MUDALIAR AND OTHERS
—APPELLANTS

versus

A. R. HAJEE FAKKEER MAHOMED SAIT
AND SONS—RESPONDENTS.

Hindu Law—Madras Presidency—Joint family—Member, contract by—Share in family property, liability of.

A member of a joint Hindu family is the Madras Presidency cannot escape from liability to perform a contract entered into by him on the ground that the contract is not such as would bind the family and that he has no separate property. His share in the family property is liable for such a contract.

Appeal from a decree of the Madras High Court, dated the 25th March 1919.

Messrs. Clauson, K. C., and Dube, for the Appellants.

Messrs. De Gruyther, K. C., and K. Brown, for the Respondents.

JUDGMENT.

Sir John Edge.—This is an appeal from a decree, dated the 25th March 1919, of the High Court at Madras, which varied in the plaintiff's favour a decree, dated the 11th August 1917, of the Subordinate Judge of the Nilgiris in Civil Suit No. 67 of 1916. The

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suit relates to a contract which was made and to be performed in the Presidency of Madras.

The defendants, who are the appellants here, are P. M. Sadasiva Mudaliar, defendant No. 1; P. M. Gurusamy Mudaliar, defendant No. 2, and P. M. Pasupathy Mudaliar, defendant No. 3. They and their youngest brother, who is a minor and is not a party to this suit, constitute a joint Hindu family. When this suit was instituted on the 4th October 1916, defendant No. 1 was 40 years of age, defendant No. 2 was 35 years of age, and defendant No. 3 was 22 years old. They were sons of P. Marudachala Mudaliar, who died in 1906. This joint family carried on business as owners of lands and house property in the Nilgiri District, and in the purchase and sale of hides, and as commission agents for the sale of beer brewed at the Rose and Crown Brewery, of which brewery the father had been a Director. In the office of Director of that brewery the father was on his death succeeded by his son the defendant No. 1. The joint family business was carried on under the names of P. M. Marudachala Mudaliar and Sons and P. M. Sadasiva Mudaliar and Brothers. In the father's lifetime he had acted as the manager for the joint family with the assistance of his eldest son, and since the father's death the defendant No. 1, with the assistance of the defendant No. 2, managed the family business.

On the 8th April 1915, the plaintiff firm obtained against persons who constituted the firm of Rangayya Goundan and Company a decree for sale of two breweries, known as the Nilgiri Brewery of Ootacamund, and the Castle Brewery of Aruvanghat, in default of payment of Rs. 1,81,429 odd, interest thereon and costs. The plaintiff firm, claiming that more was due to them in that suit, appealed to the High Court. While that appeal was pending these defendants Nos. 1 and 2, on the 6th December 1915, agreed (Exhibit H) with Rangayya Goundan, one of the judgment-debtors of the 8th April 1915, to purchase the two breweries, free from all encumbrances, for a sum of Rs. 3,70,000, of which Rs. 1,83,000 were to be paid into Court on or before the 3rd January 1916, in satisfaction of the decree of the 8th April 1915. These defendants Nos. 1 and 2, not

having the money with which to pay the Rs. 3,70,000 applied to the plaintiffs' firm for financial assistance, and on the 31st December 1915, an agreement (Exhibit AA) was drawn up as between these three defendants and their minor brother through his guardian, who were described as the mortgagors (that term to include them and each of their heirs) of the one part and the plaintiff firm of the other part, whereby the plaintiff firm agreed to advance to the mortgagors four lakhs of rupees at 12 per cent. per annum interest on the security of the two breweries, and of other property which was property of the joint family. The four lakhs of rupees were to include a bonus of Rs. 30,000 to the plaintiff firm for their assistance. The four lakhs of rupees were to be paid as follows:—To the mortgagees, the plaintiff firm, Rs. 1,83,000 or thereabouts, in satisfaction of their decree of the 8th April 1915; to the mortgagors, Rs. 51,000 or thereabouts; to Mr. Branson in satisfaction of a decree obtained by him against Rangayya Goundan and Company, Rs. 86,000 or thereabouts; an undefined amount to be kept in reserve pending the decision by the High Court of the appeal by the plaintiff firm in the suit against Rangayya Goundan and Company, and Rs. 30,000 the bonus. The agreement was signed by the defendants Nos. 1 and 2, and by the defendant No. 1 as the guardian of their minor brother. The defendant No. 3 was at the time absent from his home at Ootacamund he was in some country district, and did not sign the agreement, nor was he consulted about it.

It was found that the defendants Nos. 1 and 2 were not in a position to grant a mortgage of the two breweries, owing to the illness of Rangayya Goundan and to the widow and son of Nanjayya Goundan refusing to join in a conveyance of the breweries until certain claims which they made had been satisfied, and on the 5th January 1916, the defendants Nos. 1 and 2 gave to the plaintiff firm the following letter:—

“(Exhibit BB.)

“To Messrs. A. R. Hajee Fakher Mahomed Sait and Sons,

“Ootacamund.

“We beg to inform you that we are unable to carry out at once as agreed upon the terms of our finance agreement of the 31st December 1915 (hereinafter referred to as the ag-

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reement), on account of the delay in obtaining a proper conveyance of the Brewery properties from the vendor and all necessary parties.

"In the event of our not being in a position to execute the mortgage for Rs. 4,00,000 referred to in the agreement within two months from this date, we agree to take a transfer of the decree obtained by you against Rangayya Goundan and others on the 8th day of April 1915, in Original Suit No. 28 of 1910 on the file of the Sub-Court upon which the sum of Rs. 1,82,145-14-2 is now due and also any further decree that may be passed in your favour by the High Court on an appeal now pending from the said decree.

"In consideration of your making us an advance of Rs. 50,000 on our pro-note on this date (Rs. 20,000 having been paid in cash and Rs. 30,000 being the bonus already paid by us to Mahomed Hashim Sait for his services for arranging the loan of Rs. 4,00,000 referred to in the agreement), we hereby agree to execute in your favour a legal mortgage of our properties set out in the agreement to secure the said sum of Rs. 50,000 and interest thereon, as provided for in the agreement, as and from the 5th day of January 1916.

"As to the transfer of the said decree amounting to Rs. 1,82,145-14-2 as aforesaid we agreed to execute a legal mortgage in your favour of our properties set out in the agreement as well as the said decree to be so transferred to secure the said sum of Rs. 1,82,145-14-2 with interest as provided for in the agreement as and from the 3rd day of January 1916.

"As to any further amount that may be decreed on appeal by the High Court, we will execute a legal mortgage in your favour of our properties set out in the agreement and any excess amount so decreed and to be transferred as aforesaid to secure the excess amount decreed on appeal with interest as provided for in the agreement as and from the date of the appellate decree.

"Should the agreement to purchase the Breweries fall through, the agreement shall be restricted to the present advance of Rs. 50,000 and the amounts of the decree of the Sub-Court of the Nilgiris and of any

further decree to be passed on appeal by the High Court.

"Dated this 5th day of January 1916.

"(Signed) P. M. Marudachala Mudaliar and Sons.

"(") P. M. Sadasiva Mudaliar.

"(") P. M. Gurusamy Mudaliar.

"(") P. M. Sadasiva Mudaliar, guardian for Rajabahadur Mudaliar."

It will be observed that one of the signatures to the letter is in one of the business names of the joint family. The Solicitor who acted for the plaintiff firm probably thought that by way of precaution the letter had better be also signed by the members of the family. The defendant No. 3 did not sign that letter of the 5th January 1916, nor was he consulted about it. He was at that time still absent from home. The plaintiff firm agreed to the terms of that letter, and gave to the defendants Nos. 1 and 2 Rs. 50,000 by cheque, which was duly paid, and received from them the following promissory-note:—

"(Exhibit CC.)

"Ootacamund,

5th January 1916.

"On demand we, P. M. Sadasiva Mudaliar and P. M. Gurusamy Mudaliar, jointly and severally promise to pay Messrs. H. A. R. Hajee Fakeer Mahomed Sait and Sons or order the sum of Rs. 50,000 with interest at 12 per cent. per annum for value received this day in cash.

"Fifty thousand, only.

"P. M. Sadasiva Mudaliar.

Signed on
one anna
stamp.

"P. M. Gurusamy Mudaliar."

The defendants Nos. 1 and 2 were unable to come to an arrangement with the widow and son of Nanjayya Goundan, and consequently could not grant the mortgage of the two breweries. The two breweries were finally sold to the United Breweries Company. That Company, by payment of the amount due under the decree of the 8th April 1915, discharged that decree.

The defendants Nos. 1 and 2 in December 1915, entered into possession of the two breweries under their agreement with Rangayya Goundan, of the 6th December 1915, and

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carried on the business of brewing at the breweries. They obtained in the name of P. M. Sadasiva Mudaliar and Brothers the necessary Government Abkari licence for the official year 1915-16. That licence was hung up in a prominent place in the brewery office. The business of brewing was carried on until the breweries were sold to the United Breweries Company.

According to the evidence of defendant No. 3, he first became aware, in February 1916, that the two breweries were being carried on by the defendants Nos. 1 and 2 and of the terms on which they had acquired an interest in the breweries. That may, in their Lordships' opinion, be accepted as a fact. It appears that he had been advised by an uncle of his that the two breweries should not be treated as business of the joint family, and that on his return to Ootacamund in March 1916, he informed his brothers the defendants Nos. 1 and 2, that he objected to the breweries being joint family business. As a matter of fact, the owning and carrying on of breweries was not business which had been carried on by the joint family, and was outside the scope of the business of the joint family. If that was his opinion, as it may be assumed it was at that time, he should have avoided taking any part in the management of the breweries, and in the sale of the beer brewed there. Probably he came to the conclusion that the breweries were or would be a profitable concern for him to have an interest in as a proprietor. Whatever his motive may have been, he acted at Ootacamund in the management of the two breweries from June until October 1916. In October 1916, a depot for the sale of the beer brewed at these breweries was started at Madras, and the defendant No. 3 took charge of that depot, which was carried on in one of the trading names of the joint family. Some of the cheques which were received at the depot in Madras in payment of money due for beer were endorsed by him in the name of P. M. Sadasiva Mudaliar and Brothers, and were paid by him into the account of the joint family with their bankers. Their Lordships will later express their opinion as to what are the inferences to be drawn from the acts of the defendant No. 3 in and after June 1916, at Ootacamund and in Madras. It has not been suggested that he

acted in the position of a paid manager or paid clerk.

This suit was brought on the 4th October 1916, on the basis of the letter of the 5th January 1916, the offer contained in it having been accepted by the plaintiff firm. The plaintiff-firm claimed in their plaint Rs. 77,303-13-7, which represented the Rs. 50,000 which were advanced on the 5th January 1916, and interest on that sum; interest on the sum of Rs. 1,82,145-14-2, the amount of the decree for sale of the 8th April 1915; interest on Rs. 37,336-7-5 the additional amount which was allowed to them by the Appellate Court in the appeal from the decree for sale; and interest on the total amount of that Appellate Court decree by way of prospective damages; and the plaintiff-firm prayed for a decree against the defendants Nos. 1, 2 and 3 personally and against their family property in the hands of the defendants excepting the share in it of their minor brother. The defendants severed in the defences, the defendants Nos. 1 and 2 filed one written statement, and the defendant No. 3 filed two written statements. The defences pleaded, so far as they are now material, were, briefly, that the agreements of the 31st December 1915, and of the 5th January 1916, were not completed contracts, as they were not executed by all the parties intended to be jointly bound by them and could not be enforced against any of the defendants. That in view of the facts, as will later appear, was an untenable defence. It was further pleaded by the defendant No. 3 that the agreements were not for the benefit of the joint family, and were not within the powers of the manager of a joint family to make. The defendant No. 3 also specially pleaded that he was not consulted about the agreements and was not bound by them. The defendants Nos. 1 and 2 in their written statement, admitted their liability to pay Rs. 20,000 of the Rs. 50,000.

The learned Subordinate Judge who tried the suit and heard the witnesses giving their evidence, observed in his judgment:—

"The facts of the case not being complicated, and covering as they do a comparatively short period, the oral evidence in the case is, on the whole, short: the questions in issue are in the main questions of construction and questions of law. Despite, however, the essential simplicity of the facts, there

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has been in the case an unusual amount of hard swearing on the part of the four parties to the suit that have been examined; a most regrettable feature of the case, having regard to the fact that the plaintiffs and the defendants occupy a very leading position in their respective communities."

The four parties to the suit who gave evidence were the defendants Nos. 1, 2 and 3, and the managing member of the plaintiff firm. As regards the defendant No. 3, the Subordinate Judge also said in his judgment:—

"As regards Pasupathy Mudaliar, I do not think he is speaking the truth when he tries to dissociate himself as much as possible from the brewery business which was actually being carried on in the name of the family firm and in which he actually took part between June 1916 and January 1917, in Ootacamund and in Madras. He has tried hard to fight shy of even an ocular acquaintance with the contents of the licence in the name of the firm that was hung up in the brewery. I cannot agree with him when he pretends that he was an independent member of his joint family on the same footing as his senior brothers. I do not believe him when he says that he told his elder brother in September 1915, that he would not be bound by their forming a syndicate to buy the breweries." and:—

"As already indicated in the summary of facts, the third defendant after July 1916 took an active, though subordinate, part in the brewery business which defendants Nos. 1 and 2 wanted to acquire for the family. The reasonable inference to be drawn is that he ratified those acts of the defendants Nos. 1 and 2 under which they bound themselves to acquire the breweries, *e.g.*, the agreements H and J and those acts under which defendants Nos. 1 and 2 obtained authority from the Board of Revenue to carry on the brewing business and to open a depot in Madras. But this does not indicate that he ratified those acts of defendants Nos. 1 and 2 which are referable to the particular method of acquisition which the defendants Nos. 1 and 2 wished to adopt; and I may say that there is absolutely no evidence whatsoever which shows that the third defendant ratified Exhibits AA, BB or CC except to the extent of the sum of Rs. 20,000 which forms a portion of the consideration of the Exhibit CC promissory-note. I

make this exception as, in the absence of the account-books of the family, I must presume that this sum of Rs. 20,000 actually received by defendants Nos. 1 and 2 has passed into the family accounts, and on the ground that the implied authority given by the third defendant to defendants Nos. 1 and 2 by way of ratification to acquire the breweries necessarily implies an authority to borrow the required money under ordinary conditions; and the borrowing of Rs. 20,000 only at 24 per cent. for the purpose of making up Rs. 5,70,000, the sale price of the breweries, *prima facie* amounts to borrowing under ordinary conditions."

In conclusion, the Subordinate Judge, disallowing all plaintiff company's claims except as to Rs. 20,000, made the following decree:—

"It is ordered and decreed that the defendants Nos. 1 to 3 do pay to the plaintiffs the sum of Rs. 21,800 (being principal—Rs. 20,000 and interest thereon at the rate of 12 per cent. per annum from 5th January 1916, to date of suit, 4th October 1916,—Rs. 1,800) out of the amount sued for, with interest on Rs. 20,000 at the rate of 12 per cent. per annum from 5th October 1916 to this date, *viz.*, Rs. 2,040, and with further interest on the aggregate amount of Rs. 23,840 at the rate of 6 per cent. per annum from this date to the date of realization, and that the defendants Nos. 1 to 3 do also pay to the plaintiffs the sum of Rs. 682-2-0 on account of the proportionate costs of the suit, with interest thereon at the rate of 6 per cent. per annum from this date to the date of realization, subject, however, to the reservation that the third defendant's liability is restricted to his share in the family property only.

"It is further ordered that the defendants Nos. 1 to 3 will not get their proportionate costs on the amount disallowed to the plaintiffs and do bear their own costs."

It is not clear why the Subordinate Judge did not decree payment of the Rs. 50,000 instead of Rs. 20,000 only. If he had been consistent, he would have decreed payment of the larger amount.

From the decree of the Subordinate Judge the plaintiff company appealed to the High Court. The leading judgment in the High

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Court was delivered by Abdur Rahim, J. In his judgment, he said :—

“The main question argued both in the lower Court as well as before us is whether the agreement, Exhibit BB, was a contract at all, that is to say, whether the agreement was to be regarded as complete and binding since the third defendant in the suit, Pasupathy Mudaliar, did not sign it. It is signed by ‘P. M. Marudachala Mudaliar and Sons’—that is the name of the family firm of the Mudaliars—and also by the first defendant, Sadasiva Mudaliar, the second defendant, Gurusamy Mudaliar, and by Sadasiva Mudaliar as guardian for Rajabahadur Mudaliar, minor brother of the defendants. I have no hesitation whatever in accepting the evidence of Mr. Walker that the parties expected that the third brother, Pasupathy Mudaliar, also would execute the agreement. The promissory-note, Exhibit CC, is signed only by Sadasiva Mudaliar and Gurusamy Mudaliar, first and second defendants. The question with respect to both the documents is whether they are to be regarded as completed transactions or whether it was the intention of the parties that there was to be no binding contract until the third defendant, Pasupathy Mudaliar, joined in executing Exhibit BB. The learned Subordinate Judge has held that the agreement was conditional, that is, it was not to take effect until it was executed by Pasupathy Mudaliar. It seems to me, however, that the admitted and clearly established facts of the case point to an opposite conclusion. There can be no doubt whatever, as already stated, that both the parties intended that Exhibit BB should be binding on the entire family. At the same time, it is equally clear to me that the parties intended that, if all could not be bound, at least those who signed in their individual capacity, would be bound. The Sait had left the matter in the hands of their legal adviser, Mr. Walker, and the evidence also shows that the Mudaliars were represented by a Pleader, Mr. Rama Row, who, however, has not been examined in the case. There was considerable discussion between different parties and their lawyers as to what should be the exact nature of the arrangements. The result of the evidence amounts to this—that since there was difficulty, as mentioned in Exhibit BB itself, as to getting the necessary parties to join in

the conveyance of the breweries to the Mudaliars, the expedient that they hit upon was that the Mudaliars should take a transfer of the decree of the Sait. With that decree in their hands they expected that there would be no great difficulty in securing the breweries. The Mudaliars wanted the breweries for the benefit of the entire family, which consisted of three adults and one minor brother, but the lawyers of the parties thought that difficulty might arise in binding the entire family, as questions might be raised as to whether the transaction was a proper one for the benefit of the family. Mr. Walker’s evidence makes it clear that under the circumstances he thought it expedient and advisable that the agreement should be signed not only by the firm or in the firm’s name, but by the Mudaliars individually. The plaintiffs’ object in that was that if it so happened that the transaction did not come within the scope of the family business which consisted mainly in plantations, the members of the family who signed the agreement would be bound by them. The third defendant was at the time not in Ootacamund, and that was the reason why he did not actually sign Exhibit BB, but he was expected to sign it, and the evidence is that the first defendant, who is the head of the family, being the elder brother, undertook to obtain the signature of Pasupathy Mudaliar. Mr. Walker positively swears that it was never suggested or understood that Exhibit BB would not come into operation unless or until Pasupathy signed it. There is not the slightest reason to doubt the *bona fides* or accuracy of his statement. And it clearly could not have been the intention of the parties that Exhibit BB was to have no effect whatever until the third brother signed it.”

Their Lordships agree with all that the learned Judge said on that subject. As to the liability of defendant No. 3, he said that :—

“It cannot be disputed that at least from June 1916, he took a very active part in the business of the breweries. He was in charge of the depot in Madras for some time according to the arrangement with the Excise Authorities (their licence); he received monies from the family to funds (with which to carry on the business), and paid the profits of the business into the family account with the Bank. He also signed cheques in the name of the family firm of Marudachala Mudaliar

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and Sons and Sadasiva Mudaliar and Brothers, and there cannot be the least doubt that he regarded the business as much his own as that of the first and second defendants."

Their Lordships are not aware that the defendant No. 3 ever signed any cheque in the name of either of the joint family firms, if that is what the learned Judge meant in the passage quoted; but he probably meant that the defendant No. 3 had endorsed some cheques in the name of the firm, and with that explanation their Lordships agree with the finding quoted. Further on, the learned Judge found "the evidence clearly shows that he (the defendant No. 3) treated and adopted the whole transaction as one in which he was interested as much as the first and second defendants," and he also found that the defendant No. 3 ratified and adopted the transaction of the 5th January 1916, by his subsequent conduct, and made himself liable by adopting that contract. Spencer, J., in a short judgment, agreed with Abdur Rahim, J., and said: "I also agree in thinking that the third defendant, by his subsequent conduct, ratified and acquiesced in the agreement when he joined with his brothers in managing the brewery business in 1916." The result was, the High Court gave the plaintiff-firm a decree for Rs. 76,159-5-7, which included the Rs. 54,359-5-7, which had been decreed by the Subordinate Judge, and with some future interest at 6 per cent.

From that decree of the High Court this appeal has been brought. Their Lordships agree with the findings of the High Court, which they have quoted from the judgments delivered in that Court. There can be no doubt the business of owning and carrying on breweries was not a business of the joint family, and that the minor brother, when he comes of age, can repudiate the contract of the 5th January 1916, so far as he and his interest in the joint family property are concerned, and that his interests in the joint family property cannot be affected by this suit. The contract of the 5th January 1916, cannot be regarded as a contract of the joint family of which the minor brother is a member, but defendant No. 3 accepted that contract as binding on him, and derived benefits under it and consequently accepted it, with liability to perform it; the money which was advanced under it by the plaintiff firm was money which was required for the starting

and carrying on of the brewing business. It appears to their Lordships that it is a contract which is binding on those members of the joint family, the defendants Nos. 1, 2 and 3, who were parties to it or accepted it as a contract, and that they cannot escape their liability to perform it or to pay damages for the non-performance of it by showing that they have no property except that which is property of the joint family in which their minor brother is equally interested with them. If it were the law that some members of a joint family could escape from liability to perform contracts entered into by them on the grounds that their contracts were not such as would bind the joint family, and that they had no property other than that which was the property of the joint family, it would be necessary for every person with whom they sought to make a contract to assure himself that the business to which the proposed contract would relate was business of the joint family, and that no member of the joint family was a minor. Under such circumstances, it would be difficult to carry on business with persons who happened to be members of a joint family of the Province of Madras. What might be the position in other Provinces it is unnecessary to consider. The decree in this suit cannot be executed against the minor's interest in the joint property of the family.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

W. C. A.

Solicitor for the Appellant:—Mr. Polak.
Solicitor for the Respondent:—Mr. Douglas Grant.

PRAN KISHORE TARAFDAR v. SARODA PROSAD PAKRASI.

CALCUTTA HIGH COURT.APPEAL FROM APPELLATE DECREE NO. 213
OF 1920.

June 15, 1922.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Chotzner.• PRAN KISHORE TARAFDAR AND
OTHERS—DEFENDANTS—APPELLANTS
versus• SARODA PROSAD PAKRASI AND
OTHERS—RESPONDENTS.*Construction of document—'Jalkar', meaning
of—Right of fishery—Sub-soil rights—Pleadings—
Appeal, second—Document of title, misconstruction
of—Misconstruction of written evidence—Question
of law.*

The term 'Jalkar' is ambiguous. It may mean either a grant of a mere right of fishery or it may mean the grant of a sheet of water together with the sub-soil. The question whether what was intended to be granted in a particular case was restricted to a right of fishery or included a grant of a sheet of water together with the sub-soil must depend upon the construction of the original grant if available or must be determined with regard to the subsequent history of the property. [p. 56, col. 2.]

Bissen Lal Dass v. Ranee Khyrunnissa Begum, 1 W. R. 78, *Radha Mohun Mundul v. Neel Madhub Mundul*, 24 W. R. 200, *David v. Grish Chunder Guha*, 9 C. 183; 11 C. L. R. 305; 4 Ind. Dec. (N. S.) 774, *Rakkhal Churn Mundul v. Watson and Co*, 10 C. 50; 5 Ind. Dec. (N. S.) 35, *Radha Gobind Roy Saheb v. Inglis*, 7 C. L. R. 364 (P. C.); 3 Suth. P. C. J. 809, referred to.

The misconstruction of a document which is the foundation of a suit and which is in the nature of a contract or a document of title, is allowed to be a ground for a second appeal. [p. 56, col. 2.]

A special appeal does not lie because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. For instance, a writing supposed to contain an admission may be put in as part of the evidence, but a mistake in its meaning is not a misconstruction of a document upon which a special appeal will lie, if it is connected with other evidence, affecting its construction. [p. 56, cols. 1 & 2.]

Nowbut Singh v. Chutter Dharee Singh, 12 W. R. 222, referred to.

Appeal against the decree of the Additional District Judge, Pabna and Bogra, dated the 22nd August 1919, reversing the decree of the Subordinate Judge, Bogra, dated the 28th of March 1917.

Babu Sarat Chandra Roy Chaudhury (with him Babu Indu Bhushan Roy), for the Appellant.—I submit that the Courts below have erred in law in finding title to the lands in dispute with the plaintiffs against the weight of evidence in favour of my clients. Our contention is that the land is not comprised within the permanently settled estate

of the plaintiffs but has accreted to the adjacent permanently settled estate held by us. The land at the time of the Permanent Settlement was covered with water. The predecessors of the plaintiffs got only the right of fishery and the bed of the *jalkar* remained with the Crown. Wrong inference from facts can be assailed in second appeal, and my point is that the Courts have erred in estimating the value of evidence in the case. The Courts have misconstrued the documents. *Jalkar* has not been thoroughly understood by the learned Judge. *Mahananda Chakravarti v. Mongala Keotani* (1). I am ready to prove that the plaintiffs got only the right of fishery and nothing more. The grant does not include the sub-soil. There are different pieces of evidence to which proper weight and consideration has not been given. I contend that merely fishery right was granted.

Babu Dwarkanath Chakravarti (with him Babus Sasadhar Roy and Jatindranath Sannyal), for the Respondents.—I submit that the appeal is concluded by findings of fact and so my learned friend cannot challenge the Appellate Court's judgment in second appeal. Your Lordships cannot go into different pieces of evidence as if it was a first appeal. In this connection reference can be made to *Nowbut Singh v. Chutter Dharee Singh* (2). There is no question here of the construction of document as the original grant cannot be had. As regards the meaning of the word *jalkar*, I do not desire to go into legal subtleties, as the findings of fact arrived at by the Court of Appeal below and by the learned Subordinate Judge are unassailable.

Babu Sarat Chandra Rao Chaudhury, briefly replied.

JUDGMENT.—This is an appeal by the defendants in a suit for recovery of possession of land on declaration of title. The case for the plaintiff's is that the disputed land is comprised within a permanently settled estate held by them within the Collectorate of the District of Bogra and known as Mahal Dehi Adgola. The defendants contend that the land is not comprised within the permanently settled estate of the plaintiffs but lies outside its ambit and has accreted to the neighbouring permanently settled

(1) 31 C. 937; 8 C. W. N. 804.

(2) 19 W. R. 222

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estate held by themselves. They further contend that the claim of the plaintiffs is barred by limitation. The Court of first instance found upon the question of title in favour of the plaintiffs but dismissed the suit on the ground of limitation. Upon appeal the District Judge has affirmed the conclusions of the Subordinate Judge upon the question of title, but has reversed his decision upon the question of limitation. The result has been that the suit has been decreed.

On the present appeal the decision of the District Judge has been assailed on the ground that his conclusion upon the question of title is erroneous in law. It is not disputed that the land in suit formed at one time the bed of a Beel, called Beel Narail, known also as 'jalkar Sat Simulia'. The plaintiffs assert that at the time of the Permanent Settlement the bed of this 'jalkar' was settled with their predecessors as included in the permanently settled estate granted to them. The defendants do not controvert the position that the land was, at the time of the Permanent Settlement, covered with water, but they contend that what was settled with the predecessors of the plaintiffs was nothing beyond the right of fishery and that the bed of the 'jalkar' remained with the Crown. The grant made at the time of the Permanent Settlement has not been produced and consequently no question arises as to the construction of the fundamental title-deed. The plaintiffs, as also the defendants, have accordingly been constrained to rely upon subsequent documents which disclose various transactions connected with the disputed land or with the 'jalkar' and the Courts below have thus been called upon to ascertain from the subsequent history of the disputed land the nature of the initial grant. *Prima facie* this does not raise a question of law which can be investigated in second appeal. It was pointed out by Sir Richard Couch, C. J., in *Nawbut Singh v. Chutler Dharce Singh* (2) that a special appeal does not lie, because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. For instance, a writing supposed to contain an admission may be put in as part of the evidence, but a mistake in its meaning is not a misconstruction of a document upon which a special

appeal will lie, if it is connected with other evidence affecting its construction. The misconstruction of a document which is the foundation of the suit, which is in the nature of a contract or a document of title is allowed to be a ground for a second appeal. As we have already stated, the original grant is not available and, consequently, no question arises as to its legal construction.

The appellants have, however, attacked the judgment of the District Judge on the ground that he has lost sight of a very important distinction in connection with the meaning of the expression 'jalkar'. We are of opinion that this charge cannot be justified. It is well-known that the term 'jalkar' is ambiguous. It may mean either a grant of a mere right of fishery or it may mean the grant of a sheet of water together with the sub-soil. This is pointed out in a long series of decisions from *Bissen Lal Dass v. Rane Khyrunnissa Begum* (3) to *Mahananda Chakravarti v. Mongala Keotani* (1). Amongst the intermediate decisions, the more important are those in *Radha Mohun Mundul v. Neel Madhub Mundul* (4), *David v. Grish Chunder Guha* (5) and *Rakhai Churn Mundul v. Watson and Co.* (6). The distinction is also emphasised in the decision of the Judicial Committee in *Radha Gobind Roy Saheb v. Inglis* (7). The question whether what was intended to be granted in a particular case was restricted to a right of fishery or included a grant of a sheet of water together with the sub-soil must depend upon the construction of the original grant if available or must be determined with regard to the subsequent history of the property. In the present case the Subordinate Judge has pointed out that the entries in the two Registers known as A Register and B Register maintained under the Land Registration Act, 1876, undoubtedly support the contention of the plaintiffs. The B Register shows that the 'jalkar Sat Simulia' alias Beel Narail is one of the Mouzahs comprised in the permanently settled estate, Mahal Dehi Adgola, and that the area of the Mouzah is 1051 acres and 13 poles. It is

(3) 1 W. R. 78.

(4) 24 W. R. 200.

(5) 9 C. 183; 11 C. L. R. 305; 4 Ind. Dec. (N. S.)

774.

(6) 10 C. 50; 5 Ind. Dec. (N. S.) 35

(7) 7 C. L. R. 364 (P. C.); 3 Suth. P. C. J. 809.

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improbable that there should be a reference to the area if the right which the proprietors received from the Crown was a right of fishery. The entry in the A Register supports the conclusion that the grant includes the sub-soil. That entry shows that Rs. 5,504-6-0 was the amount of land revenue payable for the entire estate; that is, in respect of all the Mouzahs comprised in the estate inclusive of the *jalkar* Mouzah. This conclusion is borne out by the Revenue Survey map which shows that the area of the *jalkar* Mouzah which, at the date of the Survey in 1854, was all water, corresponds also with the area as subsequently shown. The Thak Survey which preceded the Revenue Survey resulted in a map which supports the same conclusions. The Courts below were, however, pressed with the proceedings of the Collector under Act IV of 1840 which supports the contention of the defendant. We are not concerned in second appeal with the weight to be assigned to the different pieces of evidence on the record and it is not open to us to examine whether the Courts below have properly given preference to the documents which we have mentioned first. But, apart from all this, the outstanding fact remains that if the grant made at the time of the Permanent Settlement was in respect of the fishery right alone, the Crown has not taken steps to resume the land after the Beel had dried up and to assess the land with revenue. The fact that the Beel has dried up has been known to the Revenue Authorities and they have for more than a quarter of a century allowed the plaintiffs to remain in occupation through their tenants of a large tract of land. Consequently, we cannot justly hold that what was granted was a franchise or an incorporeal right of fishery and not a territorial right. Evidence of a conclusive character would be required to justify the theory that in respect of a Mouzah comprised within the ambit of a permanently settled estate there was no grant of the sub soil to the grantee and that what was granted was a mere fishery right, the right to the sub-soil remaining in the Crown. Such a conclusion would be opposed to the decision of this Court in *Mathura Nath Chattopadhyay v. Sib Chandra Bose* (8).

It is plain that the defendants have no title whatsoever in the disputed land, it is not comprised within their permanently settled estate; nor can we conceive by what possible means they may have acquired title by accretion. The land never formed the bed of a public navigable river, it has not been claimed as land which has emerged from recession of a river, it has been made culturable because the Beel has dried up. In these circumstances, it is impossible to conceive how the defendant can successfully claim title by accretion. The only chance of the defendants was to prove title by adverse possession; in this they have failed according to the judgment of the District Judge. Upon the question of title, there is the concurrent decision of two Courts in favour of the plaintiffs; that decision has not been challenged on grounds admissible in second appeal.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

B. N.

Appeal dismissed.

OUDE JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL, NO. 192 OF 1922.

February 5, 1923.

Present :—Mr. Kanhaiya Lal, J. C.KISHAN LAL—DEFENDANT—APPELLANT
versus

MOOSI RAZA—PLAINTIFF—RESPONDENT.

Malicious prosecution—Defamation—Privilege—Malice—Reasonable and probable cause—Qualified privilege, elements of.

As a rule an action lies for the malicious publication of statements which are false in fact and injurious to the character of another within certain limits, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In the latter class of cases, the occasion prevents the inference of malice which the law draws from unauthorised communications; and a quasi

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fied privilege attaches to the statements so made, if fairly warranted by any reasonable occasion or exigency, and honestly made, or made in good faith for the common convenience and welfare of society. [p. 59, col. 1.]

There are three elements necessary to make the defence of qualified privilege good, namely, (1) the occasion must be fit, (2) the matter must have reference to the occasion and (3) it must be published from right motives. [p. 59, col. 1.]

Clerk and Lindsell on Torts, 7th Edition, p. 580, referred to and relied upon.

For the sake of public justice, charges and communications which would otherwise be slanderous, are protected, if *bona fide* made in the prosecution of an enquiry into a suspected crime. [p. 59, col. 2.]

Brojonath Roy v. Kishen Loll Roy, 5 W. R. 282, *Raghavendra v. Kashinathbhat*, 19 B. 717; 10 Ind. Dec. (N. S.) 480, *Abdul Hakim v. Tej Chandar Mukherji*, 3 A. 815; A. W. N. (1881) 81; 6 Ind. Jur. 320; 3 Ind. Dec. (N. S.) 521, referred to and followed.

Appeal against a decree of the Subordinate Judge, Kheri, dated the 8th April 1922, reversing a decree of the Munsif, Kheri, dated the 20th June 1921.

Mr. *Bisheshar Nath*, for the Appellant.
Mr. *Haider Hussain*, for the Respondent.

JUDGMENT.—This appeal arises out of a claim for damages for defamation and malicious prosecution. The defendant is the *Munim* and general agent of a firm styled Brahaman Prasad-Parshotamdas carrying on cloth business at Maigalganj, a Railway station in the Kheri District. The Station-Master at that place was Niaz Hussain, the maternal uncle of the plaintiff. The defendant purchased some cloth from the shop of Govind Ram-Mokand Ram at Cawnpore and got it despatched by Railway to the shop of Brahaman Prasad Prashotamdas at Maigalganj. The consignment consisted of three bundles which reached Maigalganj in due course. Some time before the 4th May 1920 Maiku Lal, a servant of the firm, took delivery of the goods and on opening the bundles and comparing their contents with the invoice, found that about 20 pieces of cloth were missing. The bales appeared to be all right from outside; but on opening them, the *bethan*, or the inner covering, was found cut suggesting that the upper covering was opened and, after the *bethan* was cut and some of the contents removed, re-sewn. Maiku Lal informed his master and the consignors about the same.

The date on which the consignment actually reached Maigalganj is not stated. Maiku Lal had to pay some demurrage for the same. He suspected that the Railway employees at the Maigalganj station were responsible for the theft: and hearing that the plaintiff was going to Sitapur with some pieces of cloth on the 10th May 1920 for getting them sewn, he secretly followed him to Sitapur. The bundle of cloth, which the plaintiff had with him and which he had brought from the house of the Station Master, was suspected to contain some of the missing pieces. The plaintiff entered a shop in the Sitapur Market. The defendant left him there and went to Seth Aisi Lal, a friend and partner of his master, and spoke to him about the whole affair. Both these men went to the Police Station at Sitapur where they made a report and, taking a Policeman with them, came to the shop where the defendant was sitting and got his bundle opened. It was found to contain some wearing apparel and some unsewn pieces of cloth. The defendant identified the unsewn pieces of cloth as a part of the property, which had been stolen from his consignment. The plaintiff remained under arrest while the Police investigation went on for about a week and had to be ultimately discharged, as the pieces of cloth found in his possession, bore no numbers or identifying marks. At the time of his arrest he admitted that he had obtained the wearing apparel and the pieces of cloth from Niaz Hussain, the Station Master of Maigalganj. The houses of Niaz Hussain and the plaintiff were searched but nothing incriminating was found.

The Trial Court was of opinion that the defendant had acted in good faith in making a report to the Police and that there was reasonable and probable cause for taking steps to get the plaintiff arrested. The lower Appellate Court, however, held that the occasion was not privileged and that the defendant could not avoid liability except by proving that the imputation was true. It observed that the pieces of cloth found in the possession of the plaintiff were not proved to have been stolen property, and that, though what the defendant said might possibly have occurred, it was his duty to supply all the links in the chain for bring-

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ing the charge home to the plaintiff and to prove his case affirmatively by evidence, which would be sufficient to convict the plaintiff on the criminal charge of keeping the stolen property. It further observed that there was evidence of malice in the relations between the parties, which were bitter from before the date of the alleged crime, but it was not necessary to go into it for if no occasion of privilege was established, the most honest and reasonable belief was of itself no justification for the charge. The claim of the plaintiff for damages for malicious prosecution not having been pressed, the rest of the claim for damages for defamation was accordingly decreed.

The view of the law taken by the learned Subordinate Judge is obviously insupportable. As a rule, an action lies for the malicious publication of statements, which are false in fact and injurious to the character of another within certain limits, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In the latter class of cases the occasion prevents the inference of malice which the law draws from unauthorised communications; and a qualified privilege attaches to the statements so made, if fairly warranted by any reasonable occasion or exigency and honestly made or made in good faith for the common convenience and welfare of society. There are three elements necessary to make the defence of qualified privilege good, namely, the occasion must be fit, the matter must have reference to the occasion and it must be published from right motives (Clerk and Lindsell on Torts, 7th Edition, page 580). Indeed, it is a duty which every one owes to society and to the State to assist in the investigation of any alleged misconduct and to promote the detection of any crime. When it comes to the knowledge of any one that a crime has been committed, a duty is laid on him as a citizen of the country to state to the authorities what he knows respecting the commission of the crime; and if he states only what he knows and honestly believes, he cannot be subjected to an action of dama-

ges merely because it turns out that the person, as to whom he has given the information, is, after all, not guilty of the crime. For the sake of public justice, charges and communications which would otherwise be slanderous, are protected, if *bona fide* made in the prosecution of an inquiry into a suspected crime (Orders on Libel and Slander, 5th Edition, page 272). In *Brojo-nath Roy v. Kishen Loll Roy* (1) it was accordingly held that every man, who considered that a criminal offence had been committed against him, had a right to make a complaint to the Police or before the Magistrate and his failure in proving a *bona fide* charge so made by him did not make him liable to an action for damages for defamation. In *Raghavendra v. Kashinathbhat* (2), where a person whose property had been stolen informed the chief Police Constable entrusted with the enquiry, that he suspected the stolen property to be concealed in the house of the plaintiff and the house of the plaintiff was accordingly searched and its floor dug up and the plaintiff was placed in confinement for a time but no property was found, it was held that the *onus* lay on the plaintiff to prove the absence of reasonable and probable cause against the defendant for the information given by him to the Police and that in the absence of such proof the defendant was protected in respect of the information given by him to the person in charge in the discharge of a public or private duty. As observed in *Abdul Hakim v. Tej Chandar Mukerji* (3), it is not essential that before a person can be held entitled to the privilege of having made a statement in good faith for the protection of his interest, he should establish that every word he has spoken or written is literally true if, having regard to the facts and circumstances within his knowledge, he might, as an ordinarily reasonable and prudent man, have drawn the conclusions which he has expressed in defamatory language for the protection of his interest, he may fairly be held to have made out his good faith.

(1) 5 W. R. 282.

(2) 19 B. 717; 10 Ind. Dec. (N. S.) 480.

(3) 3 A. 815; A. W. N. (1881) 81; 6 Ind. Jur. 320; 3 Ind. Dec. (N. S.) 521.

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There is clear evidence in this case to show that some of the stolen pieces of cloth contained in the consignment were missing. There is also evidence to the effect that the inner *bethan* or covering was found cut. The consignment had remained at the Maigalganj Railway Station for some time after its receipt and the defendant had to pay the demurrage for the same. The plaintiff admittedly obtained some cloth from the house of the Station Master and took it to Sitapur to get it sewn, followed by the defendant. There was no ill-feeling which could have prompted the defendant in following the plaintiff within six days of the delivery of his consignment, when the latter was on his way to Sitapur. The loss of some of the pieces of cloth had already been reported by the defendant to the consignors at Cawnpore. The pieces of cloth found in the bundle carried by the plaintiff tallied in description, though not in length, with the larger pieces which the consignment is proved to have contained. There is no proof of malice; and the suggestion that the Station Master had charged the defendant and some of his men with being in the habit of travelling without tickets is clearly an after-thought, for no evidence has been offered to show that at any time the defendant or any of his men was caught travelling without tickets or any penalty was ever levied from them. The defendant denies that he had ever been so caught or made to pay the penalty. The learned Subordinate Judge acknowledges that what the defendant says might possibly have occurred. It cannot be said in the circumstances that the story told by the defendant was without reasonable and probable cause or that the report made to the Police was not prompted by good faith. The defendant was acting for the protection of his own interest and for the investigation of a crime, in the detection of which he was interested. The occasion was clearly privileged and that privilege is not controverted by any evidence of malice.

The learned Counsel for the plaintiff respondent contends that the defendant made the slanderous statement in the presence of the Police and several other persons present in the market at the time of the search; but a person does not lose his

privilege by reason of the casual presence of one or even of several uninterested by-standers who happen to be present at the time of the search or arrest. If the occasion is privileged and the matter complained of has reference to the occasion, the only remaining question is whether the occasion was used without malice. That it was so is proved in this case.

The appeal is, therefore, allowed and the claim of the plaintiff dismissed with costs here and hitherto.

G. H.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 291 AND 378 OF 1922.

January 16, 1923.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr Justice Cuming.

IN NO. 291 OF 1922.

SATISH CHANDRA ADDYA—
PETITIONER—CREDITOR—APPELLANT
versus

FIRM RAJ NARAIN PAKHIRA AND
RASIK LAL PAKHIRA AND OTHERS—
DEBTORS AND OPPOSING CREDITORS—
RESPONDENTS.

IN NO. 378 OF 1922.

RASI LAL PAKHIRA AND OTHERS—
DEBTORS—APPELLANTS
versus

GIRISH CHANDRA PAL AND OTHERS—
CREDITORS—RESPONDENTS.

*Provincial Insolvency Act (V of 1920), s. 24
Prov. (a)—Application for insolvency—Court,
duty of, to enquire into present value of property—
Application for insolvency by firm—Application,
form of.*

In dealing with an application for adjudication of insolvency the Court should enquire into the present value of the properties which are available for meeting the liabilities of the debtor and decide whether, having regard to proviso (a) to section 24 of the Provincial Insolvency Act, the debtor has proved inability to pay his debts. [p. 61, col. 2.]

Where the debtor is a firm the application for insolvency must be in the name of the firm, and must be signed in the manner laid down in rules 19, 22, 24 framed by the High Court under section 79 of the Act. [p. 62, col. 2.]

Appeals against the orders of the District Judge, 24-Parganas, dated the 14th of August 1922.

SATISH CHANDRA v. FIRM RAJ NARAIN PAKHIRA-RASIK LAL PAKHIRA.

IN NO. 291 OF 1922.

Babus *D. N. Chakravarty*, *Punchanan Ghose* and *Radhica Ranjan Guha*, for the Appellant.

Babus *Mohendra Nath Roy*, *Narendra Chandra Bose*, *Manmatha Nath Roy* and *Chandra Sekhar Sen*, for the Respondent.

IN NO. 378 OF 1922.

Babus *D. N. Chakravarty* and *Jyotis Chandra Guha*, for the Appellant.

Babus *Mohendra Nath Roy*, *Narendra Chandra Bose* and *Manmatha Nath Roy*, for the Respondent.

JUDGMENT.—These two appeals arise out of proceedings under the Provincial Insolvency Act.

An application was made by one of the creditors for declaring the debtors (who are four out of five members of a firm, the fifth being a minor) insolvent. Some of the other creditors opposed the application on various grounds. The learned District Judge dismissed the application on several grounds. After the application had been disposed of, four of the debtors made an application for being declared insolvents. This also was rejected by the Court below on the ground, among others, that they had not proved their inability to pay their debts. These two appeals are against these two orders. We propose to deal first of all with Miscellaneous Appeal No. 378 of 1922 which deals with applications of the four debtors to be declared insolvents.

It appears that one of the debtors, Rasik Lal, was examined and he stated that the debts amounted to over Rs. 1,06,600 and that they were unable to pay their debts; and there is a report of the Receiver which states that the value of the Rice Mill would be about Rs. 30,000 only.

The learned District Judge, however, in arriving at the conclusion that the debtors were not unable to pay the debts, relied upon a statement in an affidavit sworn to by one of the debtors in 1920 in some other suit to the effect that the Mill was worth Rs. 95,000.

It is contended on behalf of the appellants that the Court below has not enquired into the present value of the Mill and other properties; that the Receiver was not authorized to go into the question of the value of the Mill; and that that the learned

Judge has not considered the fact that one-fifth share of the properties belong to the minor brother of the debtors who is not an applicant for insolvency.

The affidavit stated the value of the Mill as it was two years ago. What the Court below ought to have considered was the present value of the Mill and the other properties which are available for meeting the liabilities of the debtors and no inquiry has been directed to that point.

We are of opinion that the Court below should inquire into the present value of the properties and decide whether, having regard to the proviso (a) to section 24 of the Act, the debtors have proved inability to pay their debts.

A question, however, has been raised before us on behalf of the respondents, viz., that a joint application could not be made by four of the debtors for being adjudicated insolvents.

It is unnecessary to refer to the cases decided under the former Insolvency Act (III of 1907). Section 79 of the present Provincial Insolvency Act (V of 1920) provides that the High Court may make rules for carrying into effect the provisions of this Act.

Sub-section (2) lays down that such rules may provide (among others) for the procedure to be followed where the debtor is a firm.

The High Court has framed rules under section 79 of the Act.

Rule 19 provides, "where any notice, declaration, petition or other document requiring attestation is signed by a firm of creditors or debtors in the firm name, the partner signing for the firm shall also add his signature, e. g., Brown & Co., by James Green, a partner in the said firm."

Rule 22 says: "Where a firm of debtors file an insolvency petition, the same shall contain the names in full of the individual partners, and if such petition is signed in the firm name, the petition shall be accompanied by an affidavit by the partner who signs the petition showing that all the partners concur in the filing of the same."

Rule 24 lays down, "In cases of partnership the debtors shall submit a schedule of their partnership affairs, and each debtor shall submit a schedule of his separate affairs."

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It appears, therefore, that where the debtor is a firm, the application must be in the name of the firm and the manner in which such an application is to be signed, is laid down in the rules quoted above.

In the present case the application for insolvency was made by Rasik Lal, Janaki Nath, Surendra Nath and Satis Chandra, and although it was stated that they were jointly carrying on business under the name and style of Raj Narayan Rasik Lal Pakhira, the prayer was to the following effect:—"Your petitioners humbly pray that your Honour may be pleased to adjudge your petitioners insolvents, &c.," and it was signed by the four persons without the name of the firm.

We have gone through the statements made in the petition, and it seems that in substance it was an application by the four persons as representing the firm; but, as stated above, it was signed not in the firm name but by the four persons, not even describing themselves as representing the firm. Whatever the intention was in form, it was not in compliance with the provisions of the rules made under section 79 of the Provincial Insolvency Act.

It is contended on behalf of the appellant that, if the application is defective in form, they may be allowed to amend it.

We think that this may be done. We accordingly direct that the case (Miscellaneous Appeal No. 378 of 1922) be sent back to the lower Court in order that the appellants may apply for amendment of the petition so as to comply with the requirements of the rules framed under section 79 of the Act. The respondent will be allowed an opportunity of taking such objections as he may be advised to take with respect to the amended application. The application for amendment must be made within 10 days of the arrival of this order in the lower Court. The Court will then proceed to dispose of the case according to law.

Costs—three gold mohurs—to abide the result.

Miscellaneous Appeal No. 291 of 1922 arises out of the application made by one of the creditors. The firm appears to have been described as the debtor in that application, and the objection of the respondent as to the form of the application, therefore, does not apply

to it, though other objections have been raised in that case. If, however, the question of the inability of the debtors to pay their debts is decided in their favour in the case in which they are the applicants it would not be necessary to consider those objections. The Miscellaneous Appeal No. 291 of 1922 will, therefore, stand over until the disposal of the proceedings in the lower Court in connection with M. A. No. 378 of 1922. The parties will mention the matter after the disposal of the latter case in the lower Court.

RULE NO. 604-M. OF 1922.

The stay order granted on the 15th December 1922 in connection with Miscellaneous Appeal Nos. 291 and 378 of 1922 will be discharged on expiry of 10 days from the arrival of this order in the Court below. It, however, will be open to the debtor or any of the creditors at any time to apply to the Court below for the continuance of the services of the Receiver pending the inquiry directed by us and the Court below will then consider the matter and pass such orders as it thinks fit.

Let the record be sent down as soon as the order and decree are signed.

s. c.

Case sent back.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 670 OF 1922.

November 8, 1922.

Present :— Sir Norman Macleod, Kt.,
Chief Justice and Mr. Justice Crump.

HIRACHAND MOTICHAND—

PLAINTIFF—APPELLANT

versus

HANSABAI GANPATRAO—

DEFENDANT—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 22 (2)—Decree against agriculturist—Death of judgment-debtor—Property in hand of his heirs whether can be proceeded against.

Where an agriculturist judgment-debtor dies, it is not open to the decree-holder to obtain a direction from the Court, under section 22 (2) of the Dekkhan Agriculturists' Relief Act, to the Collector to take possession of the deceased's property in the hands of his heirs.

Second appeal from the decision of the Joint Judge, Poona, in Appeal No. 190

MOHNAVELU MUDALIAR v. ANNAMALAI MUDALIAR.

of 1920, confirming the order passed by the Subordinate Judge, at Baraamati, in *Darkhast* No. 655 of 1919.

Mr. S. R. Bakhale, for the Appellant.

JUDGMENT.—A question arises in this appeal which does not appear to have been decided in any reported case. The plaintiff obtained a decree against one Sagunabai. It was an ordinary money-decree, and, therefore, he could not seek to execute the decree against the immoveable property of the judgment-debtor who was held to be an agriculturist. But the plaintiff might have applied to the Court under paragraph 2 of section 22 of the Dekkhan Agriculturists' Relief Act to direct the Collector to take possession, according to the terms of that paragraph, of any immoveable property of the judgment-debtor, to the possession of which he was entitled, and which, in the opinion of the Collector, was not required for her support and the support of the members of her family dependent on her. The judgment-debtor having died, this *darkhast* was filed against her daughters as her heirs; and it is now contended that the Court has jurisdiction to direct the Collector to take possession of the immoveable property which has come to the daughters as heirs of the original judgment-debtor. Both Courts have dismissed the *darkhast*, and we think they were right. If it had been intended that in the case of the death of a judgment-debtor who was an agriculturist, his property in the hands of his heirs could be taken possession of by the Collector under the directions of the Court, then that ought to have been specifically stated in the second paragraph of section 22. We cannot accede to the argument that we should read into the section the words "or his heirs" after the word "judgment-debtor" with the various consequential alterations which would have to be made in that paragraph. That would be, so far as I can see, entirely contrary to all canons of construction, and if the Legislature thinks that a creditor should have the remedy provided by section 22, paragraph 2, not only against the judgment-debtor, but also against his heirs, then it is for the Legislature to make the necessary amendments in the Act. The appeal will be dismissed.

W. C. A.

*Appeal dismissed.***MADRAS HIGH COURT.**

SECOND CIVIL APPEAL NO. 252 OF 1921.

November 16, 1922.

Present :—Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Wallace.

MOHANAVALU MUDALIAR—

DEFENDANT No. 2—APPELLANT

versus

ANNAMALAI MUDALIAR AND ANOTHER

PLAINTIFF AND DEFENDANT NO. 1

—RESPONDENTS.

Parties—Some of several executors, whether can sue—Non-joinder of necessary parties—Dismissal of suit—Civil Procedure Code (Act V of 1908), s. 99, applicability of.

Some of several joint executors of a Will cannot maintain a suit against a debtor of the estate. The mere fact that the executors who are suing hold a power-of-attorney from the other executors will not cure the defect unless the suit is on behalf of all the executors. [p. 64, col. 1.]

If a defendant is sued by one only of two persons with whom he has contracted or by one only of two persons who have a joint cause of action against him, he has a right to have the action dismissed unless the other is joined [p. 64, col. 1.]

If a defendant takes objection to the non-joinder of necessary parties at a proper time he has a right to have them joined as plaintiffs, and if after objection has been taken the plaintiff proceeds with the suit without taking steps to add the person or persons whose non-joinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed. [p. 64, col. 1.]

Some of several executors under a Will holding a power-of-attorney from the others brought a suit on behalf of the estate in their own names. Objection as to non-joinder of the remaining executors was taken by the defendant at the earliest opportunity but no application was made by the plaintiffs to have the remaining executors added as parties. The suit was decreed by the Courts below which held that the plaintiffs by reason of the power-of-attorney could sue in their own names without joining the other executors. On second appeal:

Held, (1) that the action was wrongly conceived and must fail for non-joinder of necessary parties in spite of the provisions of section 99 of the Civil Procedure Code. [p. 64, col. 1.]

Second appeal against a decree of the District Court, North Arcot at Vellore, in A. S. No. 5 of 1920, preferred against the decree of the Court of the District Munsif, Ranipet, in O. S. No. 664 of 1917.

Mr. P. S. Narayanaswami Iyer, for the Appellant.

Messrs. T. Narasimha Aiyangar, for the Respondents.

JUDGMENT.

Schwabe, C. J.—This is an action by

MOHNAVELU MUDALIAR v. ANNAMALAI MUDALIAR.

the executors under a Will which appointed twelve executors. The Will has been admitted to Probate. Three executors have been removed and there are at present nine. Seven have given a power-of-attorney to the other two, which, in effect, authorises the two to execute all the duties of the executors in collecting and managing the estate; but, in my view, that does not authorise those two executors to sue on behalf of the estate in their own names. It might have been sufficient authority to these two to take proceedings in the names of the nine. But that is a point which must turn on the construction of the power-of-attorney and it is unnecessary to decide it here, because it is not what has been done. Therefore, in my view, this action is wrongly conceived and must fail for non-joinder of necessary parties.

Under section 99 of the Civil Procedure Code no decree is to be reversed on account of any misjoinder of parties not affecting the merits of the case or the jurisdiction of the Court, and it has been held,—how far correctly I am not prepared at present to say—that “misjoined” in that section includes non-joinder. See *Eakkannatha Eachara Umni Valia Kaimal v. Manakkat Vasunni Elaya Kaimal* (1). But if a defendant is sued by one only of two persons with whom he has contracted or by one only of two persons who have a joint cause of action against him, he has a right to have the action dismissed unless the other is joined. This is not merely technical. It may be of great importance, because, as was pointed out in *Ramsebuk v. Ramlal Koondoo* (2), he ought to be in a position to recover his costs if he succeeds, as against all the parties. If there are many executors some of whom are solvent and some insolvent it might be to the prejudice of the person against whom the estate has some claim that particular executors should be able to sue him with the result that, if he succeeded and got the suit dismissed with costs, he might find no one against whom he can execute his decree for costs, and so it is correctly stated in *Woodroffe and Amir*

Ali's Civil Procedure Code, Second Edition at page 543, that if the defendant takes the objection at a proper time it is his right to have all the proper persons joined as plaintiffs, and if after the objection is raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose non-joinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed. In this case the objection was taken at the earliest stage in the written statement. It was argued before the District Munsif and before the District Judge, and both those Tribunals held, and in my view wrongly, that these two executors by reason of the power-of-attorney could sue in their own names without joining the others. No application was made to either of those Courts to amend the plaint by joining the other executors, but probably if an application had been made to the District Munsif he would have permitted such amendment on terms as to costs. The position of the District Judge might have been more difficult, although, there too the position is not so difficult as it is in this Court on second appeal, where one is conscious of the working of the rule against appeals on questions of fact, because if we allow the amendment now, it might put the defendants in a worse position than they would have been if the amendment had been allowed in the first instance; and that may be the defendants' objection to further plaintiffs being added at this stage even if the consent of these proposed plaintiffs were obtained. I think there is no course open to us but to dismiss the suit with costs of both defendants here and in the Courts below—two sets. The appeal will be allowed with two sets of costs, one to the appellant and the other to the second respondent payable by the first respondent. The first respondent's memorandum of objections must be dismissed and the second respondent's memo. of objections must be allowed both without costs.

Wallace, J.—I agree and have nothing to add.

V. N. V.
N. H.

Appeal allowed.

(1) 5 Ind. Cas. 774; 33 M. 436; 7 M. L. T. 102; 20 M. L. J. 344.

(2) 6 C. 815; 8 C. L. R. 457; 3 Ind. Dec. (N. S.) 527.

MOFEZUDDI v. EMPEROR.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 248 OF 1922

July 5, 1922.

Present :—Mr. Justice Walmsley and Mr. Justice Suhrawardy.**MOFEZUDDI AND ANOTHER—APPELLANTS**
*versus***EMPEROR—RESPONDENT.***Criminal Procedure Code (Act V of 1898), s. 297—Jury trial—Supplementary trial—Charge—Reference to former trial—Trials, original and supplementary—Punishments; uniform, principle of, application of.*

Where there are two trials—one original and the other supplementary—the duty of the Judge at the supplementary trial is to warn the Jury that the accused must have a perfectly fair trial; and that they are not to be biased by the result arrived at in the previous trial. It is neither necessary nor desirable for him to tell the Jury the offences of which the first batch of the accused were convicted. [p. 66, col. 1.]

It is impossible to apply the principle of uniformity in convictions and punishments in all cases where there are two trials—one original and the other supplementary—one batch of prisoners being tried by one Judge and one Jury and the other batch by a different Judge and different Jury. [p. 66, col. 2.]

Babu *Dasarathi Sanyal* (with him Babus *Suresh Chandra Talukdar*, *Aswini Kumar Gupta* and *Lalit Mohun Sanyal*), for the Appellants:—There are certain misdirections in the learned Judge's charge to the Jury which had vitiated the entire case and so I would contend that there ought to be a re-trial. The learned Sessions Judge should have, in all fairness to the accused, told the Jury the offences of which the first batch of the accused had been convicted about a year ago. This omission on the part of the learned Judge has prejudiced my clients. As regards the first batch the Hon'ble High Court found them guilty under the rioting section (*i.e.*, section 148, Indian Penal Code). Their conviction under section 302, read with section 149, Indian Penal Code, was set aside on appeal to the High Court. The Jury should have been informed of this. Again, the evidence of Jabanulla has been wrongly interpreted to the Jury. The learned Judge should have used, in addressing the Jury, the precise word spoken by Jabanulla in Bengali so that the Jury would have a clear notion. The word *mara* in Bengalee means kill as

well as beat. But the Judge interprets it as kill and not beat, whereas, as a matter of fact, this witness used the word *beat* and the charge also states *to beat* so and so. The Jury were evidently misled in finding out the intention of the accused. There has been a double use of the principle of constructive guilt. Where a prisoner is constructively guilty of murder, it is doubtful if he can be said to have committed the offence of murder within the meaning of section 149, so as to make other prisoners, by a double construction guilty of murder. *Vide Empress v. Jhubbun Malhotra* (1). Moreover, I beg to submit that there ought to have been uniformity in the convictions and punishments. It is a principle which all learned Judges should respect.

Mr. Orr, for the Crown, submitted that, in any event, there can be no doubt that there was voluntary grievous hurt caused to Nehal-ud-Din by dangerous weapons or means. Of course, the learned Judge was in error in speaking of a conspiracy to kill Nehal-ud-Din.

Mr. Talukdar replied briefly.

JUDGMENT.

Walmsley, J.—The two appellants, Mofezuddi and Aizuddi, were placed on their trial before the learned Sessions Judge of Backerganj and a Jury on charges of rioting and other offences. The Jury found both the accused guilty of offences under sections 148, 302, read with 149, and 302, read with 34, of the Indian Penal Code. In addition, Mofezuddi was found guilty under section 323 and Aizuddi under section 324, Indian Penal Code, and the learned Sessions Judge, accepting the unanimous verdict of the Jury, has convicted and sentenced the accused.

The case was a very serious one which resulted in the death of a man named, Nehal-ud-Din. Eleven of the accused's party were placed on their trial more than a year ago, and were convicted in the Sessions Court. On appeal to this Court, their conviction under section 302, read with section 149, Indian Penal Code, was set aside and they were all sentenced to undergo three years' rigorous imprisonment under section 148, Indian Penal Code.

(1) 8 C. 739 at p. 751; 12 C. L. R. 233; 6 Ind. Jur. 639; 4 Ind. Dec. (N. S.) 477 (P.C.).

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The objections taken to the learned Judge's charge in the present case on behalf of the appellants are as follows: It is said, in the first place, that the learned Judge was wrong in omitting to tell the Jury the offences of which the first batch of accused had been convicted. What he said was this: "In considering the case against our two accused, I must ask you to put out of your minds the fact that eleven men have already been convicted for their part in the affair and you should take this case entirely on its own merits on consideration of the evidence which has been produced before you." I think that as a proper direction. If the Judge had gone further and told the Jury the offences of which the first batch of accused had been convicted and the sentences that had been passed upon them, I fancy objection might very likely have been taken. His duty at that moment was to warn the Jury that the present accused must have a perfectly fair trial and that the Jury were not to be biassed by the result arrived at in the previous trial.

Secondly, it is said—and this is the principal objection—that the Judge has treated the evidence of Jabanulla wrongly. He referred to the evidence of this man three times, and, on each occasion, he said that Jabanulla over-heard some members of the accused's party proposing to *kill* Nehal-ud-Din. The common object stated in the charge was "to beat Nehal-ud-Din," and our attention is drawn to the fact that, in his examination-in-chief, Jabanulla used the word "beat" while, in cross-examination, he used the word "kill." The Bengali word which the witness actually employed is not given by the learned Judge. It appears to me that, in addressing the Jury, the Judge ought to have told them that Jabanulla did not say "kill" each time; or that he used a word which is capable of a more innocent meaning. I think it is quite possible that this error misled the Jury in finding that the intention of the party was to kill Nehal-ud-Din. Supposing, however, that the Judge had reminded the Jury that the witness used the word "beat" on one occasion, the Jury would, I infer, have come to the conclusion that the common object of the party was to cause grievous hurt to Nehal-ud-Din.

The third objection is this: It is said that Mofezuddi did not himself inflict any injury on Nehal-ud-Din and that, therefore, in finding him guilty under section 302, read with section 149, Indian Penal Code, there has been a double use of the principle of construction. It is said that those who caused the death of Nehal-ud-Din are guilty by construction and, therefore, in applying section 149, there is a second use of the principle. Our attention has been drawn to certain remarks in the case of the *Empress v. Jhubboon Mahton* (1). To my mind, the question in this case is perfectly simple. All the particular individuals who struck Nehal may all *inter se* be equally guilty by virtue of section 34, Indian Penal Code. But the commission of a murder is an act which is quite independent of section 34, and if a murder is committed by any member or members of an unlawful assembly in prosecution of its common object, all the members become guilty by virtue of section 149. On that ground, therefore, I think it is quite wrong to say that there has been a double use of the principle of constructive guilt.

Lastly, it has been urged before us that there ought to be uniformity in the convictions and punishments. With that general principle, of course, I agree. But it is impossible to apply this principle in all cases where there are two trials—one original and the other supplementary—one batch of prisoners being tried by one Judge and one Jury and the other batch by a different Judge and different Jury.

These are the objections which have been raised against the charge of the learned Judge in the present case. The only one to which I think effect should be given is the second, and, taking the view I do that the learned Judge was in error in repeating three times that Jabanulla talked of a conspiracy to *kill* Nehal-ud-Din, I think the conviction under section 302, read with section 149, Indian Penal Code, and similarly the conviction under section 302, read with section 34, must be set aside. On the facts, however, I have no doubt that the Jury would have arrived but for such misdirections at the finding that the accused committed an offence under section 326, read with section 149, Indian Penal Code. I, therefore, find both the appellants guilty under sec-

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tion 326, read with section 149, and direct that they do undergo rigorous imprisonment for seven years each. The convictions under sections 148, 323 and 324, Indian Penal Code, with the sentences passed under those sections will stand—the sentences to run concurrently.

Suhrawardy, J.—I agree.

B. N.

H. N.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 505 OF 1922.

September 5, 1922.

Present:—Mr. Justice Maung Kin.

D. M. ATTIVA—APPLICANT

versus

EMPEROR.

Penal Code (Act XLV of 1860), s. 225 B—Arrest on civil warrant—Rescue from custody—Surrender next day—Offence, if complete

Where a person is arrested on a civil warrant and while in the custody of the peon, he is rescued by a number of friends, though without offering any resistance himself and disappears until he surrenders himself the next day, he is guilty of an offence under section 225 B. of the Penal Code, as he took advantage of his release from custody and got out of the way of the peon.

Queen-Empress v. Muppan, 18 M. 401; 1 Weir 203; 6 Ind. Dec. (N. S.) 628, *Public Prosecutor v. Ramaswami Konan*, 31 M. 271; 18 M. J. J. 570; 8 Cr. L. J. 200, *Public Prosecutor v. Sennimalai Govindan*, 49 Ind. Cas. 656; 25 M. L. T. 290; 9 L. W. 5; 20 Cr. L. J. 208; (1919) M. W. N. 695, *re* on.

Revision of the order of the Western Sub-Divisional Magistrate, Rangoon, directing the applicant to pay a fine of Rs. 20, or to suffer six days' rigorous imprisonment.

Mr. Auzam, for the Applicant.

Public Prosecutor, for the Crown.

JUDGMENT.—I accept the findings of the learned Magistrate. They are as follows:—

A warrant was issued for the arrest of the applicant. The process-server, after showing the warrant seized him by the arm, when a number of men interfered by assaulting the peon with the result that the applicant was released. There is nothing to show, or to suggest, that the applicant struggled or made any resistance himself. A large crowd collected, and the applicant was not seen again until he surrendered himself on the following morning. In spite of the evidence of the process-server, it cannot safely be held that the applicant ran away.

The question for consideration is whether the applicant escaped from the custody of the process-server. He has been convicted of that offence under section 225B, Indian Penal Code.

The essential facts found are that the applicant was in the lawful custody of the process-server when he got released, and that thereafter he was not seen again until he surrendered himself.

It has been argued that it was due to no fault of his that he was released, and that he had no intention to escape from the custody of the process-server, because he surrendered himself on the following morning. In my judgment it is immaterial whether he surrendered himself or not as alleged. It is clear that he was rescued by a number of his friends from the lawful custody of the process-server, and that he took advantage of this and disappeared, and thus got out of the way of the process-server. I think it must be held that the applicant escaped within the meaning of the section under which he was convicted.

In *Queen-Empress v. Muppan* (1) the respondent was convicted under section 224, Indian Penal Code, for escaping from the lawful custody of a Police Constable. Having been legally arrested, he was subsequently left unguarded; and escaped. He was then re-arrested and tried and convicted under that section. The law was stated in the following terms:—

“A man legally arrested for an offence must submit to be tried and dealt with

(1) 18 M. 401; 1 Weir 203; 6 Ind. Dec. (N. S.) 625.

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according to law. If he gains his liberty before he is delivered by due course of law, he commits the offence of 'escape.' It has been long established that, even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody, the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law (1 Russ, 5th Edition, page 567; Roscoe, 11th Edition, page 453; and Bishop's Criminal Law, 7th Edition, section 1104)."

In *Public Prosecutor v. Ramaswami Konan* (2), a case where a prisoner escaped after he was arrested owing to the neglect or consent of the person who had him in custody, the learned Judges approved of the law stated in *Muppan's case* (1), and they observed that the fact that the person who had the custody of the accused went to sleep did not, in any way, put an end to the custody, or affect the accused's duty to submit to the judgment of the law.

These two cases were followed by a Bench of the Madras High Court in the *Public Prosecutor v. Sennimalai Goundan* (3), and they pointed out that the ground of distinction made by Krishnawsami Iyer, J., *Public Prosecutor, In re*, (4) was not sound. In the latter case the learned Judge refused to follow those two cases, on the ground that they had no application to a case of arrest in execution of a civil process. They also observed that under the terms of the warrant before them the process-server was only authorised to release the judgment-debtor on actual receipt of the decretal amount.

I agree with the learned Judges. Whether the warrant is issued by a Magistrate or other officer empowered to do so, or by a Judge of a Civil Court, the requisition is the same, viz., that the person named in the warrant is to appear before an authority empowered to enquire into a case made against him.

The case before me is stronger than any of the cases above cited. The applicant took advantage of his release from

(2) 31 M. 271; 18 M. L. J. 540; 8 Cr. L. J. 200.

(3) 49 Ind. Cas. 656; 25 M. L. T. 290; 9 L. W. 216; 20 Cr. L. J. 208; (1919) M. W. N. 695.

(4) 7 Ind. Cas. 392; 8 M. L. T. 286; (1910) M. W. N. 592; 11 Cr. L. J. 477.

custody and disappeared. The applicant was rightly convicted and his application is dismissed.

Application dismissed.

N. K.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 1059 OF 1922.

January 31, 1923.

Present :—Mr. Justice Newbould and Mr. Justice Suhrawardy.

EUSAF ALI AHMAD KHAIRAJ AND OTHERS—ACCUSED—PETITIONERS
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 106 (1), (3)—Bond to keep the peace—Appellate Court, jurisdiction of.

An Appellate Court cannot exercise the power given by section 106 (3), Criminal Procedure Code, where the conviction has not been by a Court specified in sub-section (1).

Emperor v. Momin Malita, 35 C. 434; 7 C. L. J. 602; 12 C. W. N. 752; 8 Cr. L. J. 9; 4 M. L. T. 340, relied on.

Rule.

Babus Girija Prosanno Sanyal, for the Petitioners.

JUDGMENT.—The petitioners were convicted by a Magistrate of Second Class powers of offences punishable under sections 147 and 342, Indian Penal Code. On appeal to the District Magistrate, that Court upheld the convictions and further, passed an order requiring the nine petitioners to execute bonds under section 106, Criminal Procedure Code. But it has been held by this Court in *Emperor v. Momin Malita* (1), that the Appellate Court cannot exercise the power given by section 106 (3), Criminal Procedure Code, where the conviction has not been by a Court specified in sub-section (1). A Magistrate of Second Class powers is not included in the Courts named in sub-section (1). We accordingly make this Rule absolute and set aside the order of the District Magistrate of Dinajpore, dated the

(1) 35 C. 434; 7 C. L. J. 602; 12 C. W. N. 752; 8 Cr. L. J. 9; 4 M. L. T. 340.

KRISHNAMURTHY AIYER v. PARASURAMA.

6th November 1922 directing the petitioners to execute bonds for keeping the peace under section 106, Criminal Procedure Code, s. c. m. Rule made absolute.

SUKHARI NONIA v. RAMKHELAWAN.

the post (see Mayne on Criminal Law, 4th Edition, p. 872).

The English cases of *Rex v. Burdett* (1) and *Rex v. Williams* (2), and the Indian case in *Queen v. Ameer Khan* (3), support this view.

The Third Presidency Magistrate is directed to take the complaint on his file and dispose of it accordingly.

V. N. V.

Order accordingly.

W. C. A.

- (1) (1820) 4 B. & Ald. 95; 3 B. & Ald. 717; 1 St. Tr. (N. S.) 1; 22 R. R. 539; 106 E. R. 873.
 (2) (1810) 2 Camp 506, 646; 11 R. R. 781.
 (3) 17 W. R. Cr. 15 at p. 17; 9 B. L. R. 36.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 594 OF 1922.
 CRIMINAL REVISION PETITION NO. 508 OF 1922.

January 26, 1923.

Present.—Mr. Justice Spencer.

M. R. KRISHNAMURTHY AIYER—

COMPLAINANT—PETITIONER

versus

C. V. PARASURAMA AIYAR—

ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 179, 182—Defamatory letter sent by post—Offence, where triable.

Where a letter containing defamatory matter is posted at one place in order that it may be read at another, the offence of defamation is triable, under sections 179 and 182 of the Code of Criminal Procedure, either at the place where the letter was posted or at the place where it was intended to be read.

Rex v. Burdett, (1820) 4 B. & Ald. 95; 3 B. & Ald. 717; 1 St. Tr. (N. S.) 1; 22 R. R. 539; 106 E. R. 873. *Rex v. Williams*, (1810) 2 Camp 506, 646, 11 R. R. 781. *Queen v. Ameer Khan*, 17 W. R. Cr. 15 at p. 17; 9 B. L. R. 36, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Third Presidency Magistrate, Egmore Madras, in Calendar Case No. 8333 of 1922, dated the 27th June 1922.

Messrs. K. S. Ramabhadra Aiyar and C. Sankararama Sastry, for the Petitioner.

Mr. L. S. Veeraraghava Aiyar, for the Respondent.

ORDER.—If the complainant can prove that the letter was posted in Madras with a view to be read in Tinnevely, the offence of defamation is triable either in Madras or in Tinnevely under sections 179 and 182 of the Code of Criminal Procedure, seeing that the accused has done all in his power towards publication and has lost control of the letter when he has committed it to

PATNA HIGH COURT.

CRIMINAL REVISION NO. 17 OF 1923.

January 31, 1923.

Present.—Mr. Justice Ross.

SUKHARI NONIA AND OTHERS—2ND

PARTY—PETITIONERS

versus

RAMKHELAWAN THAKUR AND OTHERS

1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145 —Dispute concerning land—Magistrate, dealing with larger area—Jurisdiction, excess of.

In a proceeding under section 145 of the Criminal Procedure Code as regards a dispute concerning land, a Magistrate acts in excess of his jurisdiction if he deals with a larger area of land in his order than what is included in the proceeding, and his order is liable to be set aside.

Appeal against an order of the Magistrate, First Class, dated the 20th November, 1922.

Mr. S. P. Varma, for the Petitioners.

Mr. Shiveshwar Dayal, for the Opposite Party.

JUDGMENT.—The only point urged in support of this application is, that the Magistrate has dealt with a larger area of land than is included in the proceedings drawn up in the case, and has, therefore, exceeded his jurisdiction: as was held in *Amriteshwari Debi v. Darpa Narain Das* (1). The proceedings were drawn in respect of

EMPEROR v. NASARVANJI BOMANJI.

5 *bighas* 10 *kothas* and 18 *dhurs*. The Magistrate deals with 7 *bighas* of land settled by Karnoul Factory with certain persons. He then proceeds to deal with the land of each of these persons. He says that the first party does not claim the lands of Khobhari and Dukhni (1 *bigha* 10 *cottas* in each case) and he confirms these persons in their possession. He then says that the second party do not contest the possession of first party of 1 *bigha* of Dhan's land. This reduces the area in dispute to 3 *bighas* and he deals with these three *bighas* and confirms the first party in possession. It is, therefore, clear that he has passed orders about the possession of at least 6 *bighas*. It is said on behalf of the opposite party that there was no dispute about the lands of Khobhari and Dukhni and the real dispute was only about 4 *bighas* and, therefore, the Magistrate has not gone beyond the land dealt with in the proceedings. But he has in fact passed orders about 6 *bighas*, and it is impossible to be sure with regard to any of the really contested area whether that was included within the proceedings or not.

The whole order is, therefore, bad and must be set aside.

W. C. A.

Order set aside.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE NO. 70 OF 1922.

November 23, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

EMPEROR—PROSECUTOR

versus

NASARVANJI BOMANJI—ACCUSED.

Bombay Public Conveyances Act (VII of 1920), s. 2—Public conveyance—“Plying for hire,” meaning of—Conveyance kept for letting out on hire, whether public conveyance.

The essential idea of a conveyance being used for the purpose of plying for hire is, that it should be available at some public place, or on some regular route for any one who wishes to travel by it. A conveyance, therefore, which is kept for letting out on hire to particular persons, does not become

by such user a public conveyance within the meaning of section 2 of the Bombay Public Conveyances Act.

Criminal Reference made by the Sessions Judge, Poona, to reverse the conviction and sentence passed by the Cantonment Magistrate, First Class, Poona.

Mr. S. S. Patkar, for the Crown.

JUDGMENT.

Macleod, C. J.—This is a reference under section 438 of the Code of Criminal Procedure by the Sessions Judge of Poona in the matter of the conviction of one of Nasarvanji Bomanji by the Cantonment Magistrate of Poona under section 22 of Bombay Act VII of 1920.

The offence charged was that the accused has let his *tonga* for hire without a license. It would appear from the judgment that the only evidence against the accused was that a Lieut. Flitcroft was found driving in a *tonga* belonging to the accused and that he stated that he had hired it several times before. The accused said that he had three conveyances which he hired out to such persons as he wished, but contended that they did not become by reason of such user public conveyances. The learned Magistrate had no doubt that the *tonga* was a public conveyance and required a license, but he ignored entirely the definition of a public conveyance in section 2 of the Act and based his opinion on grounds which can only be considered irrelevant.

Under the Act a public conveyance is a vehicle which is used for the purpose of plying for hire for the conveyance of passengers and goods.

The word ‘ply’ has many meanings. From the Oxford Dictionary I find that the word can be used of a vessel or its master as meaning to go more or less regularly to and fro between certain places, and in the same sense it is used of a land-carriage. It is also used of a boatman, porter, hackman, to mean to wait or attend regularly, to have one’s stand at a certain place for hire or custom. Although it may be said that a ship, a boat or a conveyance plies between two named ports or places, it seems that the expression “ply for hire” is more correctly used only with reference to the act of the individual who controls the ship, boat or conveyance. However that may

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be, the essential idea of a conveyance being used for the purpose of plying for hire is that it should be available at some public place or on some regular route for any one who wishes to hire it or travel by it. This is made clear by section 26 (ii) which says that the driver of a public conveyance cannot refuse without reasonable cause to carry any person desiring to hire the conveyance. There seems to be a very distinct difference between "letting for hire" and "plying for hire." If A keeps motors at Poona in order to let them out to clients who wish to go to Mahabaleshwar, the motors would not become on that account public conveyances; it would be otherwise if A kept a motor-bus which plied regularly between Poona and Mahabaleshwar. If it is considered desirable that conveyances which are kept for letting out on hire should be licensed, then the Act must be amended. In my opinion, the Sessions Judge was right, the conviction must be quashed and the fine, if paid, refunded.

Crump, J.—I agree.

W. C. A.

*Conviction set aside.***PATNA HIGH COURT.**

CRIMINAL REVISION NO. 3 OF 1923.

January 19, 1923

Present:—Mr. Justice ROES.

BAIJNATH SAHAY AND OTHERS—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342—Failure to examine accused at close of trial, effect of—Cattle Trespass Act (I of 1871), s. 22—Compensation not claimed in petition of complaint—Magistrate, jurisdiction of, to grant.

The failure to examine an accused person under section 342 of the Criminal Procedure Code vitiates the proceedings

Where compensation is not claimed in the petition of complaint, the Magistrate is not justified in awarding compensation under section 22 of the Cattle Trespass Act.

Application from an order of the Deputy Magistrate, Hazaribagh, dated the 1st September 1922, affirming that of the Sub-

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Deputy Magistrate, Chatra, dated the 19th July 1922.

Mr. S. K. Mitra, for the Petitioners.

JUDGMENT—This is an application against an order of the Sub-Deputy Magistrate of Chatra, affirmed on appeal, on the petitioners to pay Rs. 40 to the opposite party as compensation under section 22 of Act I of 1871. The first ground taken is that the petitioners were not examined under section 342 at the trial and, consequently, the proceedings were vitiated. This ground is, in my opinion, a good ground and the order, consequently, cannot stand. It is further urged that no compensation was claimed in the petition of complaint and that no allegation was made as to the loss caused by the seizure of the cattle. For this reason also the Magistrate was not justified in awarding compensation which was not prayed for. The third ground that the person under whose orders the cattle were seized is not liable to compensate the complainant is, in my opinion, not a good ground. He is equally one of the persons who seized the cattle with those who directly seized them under his orders. But on the first two grounds the application must succeed. The order for compensation is set aside. The fine, if paid, will be refunded.

W. C. A.

*Application accepted.***CALCUTTA HIGH COURT.**

CRIMINAL REVISION NO. 467 OF 1922.

July 28, 1922.

Present:—Mr. Justice Walmsley and Mr. Justice Chotzner.

BAISHNAV CHARAN DAS AND OTHERS—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 367—Judgment of Criminal Court, contents of—Appellate Court, duty of.

Where a Magistrate does not dismiss a criminal appeal summarily but gives a hearing to the Pleaders of the parties and writes a judgment in which all he says is that he is satisfied that the judgment of the Trial Court is substantially right,

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the judgment is not in accordance with the provisions contained in section 367 of the Criminal Procedure Code and is liable to be set aside by the High Court.

Rule against the order of the Deputy Commissioner, Sylhet.

Babu Pronath Dutt, for Babu Hemendra Kumar Das, for the Petitioners.—The only ground upon which I obtained the Rule is that the judgment of the learned Additional District Magistrate is not in accordance with the law. He merely writes:—I agree substantially with the judgment of the lower Court. The provisions regarding the contents of a judgment are contained in section 367, Criminal Procedure Code, a reference to which will convince your Lordships of the absolute justice of my ground. The judgment does not contain the points for determination, the reasons for the decision at which the learned Magistrate has arrived and these are fatal defects.

Babu Lalit Mohun Sanyal, for the Crown, submitted that it is not obligatory upon the Magistrate to set out all the facts and circumstances and record all his reasons in detail. He might have as well dealt with the appeal in a summary way. The First Court's judgment is sufficient to understand what the learned Appeal Court meant by saying—"I substantially agree with the judgment of the lower Court."

Mr. Dutt was not called to reply.

JUDGMENT.—This Rule was issued upon the Deputy Commissioner of Sylhet calling upon him to show cause why the judgment of the Additional District Magistrate on appeal should not be set aside, and an order passed directing that the appeal be re-heard. The learned Magistrate might have dismissed the appeal summarily. Had he done so, it might have been impossible to criticise his action. He did not, however, dismiss it summarily. He gave a hearing to the Pleaders of the parties and wrote a judgment and all he said was that he was satisfied that the judgment of the Trial Court was substantially right. Such a judgment is not in accordance with the provisions contained in section 367, Criminal Procedure Code, and, on looking at the contents of the First Court's judgment, I think it is most inadequate. The result is, that the Rule is made absolute, the judgment of the lower

Appellate Court is set aside and the case is remitted to that Court to be heard afresh and disposed of in accordance with law.

Chotzner, J.—I agree.

B. N.

Rule made absolute.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 441 OF 1922.

July 13, 1922.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Cuming.

PATAL GHOSE AND OTHERS—ACCUSED—
PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 323, 325—
Alteration of conviction by Appellate Court—Prejudice to accused.*

The petitioners and one K were convicted by the Trial Court under section 325, Indian Penal Code, for having broken the knee-cap of the complainant. The Appellate Court found that, so far as the injury to the knee-cap was concerned, that had been caused by the accused K and it came to the conclusion that the petitioners had been guilty of the offence under section 323, Indian Penal Code, inasmuch as they had inflicted other injuries on the complainant:

Held, that the alteration of the conviction of the petitioners from section 325 to section 323 by the Appellate Court was unauthorised, inasmuch as they had not been given any opportunity of answering the charge in the first instance of inflicting injuries other than the injury to the knee-cap. [p. 72, col. 1.]

Babu Manmatha Nath Mukerjee (with him Babu Ramani Mohun Chatterji), for the Petitioners.—My ground before your Lordships is that the accused for whom I appear have had not a proper trial, inasmuch as they were not required to meet the charge of inflicting any other injury or injuries on the complainant than the one inflicted on the knee-cap. So the learned Sessions Judge should not have altered the conviction from section 325, Indian Penal Code, to section 323, Indian Penal Code, without giving my clients an opportunity of answering the charge under section 323, Indian Penal Code. Under these circumstances, the conviction is bad in law and cannot be sustained.

MARMADUKE PICKTHALL, In re.

Babu Atulya Charan Bose, for the Opposite Party, was not heard.

JUDGMENT.—In this case four persons named Patal Ghose, Kanta Das, Nalini Chandra Katu alias Nolini Kalir and Gui Ram Mallik were originally convicted by the Sub-Divisional Magistrate of Barrackpur, under sections 458 and 325, Indian Penal Code, and sentenced under the first section to be detained till the rising of the Court and to pay a fine of Rs. 100 each in default to one month's rigorous imprisonment, and under the second section to pay a fine of Rs. 200 each and in default to two months' rigorous imprisonment. There was an appeal to the learned Second Additional Sessions Judge of the 24-Pergannas and that officer, while maintaining the conviction of Kanta Das under sections 458 and 325, altered the conviction of the petitioners Patal, Nalini and Gui Ram into one under section 323 from section 325 and reduced the fine on these three petitioners to a fine of Rs. 100 each and in default to two months' rigorous imprisonment.

The learned Sub-Divisional Magistrate of Barrackpur found that the four persons, whose names have been set out above, had been guilty under section 325 of the offence of grievous hurt, inasmuch as they had broken the knee-cap of the complainant. The learned Additional Judge by his judgment found that, so far as the injury to the knee-cap was concerned, that had been caused by the accused, Kanta Das, and he came to the conclusion that the petitioners before us had been guilty of the offence under section 323, inasmuch as they had inflicted other injuries on the complainant.

Mr. Mukherjee, who appears for the petitioners, has pointed out that the petitioners before us were not originally tried before the learned Sub-Divisional Magistrate of Barrackpur for any offence relating to the infliction of injuries other than the injury to the knee-cap and that, therefore, the alteration of the conviction from section 325 to section 323 by the learned Additional Sessions Judge of 24-Pergannas was unauthorised, inasmuch as these three petitioners had not been given any opportunity of answering the charge in the first instance of inflicting injuries other than the injury to the knee-cap. We think that this contention must prevail and accordingly

we set aside the conviction and sentence passed upon the three petitioners under section 323.

The result, therefore, is that while the conviction and sentence under section 323 as regards the three petitioners before us is set aside, their conviction under section 458, Indian Penal Code, which was maintained by the Second Additional Sessions Judge remains unaffected.

B. N.

Order accordingly.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION NO. 320 OF 1922.

December 6, 1922.

Present.—Sir Norman Macleod, Kt.

Chief Justice, and Mr. Justice Crump.

In re MARMADUKE PICKTHALL, (No. 2)
Contempt of Court—Newspaper article—Apology.

Accused, being the Editor, Printer and Publisher of a newspaper, published an article in his paper which was a gross libel on the Judges of the High Court. A few days afterwards he published an apology for the offensive expressions contained in the article. In a proceeding calling on him to show cause why he should not be committed for contempt of Court:

Held, that the apology could not be accepted, as, while it might be to some extent a reparation, it could not overtake and counteract the mischief already done by the original publication. [p. 75, col. 2.]

Marmaduke Pickthall, 72 Ind. Cas. 17; 25 Bom. L. R. 15 at p. 20; (1922) A. I. R. (B.) 8; 24 Cr. L. J., 289; *Reg v. Gray*, (1900) 2 Q. B. 36; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484; 16 T. L. R. 305, *Narasinha Chintaman Kelkar*, *In re*, 2 Ind. Cas. 288; 33 B. 240; 10 Bom. L. R. 1040; 4 M. L. T. 359; 8 Cr. L. J. 426 and *Satyabodha Ramchandra*, *In re*, 69 Ind. Cas. 84; 24 Bom. L. R. 928; (1922) A. I. R. (B.) 426; 23 Cr. L. J. 644, referred to.

Rule.

Mr. Kanga, (Advocate-General with him Mr. S. S. Patkar, Government Pleader), for the Crown.

Mr. Thakor, instructed by Messrs. Malvi, Mody, Ranchhoddas & Co., for the Respondent.

JUDGMENT.

Macleod, C. J.—On November 13, 1922, a Rule was issued at the instance of the Government of Bombay against the respondent as Editor, Printer and Publisher of *The Bombay Chronicle* to show cause why

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he should not be committed for contempt of Court in respect of the publication of an article headed 'E1 Passant' containing the paragraph "Long live our Judges" in the Sunday issue of the paper of October 8th, 1922.

The respondent published an apology in the issue of the paper of October 11th, characterizing the paragraph as highly objectionable and apologizing to the Chief Justice and Judges of the High Court for the offensive expressions it contained and for the appearance of such a paragraph in his paper as the result of defective supervision due to illness. A copy of the paper containing the apology was sent to the Prothonotary for the information of the Chief Justice and Judges and came before us in due course. In his affidavit filed in showing cause against the Rule, the respondent said he knew of the publication of the article in the paper after it was printed therein. On Saturday, October 7, he was in his office till about 8 p. m. until when the proofs of the article were not received by him for perusal. He left office for dinner and in the ordinary course he could have returned to office about 10 p. m. As he felt tired and exhausted he did not go back to office. He had had a serious illness. The suggestion in the affidavit that if we had seen the apology we would not have granted the Rule was singularly ill-advised, as a copy of the apology was annexed to the petition of the Government Pleader. The offensive and objectionable nature of the allegations against the Judges in the paragraph referred to in the petition having been admitted, the only question which remains is what order should be made on the Rule. We demur entirely to the veiled suggestion in the respondent's affidavit that the publication of an apology must necessarily be sufficient satisfaction for the contempt committed. In this case, at any rate, it was necessary that the respondent should be called upon to appear before us. Then it was unfortunate for the respondent that this was the fifth occasion during the last three and a half years on which we have had to complain of matter published in *The Bombay Chronicle*. On the first two occasions we were satisfied with apologies without ordering the then Editor to appear before us in Court.

On June 9th 1922 a Rule was issued against the present respondent with regard to an article headed. "The Malegaon Appeals." And on June 10th, another Rule was issued with regard to an article headed "British Justice." In his affidavit on the first Rule the respondent contended that he had done nothing beyond offering reasonable criticism of the judgment of the Division Bench and pointed out what the public opinion in the country expected of the High Court for whom he never intended to show disrespect. The acting Chief Justice in his judgment of September 20th, described the article in question in the following words: *Marmaduke Pickthall, In re* (1).

"We have considered the article and the affidavit in the light of the argument urged before us. I am prepared to concede that the article does not constitute a personal abuse of the Judges such as we find, for instance, in *Reg. v. Gray* (2) or *Narasinha Chintaman Kelkar, In re* (3), nor does the article contain such a comprehensive condemnation of Courts including this Court and British Justice as is to be found in the recent case of *Satyabodha Ramchandra, In re* (4). Taking the article as a whole, and making due allowance for the style, the view point and the possible political bias of a journalist, I find it difficult to avoid the conclusion that the article does attribute improper motives and political bias to the Judges in upholding the several convictions... The article as a whole would leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done on political grounds to some of the accused who were apparently innocent. In other words, it attributes judicial dishonesty to the Judges."

The Court then imposed a fine of Rs. 200 without costs.

In his affidavit on the second Rule the respondent said he knew of the publication in the *Chronicle* of the article complained of after it was printed therein. It was impossible for him as Editor of the paper per-

(1) 72 Ind. Cas. 17; 25 Bom. L. R. 15 at p. 20; (1923) A. I. R. (B.) 8; 24 Cr. L. J. 289.

(2) (1900) 2 Q. B. 36; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484; 16 T. L. R. 305.

(3) 2 Ind. Cas. 288; 33 B. 240; 10 Bom. L. R. 1040; 4 M. L. T. 359; 8 Cr. L. J. 426.

(4) 69 Ind. Cas. 84; 24 Bom. L. R. 928; (1922) A. I. R. (B.) 426; 23 Cr. L. J. 644.

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sonally to supervise everything that went into the paper every day. If he had seen the article in question he would not have passed it for publication. It was published through a mistake of the Assistant Editor and he was sorry for the publication. Neither he, nor the Assistant Editor meant any disrespect to the Court. When the Rule came on for hearing the Court considered that the statements in the affidavit afforded under the circumstances a reasonable explanation of the manner in which the extract came to be published without his knowledge and discharged the Rule.

It cannot be suggested for a moment that the Court has not treated the Editor of the *Chronicle* with the very greatest leniency, which appears to me, I much regret to say, to have been entirely misunderstood. The respondent charged with commenting on pending proceedings says: "you cannot expect me to supervise everything that goes into the paper" and he is discharged. The respondent accuses the Judges of judicial dishonesty and he is fined Rs. 200 without costs. The paragraph now before us evidently refers to these two proceedings for contempt, for it begins, "Speaking of contempt of Court," though there was no previous reference to the subject. The object of the writer was to convey to his readers the idea that the Judges were the creatures of the Executive. This is not a criticism on a pronouncement of the Judges in a particular case, it is a sweeping assertion of the vilest character against all the Judges in India. Entirely accepting the respondent's statement that the article in question was very far from being in accordance with his policy or views, with the remark that he could hardly have said less and might well have expressed himself more directly, still the responsibility for the publication of the objectionable matter must rest with him. The same excuse which secured his discharge in September will hardly avail him again. He had had his warning that it was eminently necessary either that he should revise the paper himself before it went to press, or that he should have some responsible person on his staff whose duty it was to put before the Editor any objectionable matter. If the impression is abroad that the grossest libels on the Judges can be published with impunity provided an apology

is offered, then it is time that such an impression should be removed. An ignorant public is far more likely to believe the imputation and discard the apology.

As was said by Crump, J., on the last Rule against the respondent:

"It is impossible to permit the public to be poisoned with such calumnies as these. In a country such as this where more importance is attached to the printed word than it perhaps at times deserves, it would be difficult for the average reader to read the language used without conceiving grave doubts as to the integrity and impartiality of the Judges of the Court. Therefore, in the interests of the administration of Justice the Court cannot overlook this contempt."

The imposition of a nominal fine has been found to be useless. The ink was hardly dry on that judgment before the offence was repeated. If an individual had been libelled, a substantial sum would have been awarded for damages on the principle that a newspaper should not be tempted to increase its profits by encroaching on private rights. We are now acting in defence of public rights. The respondent must pay a fine of Rs. 5,000 and the costs of the Rule. We allow a week for the payment of the fine.

Crump, J.—So far as principles go, I have nothing to add to what I have said in my judgment of September 20th, 1922. The article now in question is plainly a contempt, and in view of the past record of this paper I agree that the time for leniency is gone. In the last case we dealt leniently with the offence because it was apparent to us that the true limitations on criticism of this nature were imperfectly understood, and we hoped that the result of our order would be that such criticism would be confined within its proper limits. The result has not been achieved. The apology in the present case cannot be accepted. It is not the first instance of careless supervision, and an apology does not remedy the evil caused by publication of the objectionable matter. If, as I have already pointed out, we act in the interest of the administration of justice it is clear that while an apology may be to some extent a reparation on the part of the offender, it cannot overtake and counteract the mischief already done

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by the original publication. Where the publication is due to a repetition of negligence which has been condoned in the past, an apology becomes little more than an idle form. I agree in the order proposed.

W. C. A.

Rule made absolute.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 680 OF 1922.

December 13, 1922.

Present:—Mr. Justice Adami.

CHHEDI UPADHYA—COMPLAINANT—
PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 211—False charge of offence, what amounts to.

The failure of a complainant to prove his case is not the same thing as the institution of a maliciously false case, so as to sustain a charge of an offence under section 211 of the Penal Code.

Appeal from the decision of the Sub-Deputy Magistrate, Bhabhua, District Shahabad.

Mr. S. P. Varma, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The petitioner laid a complaint before the Magistrate under section 379, Indian Penal Code. The Sub-Divisional Officer directed the Sub-Inspector to enquire and report. In his explanation, the Sub-Deputy Magistrate states that the case being a cognizable one was sent to the Police for investigation. What this means is not quite clear.

The Police, it appears, reported that the case was not true and then the Sub-Divisional Magistrate issued a notice on the complainant to show cause why he should not be prosecuted under section 182, Indian Penal Code. It seems from the explanation of the Sub-Deputy Magistrate that the complainant came forward and undertook to prove his case, but this is not shown in the order sheet. However, on the 24th of October 1922 the Sub-Divisional Magistrate transferred the case to the Sub-Deputy Magistrate for disposal, and thereafter on the same day the Sub-Deputy Magistrate examined the complainant and four of his

witnesses and on the 27th October cross-examined the witnesses and examined the witnesses for the other side. It appears that these witnesses were produced by the Court Sub-Inspector. Thereafter on the 14th November the Sub-Deputy Magistrate drew up an order in which he found that the complainant and his witnesses had failed to prove the complainant's case and that they were not to be relied on. He found the case was false and dismissed the complaint under section 203, Criminal Procedure Code. He found that the petitioner filed a complaint against Ramsaroop Singh and Janki Singh, accusing them of theft with intent to cause injury and thereupon ordered that proceedings under section 476, Criminal Procedure Code, should be drawn up against the petitioner for prosecution under section 211, Indian Penal Code. When the Sub-Divisional Magistrate proceeded on the Police report stating the Police report to be false it was open to him to dismiss the case on the ground that it was false and then issue notice on the complainant to show cause why he should not be prosecuted. The learned Sub-Divisional Officer, however, did not dismiss the complaint but apparently gave the complainant a chance of showing that the report of the Police was untrue and that his case was a true one. But even so, the procedure before the Sub-Deputy Magistrate appears to be wrong. He has practically held a trial allowing the cross-examination of the prosecution witnesses and calling of the defence witnesses. This is not the regular procedure. The question before the Trying Magistrate was whether *prima facie* the complainant has made out a true case which would justify the summoning of the accused. What happened really was a trial of the complainant's case in the absence of the accused, though witnesses for the accused were called. Now, furthermore, from the order of the Sub-Deputy Magistrate and the reasons that he has given in his order it is not clear to me that his enquiry showed the case to be maliciously false. It is true that the complainant failed to prove his case, but failure to prove a case is not the same thing as the institution of a maliciously false case.

Considering the procedure followed and in view of the above reasons, I do not think that any further proceedings should be

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taken in the case and I direct that the order for the prosecution of the petitioner should be set aside.

Z. K.

*Order set aside.***CALCUTTA HIGH COURT.**

CRIMINAL REVISION NO. 968 OF 1922.

January 31, 1923.

Present.—Mr. Justice Newbould and Mr. Justice Suhrawardy.

KIRAN CHANDRA CHOWDHURY—1ST PARTY—PETITIONER

versus

RAMESH CHANDRA CHOWDHURY AND OTHERS—2ND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 137, 140 (2)—Order for removal of nuisance—Application for enforcement made to successor of Magistrate—Jurisdiction to go behind order.

In dealing with an application to enforce an order under section 137 of the Criminal Procedure Code, made by his predecessor, a Magistrate acts in excess of his powers and without jurisdiction in going behind that order, and coming to a decision as to its legality.

Criminal Revision.

Babu Dasarathi Sanyal (with him Babus Bir Bhusan Dutt and Santosh Kumar Bose), for the Petitioner.

Babu Narendra Kumar Das, for the Opposite Parties Nos. 4, 7, 10, 11 and 13.

Babus Chandra Sekhar Sen and Paresh Chandra Sen, for the Opposite Party No. 1.

JUDGMENT.—This Rule is directed against an order of the Additional Sub-Divisional Magistrate of Chittagong refusing to enforce an order passed by his predecessor under section 137, Criminal Procedure Code. On the 29th October 1920 the then Sub-Divisional Magistrate of Chittagong made an order absolute directing the opposite party in this Rule to remove the nuisance from a tank either by re-excavating or by filling it up or by cleaning the water-weeds and giving other directions. This order was not obeyed. It is not necessary to set out all the events that happened, but on the 14th July 1922 the petitioner who has obtained this Rule, applied to the present Sub-Divisional Officer to enforce the order,

That application was refused on the ground that the order passed under section 137, Criminal Procedure Code, was an illegal order. We hold that the Magistrate was not justified in going behind the order of his predecessor and coming to a decision as to its legality.

It is pointed out that under section 140 (2), Criminal Procedure Code, the Magistrate has discretion, but this discretion must be a judicial discretion and no Magistrate has judicial discretion to sit as a Court of Appeal and decide whether an order passed by a Magistrate of concurrent jurisdiction was a proper order or not. For these reasons we hold that the Magistrate exceeded his powers and acted without jurisdiction. We have also considered whether or not the original order passed by the First Sub-Divisional Magistrate was legal or not, and we hold that on the findings arrived at by the Magistrate he had jurisdiction to pass the order which he did pass under section 133, Criminal Procedure Code, and make it absolute under section 137, Criminal Procedure Code. The learned Sub-Divisional Magistrate who doubted the correctness of this order has referred to rulings of other High Courts. It is unnecessary to discuss these, though we do not agree that they cannot be reconciled with the decisions of this Court. The decisions in the case of *Bistoo Chunder Chuckerbutty, In re* (1) and in the case of *Indra Nath Banerjee v. Queen-Empress* (2) show that the Magistrate has power to act under section 133, Criminal Procedure Code, in a case like the present.

We accordingly make the Rule absolute and set aside the order of the Additional Sub-Divisional Magistrate of Chittagong, dated 5th September 1922, rejecting the application of the petitioner under section 140 (2), Criminal Procedure Code, and we direct that the Magistrate do pass orders on that application according to law.

S. C.

Rule made absolute.

(1) 10 W. R. 27 Cr.

(2) 25 C. 425; 2 C. W. N. 113; 13 Ind. Dec. (N. S.) 82.

BABURAO V. MUNICIPAL COMMITTEE.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 213 OF 1922.

September 13, 1922.

Present.—Mr. Hallifax, A. J. C.

BABURAO—ACCUSED—APPLICANT

*versus*MUNICIPAL COMMITTEE, NAGPUR—
NON-APPLICANT.*Punishment—Daily fine, sentence of—Illegality.*

The infliction of a daily fine until the accused complies with the order passed against him is illegal, as no person can be punished for a thing he has not done but may possibly do in the future or is even likely to do in future.

Revision of an order, dated the 14th July 1922, passed by the City Magistrate, Nagpur, in Criminal Case No. 26 of 1922.

Mr. W. H. Dhabe, for the Accused.

Mr. M. B. Niyogi, for the Municipal Committee.

Mr. G. P. Dick, for the Crown.

FACTS.—The Municipal Committee, Nagpur, prosecuted the applicant under section 139 of the C. P. Municipal Act No. XVI of 1903 for disobeying a written notice said to have been served upon the applicant on 19th July 1917, calling upon him to remove some portion of his building built by him contrary to sanctioned plan. He was convicted under section 139, read with section 66 (1), of the C. P. Municipal Act, and sentenced to pay a fine of Rs. 5 in addition to Re. 1 per day from 14th August 1922, onwards, in case he does not remove the encroachment or obtain sanction of the Municipal Committee to its continuance.

ORDER.—I do not feel called upon to state again the obvious reasons for holding that no person can be sentenced to punishment for a thing he has not done but may possibly do in the future or even is likely to do in the future. This particular order is not even more impossible than the orders of the same kind that I have met. The period of the daily fine usually begins on the day on which the sentence is passed and is ordered to end on the occurrence of some uncertain future event. In this case even the beginning of the infliction of the fine is uncertain. It is to begin on a future date subject to the occurrence of one of two events, and presumably to end also on the occurrence of one or other of them. That portion of the sentence in which it is ordered

that a daily fine of one rupee shall be paid is set aside.

2. With the conviction itself I see no cause whatever for interference. There is no question of notice nor of the validity of any bye-law. On 22nd February 1916 the accused was given permission to build a house according to a certain plan, the permission being subject, under section 66 (1) of the Municipalities Act, to the written direction that he should have a free passage way in front of the building of six feet in width. He left the free passage of four feet only and thereby intentionally and indeed contumaciously failed to comply with the condition subject to which the permission had been given to him, that is: an offence punishable under section 139 of the Act.

3. A certain bye-law has been mentioned by the learned Pleader for the applicant, by which, as I understand it, the Municipal Committee binds itself, perhaps unnecessarily, to impose a minimum width of free passage in front of any building in respect of which it gives sanction under section 66 (1) of the Municipalities Act. We are in no way concerned with that. I am informed that this minimum was reduced from six feet to four feet shortly after or even before this prosecution was instituted. That may indicate that it was scarcely worth while prosecuting the applicant, though it makes by no means certain, and it is to be presumed that the Municipality considered this matter. Even if it is so, the applicant is still technically guilty, and in the circumstances a fine of five rupees may well be called only a technical punishment.

4. Reference was also made to the section 66 (1) which enacts that the Committee shall make full compensation to the owner for any loss he may sustain in consequence of the Committee requiring any land belonging to him to be added to the street. If this land has been added to the street I have no doubt the Committee is willing or could easily be compelled to make full compensation to the applicant, but I may remark that his own action has probably reduced the compensation he will get for the four feet street to something below two-thirds of what he would have got for the six-foot street. The order that the applicant shall

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pay a daily fine is set aside. The conviction and the sentence of fine of five rupees will stand.

W. C. A. *Application partly allowed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 34 OF 1922.

January 30, 1923.

Present:—Mr. Justice Newbould and

Mr. Justice Subrawardy.

MATHURA NATH BHATTACHARJYA

—PETITIONER

versus

RAJENDRA KUMAR BASU—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195 (b)—Sanction to prosecute—Sanction refused by primary Court—District Judge, power of—Remand, whether justified.

A District Judge, acting under section 195 of the Criminal Procedure Code, has no jurisdiction to remand a case to the subordinate Court for further inquiry. He ought himself to decide whether the sanction refused by that Court should be granted, and for this purpose has power to take evidence himself.

Budhu Lal v. Chattu Gope, 39 Ind. Cas. 465; 44 C. 816; 21 C. W. N. 269; 25 C. L. J. 193; 18 Cr. L. J. 497, relied on.

Criminal Revision.

Babu Benode Lal Mukherjee, for the Petitioner.

Babu Hira Lal Chakrabutty, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order of the District Judge of Faridpur remanding the case to the lower Court for reconsideration of an application for sanction to prosecute. The order of the District Judge is passed on an application under section 195 (b), Criminal Procedure Code. As has been pointed out in the case of *Budhu Lal v. Chattu Gope* (1), the Judge acting under that section has no jurisdiction to remand a case to the subordinate Court for further enquiry. He must himself decide whether the sanction which was refused

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by the Munsif should be granted, and he has power for this purpose to take evidence himself; but he has no power to remand the case for further enquiry by the Munsif. The Rule is also directed against the order of the District Judge assessing costs in this matter. The learned Vakil for the opposite party does not contest this portion of the Rule.

The result is, that the Rule is made absolute. The order of the District Judge, dated the 23rd August 1922, remanding the case to the Munsif, is set aside and also his order of the 25th August assessing the costs of the application before him is set aside. The District Judge will now proceed to determine the application under section 195 (b) according to law.

Let the record be sent down at once.

W. C. A.

Rule made absolute.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE NO. 44 OF 1922.

January 31, 1923.

Present:—Mr. Dalal, A. J. C. and Mr.

Simpson, A. J. C.

EMPEROR—COMPLAINANT

versus

SHEO RAM AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 106—Security order—Conviction under section 323; Penal Code—Attack in public place—Breach of the peace.

As an attack in a public place involves a breach of the peace, an order requiring security under section 106, Criminal Procedure Code, is justified against a person convicted under section 323, Indian Penal Code, for striking with a lathi and kicking and cuffing another in an open public place.

Dubri v. Emperor, 71 Ind. Cas. 691; 8 O.L.J. 318 24 Cr. L. J. 227, distinguished.

Maulvi Maqbul Ahmad v. King-Emperor, 9 O. C. 381; 5 Cr. L. J. 25, *Syed Yacoob v. Emperor*, 5 Ind. Cas. 783; 21 Bom. L.R. 270; 43 B. 554; 20 Cr. L. J. 543, *Tarmi Charn Mundle v. Gourikant Biswas*, 7 C.W.N. 25 and *Emperor v. Manik Rai*, 11 Ind. Cas. 589; 33 A. 771; 12 Cr. L. J. 405; 8 A. L. J. 925, referred to.

Case reported by the Sessions Judge, Rae Bareilly, under section 438 of the Criminal Procedure Code.

Mr. Bhawani Shankar, for the Accused.

The Government Pleader, for the Crown,

(1) 39 Ind. Cas. 465; 44 C. 816; 21 C. W. N. 269; 25 C. L. J. 193; 18 Cr. L. J. 497

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ORDER.

Dalal, A. J. C.—This matter has been heard by a Bench on a certificate by one of us under section 8 of the Oudh Courts Act. (XIV of 1891). Sheo Ram and two others were convicted by an Honorary Magistrate of Rae Bareilly of an offence under section 323, Indian Penal Code. The complainant was a servant of a *zemindar* and was struck with a *lathi* by one of the accused persons and kicked and cuffed by the others in an open public place in the village because of the accused's displeasure against the *zemindar*. The Honorary Magistrate after a consideration of the facts of the case came to the conclusion that the accused should be bound over under section 106 of the Code of Criminal Procedure and, as he was not empowered to do so, referred the case to the Sub-Divisional Magistrate under section 349 of the Code of Criminal Procedure. The Stipendiary Magistrate fined each of the accused Rs. 5 and ordered him to execute a bond for Rs. 50 to keep the peace for three months. The convicted persons applied in revision to the learned Sessions Judge who was of opinion that neither in law nor on facts was the order under section 106 justified. He consequently submitted the record to this Court with a recommendation that the order under section 106 may be set aside.

The learned Counsel on behalf of the applicants relied on the following cases: *Dubri v. Emperor* (1), *Maulvi Magbuhl Ahmad v. King-Emperor* (2), *Muthiah Chetti v. Emperor* (3), *Baidya Nath Majumdar v. Nibaran Chunder Gope* (4) and *Abdul Ali v. Emperor* (5). *Dubri's case* (1) is distinguishable from the present case. In this case the complainant was attacked in a public place and the offence of the accused will, therefore, involve a breach of the peace. In the other Oudh case a learned Judge of this Court refused to apply the provision of section 106 to a conviction under section 504, Indian Penal Code. There is, however, a ruling by a Bench of the Bombay High Court in *Syed Yacoob v. Emperor* (6)

where the Bench held an order requiring security after a conviction under section 504, Indian Penal Code, to be lawful, inasmuch as a breach of the peace or a probability of a breach of the peace was an ingredient of that offence. In discussing the words "other offences involving a breach of the peace" Heaton, J. observed: "To my thinking the words cover at any rate two classes of cases. The first class of cases is where there has actually been a breach of the peace. The other class is where the definition of the offence involves a breach of the peace." In the case of *Tarini Charn Mundle v. Gourikant Biswas* (7) a Bench of the Calcutta High Court sustained an order under section 106 against a person who was convicted of house trespass with the object of causing hurt.

Lastly, may be mentioned the opinion of Sir George Knox in *Emperor v. Manik Rai* (8), that an offence involving a breach of the peace mentioned in section 106 means an offence which necessarily involves a breach of the peace or of which a breach of peace forms an ingredient. He went so far as to include such an offence as in common knowledge is ordinarily or very probably the occasion of a breach of the peace, as, for example, the removal of a land mark, but it is not necessary for me to go so far for the purposes of the present case.

I am of opinion that the offence committed by the applicants was one which involved a breach of the peace. The learned Judge designates the offence of the applicants a trivial one and desires that the order for security should be cancelled on the merits of the case. Both the Honorary Magistrate, acquainted with local conditions and the Deputy Magistrate in charge of the Sub-Division have considered a security order to be necessary, and I shall be very slow to interfere in such a matter with the discretion of the Trial Courts.

For these reasons, I would not accept the reference.

Simpson, A. J. C.—I agree.

S. D. *Reference not accepted.*

(7) 7 C. W. N. 25;

(8) 11 Ind. Cas. 589; 33 A. 771; 12 Cr. L. J. 405; 8 A. L. J. 925.

- (1) 71 Ind. Cas. 691; 8 O. L. J. 318; 24 Cr. L. J. 227.
 (2) 9 O. C. 381; 5 Cr. L. J. 25.
 (3) 29 M. 190; 3 Cr. L. J. 461.
 (4) 30 C. 93; 6 C. W. N. 471.
 (5) 34 Ind. Cas. 961; 43 C. 671; 20 C. W. N. 197;
 23 C. L. J. 108; 17 Cr. L. J. 241.
 (6) 51 Ind. Cas. 783; 21 Bom. L. R. 270; 43 B. 554;
 20 Cr. L. J. 543.

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 817 OF 1921.

November 24, 1922.

Present:—Sir Walter Schwabe, K.T.,
Chief Justice, and Mr. Justice Wallace.
DAVUD BEEVI AMMAL—PLAINTIFF—
APPELLANT

versus

P. R. RAMAKRISHNA AIYAR AND
OTHERS—DEFENDANTS—RESPONDENTS.
*Hindu Law—Joint family property—Alienation
by one co-parcener—Partition—Allotment of alien-
ated portion—Alienee, right of.*

Under the Hindu law, a purchaser from one member of a joint family of property which belongs to the family can enforce the sale only by a partition of the entire family property, and if in such partition the property sold can, with due regard to the interests of the other sharers, to the debts due by the family, and to the equitable allocation of the various items of family property to the shares of the several co-parceners, be wholly allotted to the vendor's share the purchaser will be entitled to the whole property which the vendor professed to convey to him. [p. 82, col. 2; p. 83, col. 1.]

This right of the alienee does not depend on whether a suit was first brought by him for a partition of the whole joint property or by the other co-parceners against him for a partition of a part. [p. 83, col. 1.]

Even in a suit brought by the son for his share of the alienated property, it would be open to the Court on the application of the alienee to decree a general partition in which this principle of equity would be applied. [p. 83, col. 2.]

The principle applies not only to a case where the alienor purports to sell the property as his own but also where he sells it on behalf of himself and on behalf of the other co-parceners. [p. 83, col. 2.]

The mere fact that the alienee knew or must have known that the alienation was not for necessities does not affect his right in equity. [p. 83, col. 2.]

Ibaramsa Rowthan v. Thirumalai Muthuveera Thiruvengatasami Naick, 7 Ind. Cas. 559; 34 M. 269; (1910) M. W. N. 380; 8 M. L. T. 269; 20 M. L. J. 743, explained.

Aiyyagari Venkataramayya v. Aiyyagari Ramayya, 25 M. 690; at pp. 716, 718 (F. B.), *Ramkishore Kedarnath v. Jainarayan Ramrupal*, 20 Ind. Cas. 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 665; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.), *Nanjaya Mudali v. Shanmuga Mudali*, 22 Ind. Cas. 555; 38 M. 684; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576, followed.

Sripati Chinna Sanyasi Razu v. Sripati Suriya Razu, 5 M. 196; 6 Ind. Jur. 410; 2 Ind. Dec. (N. S.) 137, *Subramanya Chettyar v. Padmanabha Cheyyar*, 19 M. 267; 6 Ind. Dec. (N. S.) 891, *Vadwalam Pillai v. Natasami Pillay*, 16 Ind. Cas. 835; 37 M. 4351

12 M. L. T. 192; 23 M. L. J. 2561 (1912) M. W. N. 851, relied on.

Second appeal against the decree of the Court of the Second Additional Subordinate Judge of Tanjore, in Appeal Suits Nos. 68 and 70 of 1920 (Appeal Suit Nos. 145 and 147 of 1920 District Court, Tanjore) preferred against the decree of the Court of the District Munsif of Negapatam, in Original Suit No. 551 of 1918.

Mr. A. Krishnaswami Iyer for the Appellant.—The only point in the case is, whether the District Judge was right in refusing to allot the alienated property to the alienor co-parcener whether a co-parcener has an absolute and an indefeasible right to his share of the alienated properties so as to defeat the equitable right of the alienee. The claim of the alienee is clearly an equitable claim. A purchaser for value has an equity to have such portion or so much thereof as is practicable, so allotted, if that can be done without prejudice to the interests of the other co-sharers. See *Aiyyagari Venkataramayya v. Aiyyagari Ramayya* (1) and also *Nanjaya Mudali v. Shanmuga Madali* (2). In this case there is no suggestion that such an allotment would be prejudicial to the interests of the non-alienating co-parceners. The decision of the Privy Council in *Ramkishore Kedarnath v. Jainarayan Ramrupal* (3) shows that an alienee is entitled to insist that he stands in the shoes of the alienating co-parcener as to the share he would come to on partition and that the Court may insist on the other co-parcener assenting to a partition so as to give effect to the rights of the alienee claiming through his alienor.

Mr. T. R. Venkatarama Sastry, for the Respondent.—It, has been settled in a series of decisions that it is open to a member of a family to bring a suit against the purchaser of part of the family property for the recovery of his share in the part alienated without claiming a division of the entirety of the family property. *Ibaramsa Rowthan v.*

(1) 25 M. 690 at pp. 716, 718 (F. B.).

(2) 22 Ind. Cas. 555; 38 M. 684; 15 M. L. T. 186; (1914) M. W. N. 356; 26 M. L. J. 576.

(3) 20 Ind. Cas. 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 665; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.).

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Thirumalai Muthuvegra Thir. venkalasami Naick (4).

That right of the non-alienating co-parcener cannot be defeated by a suit by an alienee for general partition nor could the co-parcener be driven by the purchaser from another share to institute a suit for general partition. The equity of the alienee, who purchases the properties from a limited owner like the manager of a joint Hindu family, cannot override or subordinate the rights of a member of a joint family. The alienee's claims are merely claims in equity. He purchased with knowledge of the invalidity of the alienation and cannot claim rights as if the alienation was perfectly good and valid. This principle of equity cannot be applicable to a case where a manager purports to sell for himself and other co-parceners. The representation in the latter case is specific and express, and the alienee who purchases on these terms cannot claim higher rights.

If in the separate suit for partition at the insistence of the other member, the other items had been partitioned, there would have been no means of the alienee working out his rights which are and must be subordinated to the paramount rights of members of joint families to a share in the family property.

JUDGMENT.

Schwabe, C. J.—By a deed of absolute sale one Ramachandra Iyer sold certain lands to the 3rd defendant purporting to act for himself and as the guardian, protector and father of his minor son, the second defendant.

The rights of the 3rd defendant are now vested in the plaintiff. The 1st and 2nd defendants are members of a joint Hindu family and the lands in question were their joint property. At the time of the sale the 3rd defendant obtained from the first defendant a security bond by which the 1st defendant gave him an indemnity against the loss that might arise by any claim of the minor 2nd defendant. That bond took the form of a charge to the extent of Rs. 6,000 on certain other lands which it

appears also formed part of the joint family property. This suit is brought for a general partition of the joint family property, and it is prayed that on that partition the suit lands shall be allotted to the 1st defendant so that, whether he was entitled to alienate them or not, the plaintiff may get them as standing in the shoes of the 1st defendant.

The District Munsif of Nagapatam, Mr. R. V. Krishna Iyer, held that the sale was not binding on the 2nd defendant. He decreed partition and directed that all the joint properties shall be divided into two equal shares between the 1st and 2nd defendants and that in effecting such partition the lands sold to the 3rd defendant, should be allotted to the 1st defendant and adjourned the suit to appoint a Commissioner to effect the partition. Without the appointment of a Commissioner the 1st and 2nd defendants divided the property filing lists of properties which they had agreed to take in those lists allotting to the 1st defendant the properties sold to the 3rd defendant. It was not contended that this division of property would work any injustice to the 2nd defendant and indeed by the agreement between the 1st and 2nd defendants as to the division it is clear that it was admitted that this was not the case. The District Munsif in his judgment has stated quite clearly the principle to be applied. On the case coming before the Subordinate Judge, Tanjore, he reversed the decree stating that the 2nd defendant has a *prima facie* right to a half share in the specific properties alienated and that there was no reason for depriving him of that natural right in giving effect to the equity in favour of the 3rd defendant and he saw no paramount equity to be enforced in favour of the 3rd defendant or his vendee so as to override the natural rights of the plaintiff operating to his prejudice.

The principle of equity to be applied in such cases is well established and will be found clearly stated in the judgment of Bhashyam Iyengar, J., in his very learned judgment in *Aiyagari Venkata-ramayya v. Aiyagari Ramayya* (1) and in *Nanjaya Mudali v. Shanmuga Mudali* (2), and it is that a purchaser from one member of a joint family of property which that member has

(4) 7 Ind. Cas. 559; 34 M. 269 (1910) M. W. N. 380; 8 M. L. T. 269; 20 M. L. J. 743.

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no right to sell, it being the joint property, can enforce the sale only by a partition of the entire family property, and if in such partition the property sold can, with due regard to the interests of the other sharers, to the debts due by the family and to an equitable allocation of the various items of family property to the shares of the several co-parceners, be wholly allotted to the vendor's share, the purchaser will be entitled to the whole property which the vendor professed to convey to him. In my judgment the learned District Munsif puts this case from the right point of view, and I shall content myself with saying that I have nothing to add to his excellent judgment which is a clear and well reasoned judgment, and that I do not agree with the judgment of the Subordinate Judge because I do not appreciate what natural rights of the plaintiff operating to his prejudice are overridden by the District Munsif's decree. But Mr. Venkatarama Sastry has contended that it is now established as far as Madras is concerned that, where family property has been alienated by one co-parcener, the others may without any general partition either claim the whole property from the alienee or may claim back their share of that property, such share being the proportion to which they would have been entitled on a partition of that specific property, and for this proposition we are referred to the judgment of a Full Bench of this Court in *Iburaṃsa Rowthān v. Thirumalai Muthuveera Thiruvēnkataśāmi Naick* (4). That case is, of course, binding on us sitting in second appeal, but I do not think that it was intended by that Court in any way to dissent from the principle of equity stated above and so well-established. Nor do I think that it was meant whether the alienee in such cases could get the property was to depend on whether a suit was first brought by him for a partition of the whole joint property or by the other co-parceners for a partition of a part. We are informed that there was pending, at the time of the hearing of this suit, another suit by the son claiming partition of the particular property and award to him of a half; so that if, by chance that suit had been heard first and the principle in *Iburaṃsa Rowthān v. Thirumalai Muthuveera Thiruvēnkataśāmi Naick* (4) had been

applied, assuming it to be consistent with the equitable principle that would otherwise apply, the son would have got half of the property in question and the plaintiff one half, whereas by applying the equitable principle he would have got the whole of what had been sold. That there is no such conflict, I think, is clear from the decision of the Privy Council in *Ram-kishore Kedarnāth v. Jainarayan Ram-rachpal* (3). There the suit was brought by members of a joint Hindu family to set aside an alienation by their father to an adopted son whose adoption was alleged to be invalid. Their Lordships in sending back the case pointed out that the adopted son might be entitled to insist that he stood in the shoes of the adoptive father and be entitled in that suit to obtain a partition in which he could get the share which would come to the father so as to give effect to any rights to which the adopted son might be entitled claiming through the father. In my view, this is authority for the proposition that, if this suit had been a suit by the son for a share of the alienated property it would be open to the Court on the application of the alienee to decree a general partition in which the principle of equity should be applied.

It is further contended that this principle has no application where the alienor purports not to sell the property as his own but purports to sell it on behalf of himself and on behalf of the other co-parcener, his infant son. I am unable to appreciate this distinction, for it is clear that, if he had sold in his own name, then the principle would apply, and I do not appreciate how the fact that he purported to sell both for himself and for his infant son in any way reduces the interest purchased by the alienee.

It was further contended that the purchaser must have known from the statement of the consideration that the 1st defendant had no right to sell the property as managing member, because the consideration showed that the sale could not have been for necessities. The Subordinate Judge states that there was no necessity for the alienation so as to bind the minor's interest in the property. On an examination of the consideration, a considerable amount was paid in cash, but a large balance was secured by a hypothecation bond of some

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property of the purchaser. I am not satisfied that this fact must necessarily have shown to the purchaser that the sale could not be a proper alienation in the interest of the joint family; nor do I see, even if it were so, why I should deprive the purchaser of his rights against the alienor to obtain the alienor's interest by partition on the equitable principle which has been applied here.

It was also argued that the taking of the security-bond was evidence that the purchaser knew that the 1st defendant had no right to alienate, and also that its existence prevented the application of the equitable principle. It is a wise precaution when purchasing from a managing member to take security against possible claims of other co-parceners, and I do not think that any such significance is to be attached to the taking of this bond. If, however, the security, if resorted to by the purchaser, would result in the son being in a better position, it may be that the Court, in applying the equitable principle might take that into consideration. But that is not the case here, as the property given as security is also joint property; and there is no evidence, nor has it been suggested, that the son would in any way benefit by that security property being allotted to the father and given to the plaintiff.

For these reasons, this appeal must be allowed and the decree of the District Munsif must be restored so far as A schedule property is concerned. The plaintiff must have costs of the appeal in the Court of the Subordinate Judge and of this appeal.

Wallace, J.—I agree. On the important question of law raised in this appeal, I should like to say a few words.

1. The point for decision in this case is:—Can a co-parcener whose share in one item of joint family property has been wrongly alienated by another co-parcener, who nevertheless had the power of alienating it, resist the delivery by the Court of that share to a *bona fide* purchaser of it from the alienating co-parcener in the practical working out of the equity of that purchaser to have decreed to him, in his general partition suit brought for that purpose, the property purchased by him *bona fide* for value, apart from any consideration of the question whether any real unfair-

ness or injustice would be done to the non-alienating co-parcener by granting the alienee the decree he seeks for?

2. The main and well-settled principles of law necessary for consideration here as laid down in this Presidency are: (a) that ordinarily no co-parcener can sue for partial partition of his share in any single item of joint family property, (b) that when a specific item of joint family property has been alienated by another co-parcener, a non-alienating co-parcener can sue for recovery of his share in the item alienated [See *Sripati Chinna Sanyasi Razu v. Sripati Suriya Razu* (5) and *Subramanya Chetiyar v. Padmanabha Chettyar* (6)]; or (c) where the alienee has been given possession of such specific item, the whole joint family may sue to recover possession: See *Ramkishore Kedarnath v. Jainarayan Ramrichpal* (3). As against these rights of co-parceners against the alienee from a co-parcener has to be set the right of such alienee to enforce by a general partition suit his right by purchase in and possession of the specific item purchased, if that can be done without prejudice to the co-parceners who were not parties to the alienation: *Nanjaya Mudali v. Shanmuga Mudali* (2), *Aiyyagari Venkataramayya v. Aiyyagari Ramayya* (1). This right will prevail against right (c) set out above, *vide* the Privy Council decision in *Ramkishore Kedarnath v. Jainarayan Ramrichpal* (3). The present question is whether it also prevails against right (b). Now, while it is not necessary for the non-alienating co-parcener to institute a suit for general partition, in order to recover his share in the item alienated by another co-parcener, while he may sue for partial partition, of his share in that item only. I do not find any authority for holding that, when he has so recovered that share, it is, as against his fellow co-parceners, his specified property or that the effect of his suit is to cause the recovered share to cease to be the joint family property, which it was before the suit. No more after the suit than before it, can the recovering co-parcener predicate that he has himself a particular

(5) 5 M. 196; 6 Ind. Jur. 410; 2 Ind. Dec. (N. S.)

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(6) 19 M. 267; 6 Ind. Dec. (N. S.) 891.

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share in that item of the joint family property. He has in my view merely recovered that share for the joint family, or rather prevented it passing as a specific item out of the joint family property, prevented that hitherto undivided share of his crystallising into a specific divided item, and so separating itself from the general property. His decree does not have the effect of dividing the alienated item by metes and bounds between himself and other non-alienating co-parceners. But, of course, an alienor co-parcener has lost his claim to share in that item at a general family partition. In my view the decree obtained in such a suit by a non-alienating co-parcener, while it is an exception to the general rule that no co-parcener can sue for partial partition, does not go further and form any exception to the rule that no co-parcener can, as against his co-parceners, predicate that he is entitled to hold and retain against them a particular share in any particular joint family property. By the very frame of the suit, the decree in it is a decree for partial partition as against the alienee, but not as against his co-parceners, and its object is to ascertain by partition the particular property which the purchaser may retain and to separate that from the joint family property. The decree in it will, no doubt, bind the alienee to this extent that he cannot contend that the non-alienating co-parcener's share must be available for recovery by him. It does not preclude him from claiming that in working out his equity, it may be available, though no doubt the existence of the decree may in certain cases raise a strong equity in favour of the non-alienating co-parcener retaining the share he had taken so much trouble to recover.

3. It follows then that, when an alienee from a co-parcener files his suit for general partition in order to work out the equity in his favour as purchaser, a non-alienating co-parcener who has obtained a decree for his share of that item, is not ordinarily in any superior position to retain that share against the alienee than a non-alienating co-parcener who has not obtained such a decree, and cannot without proof of specific prejudice to himself, set up against the alienee a claim to a particular share in the item alienated, since

that share has fallen back into the general family property, or rather has really never left it. In working out the equities, it follows that the ordinary rule will apply, viz., that the alienee will be decreed the possession of the specific property purchased by him, if that can be done, without substantial injustice to the co-parceners, and no co-parcener has a right to insist, in the absence of proof of such injustice, on his being given on division a share in the alienated item.

4. None of the rulings quoted in support of respondents seems to me to affect this result. That in *Iburamsa Rowihan v. Thirumalai Muthuveera Thiruvengkatasami Naick* (4) deals with the equities between two alienees, each from a separate co-parcener, in which case it was held that equity could not insist on the second alienee suing for general partition but would permit him to sue for the partition of his share, corresponding to his alienor's share in the property conveyed to the first alienee. This was merely an extension of the principle that the alienee shall, so far as possible, be decreed what he purchased. This ruling did not consider the question what the effect of a suit by one of the alienees for general partition for the purpose of working out his equity would be, and it is certainly no authority for the proposition that such an equity cannot be enforced against a non-alienating co-parcener who has recovered by suit his share in the property alienated when no substantial injustice would be done to him.

5. So long as the alienee refrains from filing his suit for general partition, i.e., from insisting on the working out of his own equity, the claims of the non-alienating co-parceners will be enforced against him, on equitable terms. See *Vadivalam Pillay v. Natasam Pillay* (7). The principle, as I understand it, is that, until he so sues, his interest in the property is only vested and not separate, "a legal estate" not yet reduced into possession and which may never be reduced into possession. But when he has sued to carve out and reduce to possession that vested interest and has ob-

(7) 16 Ind. Cas. 835; 37 M. 435; 12 M. L. T. 192; 23 M. L. J. 256; (1912) M. W. N. 851.

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tained a decree, then his equity to get for himself the specific property in which he purchased an interest will prevail, if no substantial injustice will be thereby caused to the co-parceners, and can be resisted by any co-parcener on no other ground than that it will do him a substantial injustice. I agree with the learned Chief Justice that in this case no substantial injustice has been proved to be likely to follow the allotment to the purchaser of the property purchased by him.

6. I have nothing to add on the other parts of the case and agree that the appeal must be allowed on the terms proposed by the learned Chief Justice.

V. N. V.

*Appeal allowed.***LAHORE HIGH COURT.**

CIVIL REVISION No. 861 OF 1922.

February 9, 1923.

Present:—Mr. Justice Le Rossignol.BHOLA NATH—PLAINTIFF—PETITIONER
versus

SUPPER—DEFENDANT—RESPONDENT.

Transfer of Property Act (I V of 1882), s. 109—Lease—Transfer of lessor's interest—Notice to lessee, absence of, effect of.

Section 109 of the Transfer of Property Act provides no penalty for want of notice to the lessee of the transfer of the lessor's interest except the loss of rent paid by the lessee to the original lessor. The want of notice does not absolutely debar the transferee from recovering rent from the lessee.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Munsif, First Class, and Judge, Small Cause Court, Delhi, dated the 27th of July 1922.

Mr. Shamair Chand, for the Petitioner.

JUDGMENT.—The lower Court has dismissed this suit for rent on the ground that defendant was never a tenant of plaintiff, for the reason that the transfer of the property by defendant's lessor to plaintiff was not notified to the defendant.

The Transfer of Property Act applies to this part of Delhi and section 109 provides no penalty for want of notice except

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the loss of rent paid by the lessee to the original lessor.

I accept the petition and direct the Court below to decide on the merits. The points for decision are: How long after the transfer did defendant occupy the house?

What rent, if any, has he paid to the plaintiff's transferor?

Costs to follow final event.

Z. K.

*Petition accepted.***ALLAHABAD HIGH COURT.**

CIVIL REVISION No. 138 OF 1922.

February 5, 1923.

Present:—Mr. Justice Lindsay.MUNNI BABU AND ANOTHER—DEFENDANTS
—APPLICANTS*versus*KOER KAMTA SINGH—PLAINTIFF—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Specific Relief Act (I of 1877), ss. 19, 29, applicability of—Contract for sale—Suit for specific performance, failure of—Subsequent suit for recovery of earnest money, whether barred—Limitation applicable—Limitation Act (IX of 1908), Sch. I, Arts. 62, 97—Hindu Law—Earnest money paid to father, recovery of—Personal decree against sons—Pious obligation.

If a plaintiff is not successful in his suit for the specific performance of a contract for sale, he is not precluded under O. II, r. 2 of the Civil Procedure Code from bringing a suit to recover the earnest-money paid. The claim for the earnest-money is based upon a different cause of action from that of the claim for specific relief.

Sections 19 and 29 of the Specific Relief Act do not apply, where the claim is for the recovery of earnest-money. [p. 87, col. 1.]

Parangodan Nair v. Perumtoduha Illot Chata, 27 M. 380, referred to.

The proper Article of the Limitation Act to apply to a suit for recovery of earnest-money after a suit for specific performance of a contract for sale has failed is Art. 97 and not Art. 62. [p. 87, col. 2.]

Udit Narain Misra v. Muhammad Minnat-ulla, 25 A. 618; A. W. N. (1903); 117, *Amma Bibi v. Udit Narain Misra*, 1 Ind. Cas. 890; 31 A. 68; 9 C. L. J. 512; 11 Bom. L. R. 525; 19 M. L. J. 295; 6 M. L. T. 89; 36 I. A. 44 (P. C.) and *Hanuman Kammat v. Hanuman Mandur*, 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.), followed.

In a suit for the recovery of earnest-money against the sons of a Hindu father with whom the contract for sale was entered into and who died prior to the filing of the suit, it is not improper to give a personal decree against the sons, inasmuch as the father having died the sons are under a pious obligation to discharge his debts. [p. 88, col. 2.]

MUNNI BABU V. KOER KAMTA SINGH.

Civil revision from an order of the Judge of the Court of Small Causes at Agra, dated the 12th August 1922.

Mr. N. P. Asthana, for the Applicants.
St. C. Thompson and Mr. U. S. Bajpai, for the Opposite Party.

JUDGMENT.—This is an application for revision of a judgment of the Small Cause Court at Agra.

The suit was brought by the plaintiff for the purpose of recovering a sum of Rs. 200 which he had paid as earnest-money in the following circumstances:—

On the 11th of October 1915 the plaintiff had entered into a contract with the father of the defendants for the sale of certain property. Afterwards, the plaintiff sued the father of the defendants for specific performance of the contract. That suit was dismissed finally by a judgment of this Court. The plaintiff now brings the present suit for recovery of the earnest-money paid. The father having died in the meantime the suit was brought against the sons.

Two pleas were raised in the Court below in order to defeat the plaintiff's claim. It was argued in the first place that the suit was barred by the provisions of O. II, r. 2 of the Code of Civil Procedure. The lower Court overruled this plea and, in my opinion, rightly.

The learned Counsel for the applicant bases his claim upon the provisions of section 29 of the Specific Relief Act. The lower Court in its judgment refers also to the language of section 19 of the same Act.

Section 19 enables a person who is claiming specific performance to ask in addition for compensation. Section 29 bars a subsequent suit for compensation after a suit for specific relief has been dismissed. Neither of these sections has anything to do with the present case where the claim is for recovery of the earnest-money. O. II, r. 2 has no application. The claim for the earnest-money is based upon a different cause of action from that of the claim for specific relief. I may refer in this connection to the case reported as *Parangodan Nair v. Perumtodka Illot Chata* (1).

The other plea raised was a plea of limitation. The defendants contended that Art. 62 was the proper Article to apply on

the ground that the money advanced by way of earnest-money should be deemed to be money had and received and that the suit under this Article was barred by limitation. The lower Court rejected this plea and applied Art. 97 of the Schedule to the Limitation Act, holding that the suit was one to recover money paid on an existing consideration which had afterwards failed. The lower Court took the starting point of limitation to be the date of the judgment dismissing the plaintiff's suit for specific performance. Clearly, this was a correct decision. The case is covered by authority reported as *Udit Narain Misr v. Muhammad Minnat-ulla* (2). Another case which is in point is *Amma Bibi v. Udit Narain Misra* (3), a decision of their Lordships of the Privy Council in which the judgment in *Udit Narain Misr v. Muhammad Minnat-ulla* (2) was upheld.

The applicant has relied on *Hanuman Kamat v. Hanuman Mandur* (4). That was a case where one member of a joint family governed by Mithila law had executed a sale. It was there held that an agreement for sale by a member of a joint family was not void but voidable and that the consideration only failed when the purchaser being opposed found himself unable to obtain possession. The failure of consideration did not take place when the money was paid so as to bring the case under Art. 62 of the Schedule to the Limitation Act. On page 126* of the report their Lordships say:—"If there never was any consideration, then the price paid by the appellant was money had and received to appellant's use. But their Lordships think that the sale was not necessarily void, but was voidable only if objection were taken to it by the other members of the joint family. If so, the consideration did not fail at once, but only from the time when the appellant endeavoured to obtain possession of the property, and being opposed, found himself unable to obtain possession. There was then, at all events, a failure of consideration."

And, therefore, Art. 97 applied.

(2) 25 A. 618; A. W. N. (1903), 117.

(3) 1 Ind. Cas. 890; 31 A. 68; 9 C.L.J. 512; 11 Bom. L. R. 525; 19 M. L. J. 295; 6 M. L. T. 89; 36 I. A. 44 (P. C.).

(4) 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.).

* Page of 19 C.—[Ed.]

(1) 27 M. 380.

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This is exactly the case here and I hold that the decision of the Court below is correct. It has been represented to me that the lower Court has given a personal decree against the defendants and it is said that, in the circumstances, the father having died no personal decree ought to be made against the sons. On the other hand, there is the consideration that the father having died, the sons are under a pious obligation to discharge his debt. I do not think there is any ground for interference with the decision of the Court below. The application is dismissed with costs.

M. A. A. & N. K. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO.

132 OF 1920.

March 9, 1922.

Present.—Justice Sir N. R. Chatterjea, Kt.,

and Mr. Justice Pearson.

JOGESH CHANDRA SHAHA—

PETITIONER—APPELLANT

versus

BHIKU SAU PARAMANIK AND OTHERS

OBJECTORS—RESPONDENTS.

Will—Testamentary capacity—Sense or consciousness, existence of, if sufficient.

The mere fact that at the time of the execution of an alleged Will the testator had sense or consciousness, or that he was able to answer a question or two put by the Doctor about his illness, is not sufficient evidence of his testamentary capacity. [p. 90, col. 2.]

Appeal against the decree of the District Judge, Birbhum, dated the 23rd June 1920.

Dr. Jadu Nath Kanjilal (with him Babu Jyotish Chandra Sircar), for the Appellant.—I beg to submit that the learned Judge has arrived at a wrong conclusion on a wrong consideration of the evidence addressed on behalf of my client. My client was more intimate with the testator than the objector and such is also the clear finding of the learned Judge and so it was quite natural and fit that the testator should make the Will in favour of my client. The learned Judge has misread the evidence and come to

a wrong finding that the testator had no testamentary capacity when he is said to have executed the Will. The learned Judge makes much of the fact that, although there were Pleaders, Mukhtears and other respectable persons they were not called in to attest the Will. I submit that, as the testator was a *Shaha*—one of the depressed classes—it could not be expected that respectable men would come to attest his Will. The evidence of the Kaviraj is entitled to great respect and credence and he has said that the testator was in full possession of his senses. The Doctor also has deposed to the same effect. The evidence of Rakhal is also clear and explicit on the point. Shib Nath Saha is written as Shibu Saha by reason of abbreviation and cannot be regarded as a material discrepancy. *Shaha* can be spelt as *Shou*. The Kaviraj and the Doctors' evidence as to the testator's full possession of senses when he executed the will ought to be sufficient to cut the ground from the bottom of the learned Judge's findings and the appellant should succeed on the evidence.

Babu Amarendra Nath Bose (for Babu Manmatha Nath Mukherjee) and Babu Panna Lal, for the Respondent, not called.

JUDGMENT.—This appeal is against an order of the District Judge of Birbhum refusing to grant Probate of the Will of one Rasaraj Saha. He is said to have executed the Will on the 2nd November 1919 at about 10 A. M. He died the very same day at about 4-30 P. M.

The petitioner who propounded the Will is a distant agnate of the deceased. The objector is the first cousin (father's brother's son). He lived at a different place about 12 miles away and had no concern with the deceased. On the other hand, Rasaraj used to take his food in the house of the petitioner and was evidently more intimate with him. Under these circumstances, we think the learned Judge was right in holding that the deceased, if he had testamentary capacity when he is said to have executed the Will, would in all probability have excluded the objector and that the Will in favour of the petitioner could not be said to be unnatural.

The learned Judge, however, found that the deceased had no testamentary capacity at the time when the Will is said to have

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been executed and that the Will was not executed by the deceased.

Seven witnesses have been examined by the petitioner. The learned Judge has considered the evidence of those witnesses. He has pointed out certain discrepancies in the statements made by some of them and has, upon a consideration of the various circumstances mentioned in his judgment, come to the conclusion that the deceased had no testamentary capacity.

We need not consider in detail the evidence of witnesses other than Rakhal, Noor Mohamed, Dr. Monmohan and Kaviraj Brojendra Narain Sen, the last witness having been examined under orders of this Court passed by another Bench.

It appears that the Kaviraj saw the deceased once in the morning and the second time at about 10 A. M. On the first visit he prescribed *Makaradhwaj* and musk. At that time the patient was pulseless and weak. At that time the Kaviraj asked the deceased since when he felt so bad. He replied "from over-night." He again visited him at about 10 A. M. Rasaraj asked him if there was any chance of his surviving the disease and he told him that there was none. The Kaviraj says that he did not hear that Rasaraj was going to execute any document but that he saw some sheets of white paper and pen and ink with Jogesh (the appellant) at 8-30 A. M., when the latter came to his house for medicine. What those papers were, he could not say.

As for the Doctor, he says he does not remember the hour at which he saw the deceased, that when he saw the deceased in the morning, he was seriously ill, but that he was in full possession of his senses. He does not remember, however, what, if any, conversation he had with him. He also says that there was no talk of any Will in the morning, but that in the evening he was in the house of the deceased, Rakhal Bistoc told him that the deceased had executed a Will and he saw a piece of paper lying in the Angina.

Noor Mohamed, who is a clerk in the Birbhum Collectorate, says that on Sunday morning he heard Rasaraj was pulseless and *in extremis* and went to see him. He asked Rasaraj whether he was going to execute a Will in favour of Jogesh. He answered in the affirmative. That was at

about 7 or 7-30 in the morning. He again saw the deceased at about 11-30 A. M. He could not speak then and made signs to express that he was not well. Sometime after that, Rakhal (one of the witnesses to the Will) came to his house and requested him to be an attesting witness. The witness said that, as the paper was not stamped, his conscience did not permit him to be a witness as requested.

The learned Judge observes that the real reason why his conscience did not permit him to be a witness was that the Will was not genuine and not that it was unstamped. He has also commented upon the fact that, although there were Pleaders, Mukhtears and other respectable persons in the neighbourhood, none of them was called to attest the Will.

It is contended before us that it is not to be expected that such persons should come in for attesting the Will of a *Saha* and with respect to property valued at Rs. 1,300 only. Although we do not think there is much force in the comment made by the learned Judge, there were respectable persons available for the purpose, namely the Doctor, Kaviraj and Noor Mohamed who actually came to see the deceased in his house.

Rakhal says that when the Doctor came to the deceased in the after-noon, he requested the Doctor to attest the Will, as he had heard about the Will in the morning. The Doctor does not say that he was asked to attest the Will, nor does he say that he had heard of any talk of the Will in the morning.

The fact remains, however, that Rakhal attempted to get the Will attested by the Doctor in the after-noon, just before the death of Rasaraj.

No explanation has been given as to why the Doctor was not asked to be an attesting witness, or even told of the execution of the Will either by Rasaraj or by Rakhal at the time when the Doctor saw the deceased at about 11 A. M., by which time, according to the petitioner, the Will had been executed. They could have got the Doctor as an attesting witness, and, in any case, there could have been an acknowledgment by Rasaraj to the Doctor about the execution of Will.

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So far as the Kaviraj is concerned, we have already pointed out that he never heard of the Will although he went twice to the house of the deceased. He went there the second time at about 10 A. M. when the Will had already been executed according to the petitioner's case.

Noor Mohamed was also not asked by Rasaraj to attest the Will, nor was any statement made to him by Rasaraj that a Will had been executed by him, although he saw Rasaraj at about 11-30 A.M. Rakhal requested him to attest the Will sometime after that in the house of the latter. The fact that none of these three witnesses, who are respectable persons, was asked to be an attesting witness, or was told by the testator that a Will had been executed, throws great suspicion upon the case.

Moreover, the attempt by Rakhal to get the Will attested at the time when Rasaraj was dead, or about to die, and the fact that neither the Doctor nor the Kaviraj nor Noor Mohamed had seen the testator execute the Will, nor received any acknowledgment from him about the execution, also go against the case for the petitioner.

According to witness No. 4, Sasi Bhusan Saha, when the Kaviraj came, Kiron, the scribe, was writing the Will and Noor Mohamed also saw Kiron writing the Will. If so, there is no reason suggested why neither of them was asked to attest the Will and it is to be noted that neither of them says that he saw the writing of the Will.

The witness Rakhal appears to have taken a good deal of interest in the matter. He is the manager of a Kalibari in that locality and there is a provision in the Will that Jogesh, in whose favour the Will is said to have been executed, was to erect a roof for the *Kalibari* and a *natshala*.

The other witnesses are Satya, a grocer and a relation of Rakhal, Kiron, the scribe, who is a Pleader's clerk and who was called by Rakhal, and Surendra, a mason, who constructed the Kalibari.

The learned Judge points out that the name of the father of Rasaraj is stated in the Will to be Sihu Saha, whereas in the admitted documents, it was Shib Nath and that the name of Rasaraj is signed on the Will as Rasaraj *Salia*; whereas in the admitted document it was Rasaraj *Sou*; and although *Saha* can be spelt both ways as *Sou* or *Saha*,

it is not likely that, having adopted one mode of spelling, he should sign in another way. On the whole, the learned Judge was inclined to disbelieve the signature of Rasaraj on the Will.

Upon a consideration of the entire evidence he came to the conclusion that the deceased had no testamentary capacity at the time when the Will is said to have been executed. The witnesses were before him, and, after considering all the circumstances, we are unable to hold that the Judge is wrong in the view he has taken.

It has been pressed upon us that the Doctor stated that at the time of his first visit the deceased was in "full possession of his senses" and, as the Will was in existence at about noon, it ought to be held that the deceased had testamentary capacity at about 10 or 11 A. M.

But the mere fact that the testator had sense or consciousness, or that he was able to answer a question or two put by the Doctor or Kaviraj about his illness is not sufficient.

It is stated that the Will was written out under instructions from Rasaraj who, all the time the Will was being written out, was sitting up. The evidence of the Doctor however, shows that the patient could not sit up.

It is to be observed that no question was put to the Doctor or to the Kaviraj as to whether Rasaraj had sufficient capacity at the time to execute the Will, or any question about his mental faculties. Having regard to his physical condition at the time, the plaintiff ought to have adduced evidence to show that he had testamentary capacity.

On a consideration of all the circumstances and the evidence, we think that the appeal must be dismissed with costs.

We assess the hearing fee at one gold *mohur*.

B. N.

Appeal dismissed.

NABI BAKHSH v. MUHAMMAD SALAM ULLAH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2146 OF 1922.

February 8, 1923.

Present:—Mr. Justice LeRossignol and
Mr. Justice Harrison.NABI BAKHSH AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

MUHAMMAD SALAM ULLAH AND OTHERS
—DEFENDANTS—RESPONDENTS.Civ. Procedure Code (Act V of 1908), s. 11—
Expl. IV—*Res judicata*—Test.

Where a defendant fails to take a plea which, if established, would result in the dismissal of the plaintiff's suit and the suit is decreed, the matter becomes *res judicata* under Explanation IV to section 11 of the Civil Procedure Code and cannot be re-agitated in a subsequent suit between the parties.

Second appeal from an order of the Additional District Judge, Jhelum, at Gujrat, dated the 26th April 1922, reversing that of the Senior Subordinate Judge, Gujrat, dated the 6th February 1922.

Mr. Zafrulla Khan, for the Appellants.
Sir Muhammad Iqbal, Kt., and Mr. Khurshid Zaman, for the Respondents.

JUDGMENT.—The plaintiffs in this case are one branch of the reversioners of one Mahbub Alam, who died leaving two widows, Musammat Jawahar Bibi and Musammat Niamat Bibi and a daughter Musammat Rasul Bibi who is the child of Musammat Jawahar Bibi. Both widows have now died and the plaintiffs claim their share of the land left by Mahbub Alam, the only contesting defendant being Salam Ullah, the son of Musammat Rasul Bibi and grandson of Mahbub Alam. The suit was decreed by the Trial Court on the ground that, in consequence of the previous litigation, the pleas now put forward by Salam Ullah were governed by the law of *res judicata*. On appeal the learned District Judge held that Explanation IV of section 11 did not apply and remanded the case for decision on the merits; and the only point before us is whether the present defence to the claim is barred by that section.

On the death of Mahbub Alam, both widows had the land entered in the name of their son-in-law, Aman Ullah. In 1886

the present reversioners sued for a declaration that the gift by the widows in favour of this son-in-law of Mahbub Alam would not affect their reversionary rights. The suit was resisted on two grounds, that the gift was valid and that he (Aman Ullah) was a *Khanadamad*, but the plaintiffs succeeded and obtained a decree. Aman Ullah died in 1890 and the land standing in his name was mutated in favour of the present defendant, his son Salam Ullah, in 1895. In 1905 Musammat Jawahar Bibi died and then the reversioners brought another suit for possession against Salam Ullah. This suit was dismissed on the ground that the second widow was still alive, but the plaintiffs were given a declaration that the mutation did not affect their reversionary rights. That suit was contested by Salam Ullah only on the ground that he stood in his father's shoes. He did not urge either of the pleas which he now puts forward that he is entitled to the land as his mother's son and that the land is not ancestral. On the question whether these pleas should have been taken in the previous suit, we find that the suit would certainly have been defeated by the present pleas had they been established, or rather by the plea that Salam Ullah, as grandson of Mahbub Alam, was entitled to succeed, that as this plea was not taken it cannot be taken now and that the present defence of Salam Ullah is barred by section 11, Explanation IV.

We, therefore accept the appeal and restore the order of the Trial Court giving the plaintiffs the decree they seek. The plaintiff's costs will be paid throughout by Salam Ullah. The other defendants were merely *pro forma* and have not appealed.

Z. K.

Appeal accepted.

VILAYAT HUSSAIN V. MISRAN.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL, NO. 95 OF
1921.

February 16, 1923.

Present.—Sir Grimwood Mears, Kt., Chief
Justice, and Justice Sir P. C. Benerji, Kt.,

Sheikh VILAYAT HUSSAIN AND

ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat MISRAN AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Fraud—Fraud accomplished—Estoppel—Equity
—Defence of In pari delicto.

In all cases where a plaintiff is relying upon a deed, the defendant is entitled as of course to give evidence of the circumstances under which the document came into existence. When those circumstances embrace and include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the Court to look into the matter, and if the Court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud, and that there is no difference in the degree of guilt of the plaintiff (who is asking the Court to give him some help) and that of the defendant the duty of the Court is not to assist either party; in other words, the duty of the Court is to dismiss the claim, because the Court having then in its knowledge that it has before it two persons equally guilty of fraud will not assist either of them. [p. 93, col. 1.]

Taylor v. Chester, (1869) 4 Q. B. 309 at p. 312; 10 B. & S. 237; 38 L. J. Q. B. 225; 21 L. T. 359, *Herman v. Feuchner*, (1885) 15 Q. B. D. 561; 54 L. J. Q. B. 340; 53 L. T. 94; 33 W. R. 606; 49 J. P. 502 and *Raghupathi Chatterjee v. Nrisingha Hari Das*, 71 Ind. Cas. 1; 36 C. L. J. 491; (1923) A. I. R. (C.) 90, followed.

Siddlingappa v. Hirasa, 31 B. 405 at p. 410; 9 Bom. L. R. 542 and *Doe d. Roberts v. Roberts*, (1819) 2 B. & Ald. 367; 20 R. R. 477; 106 E. R. 401, dissented from.

Letters Patent Appeal against an order of Mr. Justice Stuart, dated the 19th May 1921.

Messrs. U. S. Bajpai and Janki Prasad, for the Appellants.

Mr. Haribans Sahai, for the Respondents.

JUDGMENT.

Mears, C. J.—This is an interesting case which has given rise to a discussion as to under what circumstances a defendant can properly plead and rely upon facts showing that he and the plaintiff were in *pari delicto*.

The circumstances are as simple as they can be. Sheikh Vilayet Hussain

and Musammat Imaman were, on the 12th of September 1904, indebted to various creditors. There was at least one decree outstanding which was in the course of execution. In that position of affairs they turned to Muhammad Ismail, who was a friend and who agreed with them that a fictitious deed of sale of property should be executed in his favour so that that might serve as a shield against the demands of creditors. That deed of sale was in fact executed on the 12th of September 1904 and no consideration passed from Muhammad Ismail to the ostensible vendors. Muhammad Ismail put forward a claim and got this very property released from the operation of the decree. Therefore, the contemplated fraud was successfully carried out. It is probable Muhammad Ismail collected the rents for some period, but if this was done, it was only to make the transaction of the 12th of September 1904 appear to be a genuine and valid one. Under some circumstances which are not very clear, on the death of Muhammad Ismail Vilayet Hussain and Musammat Imaman got possession of the house and began to collect the rents themselves. In this way they asserted possession and dominion over the house in question. That was in the year 1909.

On the 30th of June 1917, after a lapse of some nine years, the plaintiffs, who are the heirs of Muhammad Ismail, brought the suit to recover possession on the strength of the sale-deed of the 12th of September 1904.

It is now important to turn to the pleadings to see how the case was framed by the parties. As one would expect, the pleading in the plaint was quite simple; it was based upon a sale-deed, the death of Muhammad Ismail and the realisation of rents by the defendants. To that apparently genuine claim the defendants set up what they contended was the true story; that is to say, they drafted pleas which showed, if they were true, and as they were subsequently found to be true, that Vilayet Hussain and Muhammad Ismail were in *pari delicto*, that is to say, not one man but both were jointly engaged on a fraud in which each was equally culpable.

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If that written statement was a written statement in accordance with the rules and with the procedure, then it had to be considered by the Court and proper issues framed. No body seems to have suggested that the pleading was not in any way proper and indeed there can be no question that this pleading was the proper pleading, and the points urged in it and the facts set out in it were proper to be raised and those which it was the duty of the Court to consider, and in fact the Court did consider this matter and the Court allowed the genuineness of the document to be impeached.

In all cases where a plaintiff is relying upon a deed, the defendant is entitled as of course to give evidence of the circumstances under which the document came into existence. When those circumstances embrace and include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the Court to look into the matter and if the Court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud, and that there is no difference in the degree of guilt of the plaintiff (who is asking the Court to give him some help) and that of the defendant, the duty of the Court is not to assist either party: in other words, the duty of the Court is to dismiss the claim; because the Court having then in its knowledge that it has before it two persons equally guilty of fraud will not assist either of them.

The position, therefore, of this matter is that the decision of the lower Appellate Court is the right decision and that decision must be restored. But, inasmuch as there has been considerable discussion on this matter, it may be useful, without going into great length, to mention some authorities so that there can be no question as to the propriety of pleading and entertaining any evidence of the allegations of a joint and equal fraud of plaintiff and defendant. An example of that type of pleading will be found in *Taylor v. Chester* (1). There, by way of a special reply, all the

facts were stated which went to show that, if those facts were true, the plaintiff and defendant were *in pari delicto*. It may be noticed that in that case the defendant took issue on the reply and raised the precise question as to whether a pleading of this nature was a fit and proper pleading to be entertained by the Court. The Court decided that it was, went into the whole facts of the case and in the course of its judgment said: "The maxim '*in pari delicto potior est conditio possidentis*' is as thoroughly settled as any proposition of law can be. It is a maxim of law established, not for the benefit of plaintiffs or defendant, but is founded on the principles of public policy which will not assist a plaintiff who has paid over money, or handed over property in pursuance of an illegal or immoral contract, to recover it back, for the Courts will not assist an illegal transaction in any respect." The Court also pointed out the further proposition that if a plaintiff can go into a Court and make out a complete case without himself disclosing any fraud, then he may be entitled to recover. In all cases, however, where a plaintiff has to produce a document, he can either by interrogatories, or when he is actually present in the box be asked questions under cross-examination which will show that his first story to the Court as regards the circumstances under which the document was executed is not a true story, and the defendant then is entitled, if he has put on record the proper pleadings; to go into the whole of the circumstances and show that each party is *in pari delicto*. There are many other English authorities to that effect, but the most concise summary of the law is to be found in Broom's *Legal Maxims*, 8th Edition, at page 561 and 562. Once it is established that the parties are *in pari delicto* the Court will not assist an illegal transaction in any respect, that is to say, the person who has asked the Court to do something in his favour will fail. Not only, says the learned author, *in acquat jure* but likewise *in pari delicto*, is it true that *potior est conditio possidentis*; where each party is equally in fault, the law favours him who is actually in possession, a well-known rule which is in fact included in that more comprehensive maxim to which the present remarks are

(1) (1869) 4 Q. B. 309 at p. 312; 10 B. & S. 237; 38 L. J. Q. B. 225; 21 L. T. 359.

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appended. 'If' said Buller, J., 'a party comes into a Court of Justice to enforce an illegal contract, two answers may be given to his demand, the one, that he must draw justice from a pure fountain and the other that *potior est conditio possidentis*.'

Our attention has been drawn to the case of *Sidlingappa v. Hirasa* (2) and it is contended that the facts of that case are so identical with the facts of the case under consideration that we are bound by the course that that case took. If one studies that case, one will see that no attention was concentrated upon the question with which we are concerned here, which is whether a defendant can in a pleading raise facts which show that he and the plaintiff were *in pari delicto*. If he can raise such facts, he is entitled to prove such facts; and if he proves such facts, he can bring himself within the principle of law which has been laid down in the case to which we have referred above, and in others which are to be found appended to the notes in Broom's Legal Maxims. The Court was referred to *Doe d. Roberts v. Roberts* (3) but the Court does not seem to have paid any attention to the principle of *in pari delicto potior est conditio defendantis* and that case is certainly not in harmony with the principle of subsequent decisions of which *Taylor v. Chester* (1) (supra) and *Herman v. Jeuchner* (4) are characteristic examples and appears to us of doubtful authority. The essence of the case now under consideration is that the defendants set up the joint iniquity of Vilayet Hussain and Muhammad Ismail they were alleging through the concerted plan by which both the plaintiffs and defendant in equal degree of wrong-doing defendant had agreed to take a course which would defeat, and did in fact defeat creditors. In the case of *Sidlingappa v. Hirasa* (2) this point does not appear to have been urged upon the Court; at all events, it finds no place in the judgment. We have no doubt whatever that the practice is that a defendant may always allege facts, that

he and the plaintiff were together jointly equally guilty of a contemplated and executed fraud. Provided the pleading contains proper facts an issue has to be found on that, and if it is established to the satisfaction of the Court that the plaintiff and defendant were jointly and equally engaged upon a fraud, it is then the duty of the Court to give no assistance to the plaintiff; the position being that the plaintiff must come into Court with clean hands.

On the question of *pari delicto* one has to consider all the facts, and that requires an examination of the circumstances attending the execution of the document if it be a document which is impeached. In this case the wrong-doing was in and around the 12th of September 1904. The parties who were guilty of that wrong-doing were Vilayet Hussain and Muhammad Ismail. Neither of them could have obtained any assistance from any Court after the contemplated fraud had been carried out, and that bar applies also to people claiming directly through them.

Mr. Uma Shanker Bajpai after the close of the arguments and indeed after delivery of judgment called our attention to the very recent case of *Raghupati Chatterjee v. Nrishingha Hori Das* (5). There the Calcutta High Court on a full consideration of all the authorities came to the same conclusion at which we have arrived.

We are, therefore, of opinion that this appeal must be allowed and the decree of the learned Judge of this Court set aside and the decree of the lower Appellate Court restored. The result will be that the plaintiff's suit will be dismissed. Each party must pay his own costs throughout.

Banerji, J.—I agree.

N. H.

Appeal allowed.

(2) 31 B. 405 at p. 410; 9 Bom. L. R. 542.
(3) (1819) 2 B. & Ald. 367; 20 P. R. 477; 106 F. R. 401.
(4) (1885) 15 Q. B. D. 561; 54 L. J. Q. B. 340; 53 L. T. 94; 33 W. R. 606; 49 J. P. 502.

(5) 71 Ind. Cas. 1; 35 C. L. J. 491; (1123) A. I. R. (C.) 90.

BUDAVARAM NARASIMHALU CHETTY v. NOOTA IBBUNDRAM NAGASAM VARU.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 683 OF 1921.

November 29, 1922.

Present:—Mr. Justice Krishnan.

BUDAVARAM NARASIMHALU CHETTY

—DEFENDANT NO. 1—PETITIONER

versus

NOOTA IBBUNDRAM NAGASAM VARU

BY REPRESENTATIVE RAVOOR SUBBA-

ROYA CHETTY—PLAINTIFF—

RESPONDENT.

Contract—Class of persons—Capacity to enter into contract—Suit to enforce contract—Procedure—Civil Procedure Code (Act V 1908), O. I, r. 8.

An indefinite body, for instance, a particular community consisting of a fluctuating body of persons, is capable of owning property and can enter into a contract to receive money.

An agreement to pay a sum of money to such a body can be enforced in a suit brought under O. I, r. 8 of the Civil Procedure Code.

Navroji Manekji Wadia v. Dastur Kharsedji Mancherji, 28 B. 20 at p. 49; 5 Bom. L. R. 745; *Secretary of State v. Haibatrao Hari*, 28 B. 276; 6 Bom. L. R. 43; *Sivathal Periyava Nadar v. Nana, Chuna, Velmuruga Nadar*, 64 Ind. Cas. 618; 30 M. L. T. 47 and *Idris v. Jane Skinner*, 56 Ind. Cas. 723; 82 P. R. 1919; 45 P. W. R. 1919; 126 P. L. R. 1920 (P. C.), relied upon.

Yusuf Beg v. Board of Foreign Missions of the Presbyterian Church of New York, 16 A. 420; A. W. N. (1894) 154; 8 Ind. Dec. (N. S.) 274; *Panchaiti Ahkhar Kalan v. Gauri Kuar*, 20 A. 167; A. W. N. (1898) 7; 9 Ind. Dec. (N. S.) 469; *Muhammadian Association of Meerut v. Bakhshi Ram*, 6 A. 284; A. W. N. (1884) 76; 3 Ind. Dec. (N. S.) 919 and *Maharaj Bahadur Singh v. Gandauri Singh*, 39 Ind. Cas. 868; 2 P. L. J. 323; 2 P. L. W. 282, distinguished.

Petition under section 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the District Munsif, Chittoor, in Small Cause Suit No. 107 of 1921.

Messrs. T. R. Srinivasa Thathachari, and Thirumalai Thathchari, for the Petitioner.

Mr. Jagadisa Iyer, for the Respondent.

JUDGMENT.—This is an application to revise the decree of the District Munsif of Chittoor in Small Cause Suit No. 107 of 1921. The suit was brought for a sum of Rs. 28 and interest thereon Rs. 9-10-0, in all for Rs. 37-10-0, alleged to be due on account by the defendants to the Vysia community of Mogarala village in Chandragiri Taluk, as evidenced by a deed executed by the first defendant. It says: "on 3rd March 1918, I, Budavaram Narasimhulu Chetti; said at time of the death of Budhavaram Cheugalvaraya that I would pay Rs. 28 to the

Mogarala Nootayibandum Nagaram Varu, as charity. Interest should be charged hereon at the rate of Re. 1 per cent. per mensem. I shall pay the amount of principal and interest thereon to the aforesaid Nootayibandum Nagaram Varu on 15th October 1918." There is clear evidence that the first defendant did undertake to pay Rs. 28 and interest to the Vysia community of the village in question.

The main objection taken by the first defendant before me is that such a claim as this could not be enforced at all, as no promise to pay any money to a fluctuating body like the Vysia community of Mogarala is legally enforceable. I may say at once that I do not look upon the document executed by the first defendant as a promissory-note or negotiable instrument; it is really only a memorandum of what he orally promised to pay at the time of the death of the deceased. Therefore, the question whether a promissory-note can be executed in the name of a community does not arise for decision. The only question is whether a person can make himself liable to a community by agreeing to pay a certain sum of money to it. The frame of the suit in the present case cannot be objected to, because leave was obtained by the plaintiff Subbaroya Chetti to sue on behalf of the Vysia community of Mogarala under O. I, r. 8, Civil Procedure Code. It has been held in several cases that an indefinite body like the Vysia community of Mogarala can own property. Vide *Navroji Manekji Wadia v. Dastur Kharsedji Mancherji* (1); *Secretary of State v. Haibatrao Hari* (2) and *Sivathal Periyava Nadar v. Nana, Chuna, Velmuruga Nadar* (3) and the position has also been recognised by the Privy Council in *Idris v. Jane Skinner* (4), where a right of pre-emption was allowed to be enforced in favour of an indefinite body like the occupancy tenants in an estate in the Punjab.

The petitioner has cited some cases from the Allahabad Reports on the authority of which he contends that the present suit should be dismissed as improperly laid. The

(1) 28 B. 20 at p. 49 5 Bom. L. R. 745.

(2) 28 B. 276; 6 Bom. L. R. 43.

(3) 64 Ind. Cas. 618; 30 M. L. T. 47.

(4) 56 Ind. Cas. 723; 82 P. R. 1919; 45 P. W. R. 1919; 126 P. L. R. 1920 (P. C.).

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cases cited are *Yusuf Beg v. Board of Foreign Missions of the Presbyterian Church of New York* (5), *Panchaiti Akhara Kalan v. Gauri Kuar* (6) and *Muhammadan Association of Meerut v. Bakhshi Ram* (7). Now, all these cases deal with suits which are brought in the name of a community or indefinite body of persons by some one individual or more without any authority being obtained by that individual or those individuals either under O. I, r. 8, Civil Procedure Code, or by getting the body registered under the Societies' Registration Act or any other Act, and it was held that such suits were not properly instituted. But these decisions do not apply to the present case, as in this case leave has been obtained from the Court by the plaintiff to sue on behalf of the community. The petitioner has also cited the case in *Maharaj Bahadur Singh v. Gandaury Singh* (8). That case does not seem to have any direct bearing on the present case; what was held there was that a right to hunt in a certain jungle for a day in the year cannot be acquired as an easement by 20 years' enjoyment under section 26 of the Limitation Act of 1908 by the members of a tribe such as the Sonthals or Gharwalis. It is not necessary to consider whether that is rightly decided, because here no such question is raised. The only question here is whether a body like the Vysia community of Mograla, which, I understand, consists of a very few individuals, can enter into a contract to receive money from a third party. I have no doubt that, as they can own property, they can do so just as they can enter into contracts to pay money for work done for them. I, therefore, overrule the first objection.

Another objection has been taken in this case, namely, that on the face of the document, Exhibit A (1), the promise to pay is not supported by consideration, because it was only intended as a charity as the document says. The District Munsif has considered this point and has found on the evidence given in this case that, 'although Exhibit A speaks of the payment as a matter

(5) 16 A. 420; A. W. N. (1894) 154; 8 Ind. Dec. (N. S.) 274.

(6) 20 A. 167; A. W. N. (1898) 7; 9 Ind. Dec. (N. S.) 469.

(7) 6 A. 284; A. W. N. (1884) 76; 3 Ind. Dec. (N. S.) 919.

(8) 39 Ind. Cas. 868; 2 P. L. J. 323; 2 P. L. W. 282.

of charity, there was consideration for the payment, inasmuch as the members of the Vysia community of Mograla helped the first defendant in carrying the corpse of his deceased brother and in having the cremation of the dead body carried out and that, instead of bargaining for payment to themselves, they asked that payment should be made to the community as a whole. I think the District Munsif is right in his view that this would form sufficient consideration for the promise to pay Rs. 28 to the community. It is not necessary that consideration should move from the person to whom the promise is made. The fact that the document does not mention this, is only a matter to be taken into consideration in weighing the evidence; it does not prevent such evidence as has been given in this case from being given. This objection also fails.

As both the points taken in the revision petition fail, the revision petition itself fails, and is dismissed with costs.

V. N. V.

Z. K.

Petition dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 484 OF 1921.

February 6, 1923.

Present :—Mr. Justice Foster.

GOBIND SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JAIGOPAL SINGH AND OTHERS—

PLAINTIFFS AND SAUKHI LAL,

AND OTHERS—DEFENDANTS 2ND PARTY

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appellate Court; powers of—Interference with portion of decree not included in appeal.

An Appellate Court does not exceed the powers given to it by O. XLI, r. 33 of the Civil Procedure Code by interfering with a portion of the decree not included in the appeal, where it adopts the principle on which the decision of the First Court was based, and makes an order which it considers ought to have been made by the said Court on the basis of that principle. [p. 98, col. 2.]

Rangamlal v. Jhandu, 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 1111, distinguished.

Jawahar Bano v. Shujaat Hussain Beg, 58 Ind. Cas. 114; 18 A. L. J. 925; 2 U. P. L. R. (A.) 309; 43 A. 85 relied on.

Appeal from a decision of the Subordinate Judge, First Court, Monghyr, dated the 30th July 1920, modifying a decision of the

GOVIND SINGH v. JAIGOPAL SINGH.

Munsif, Second Court, Begusarai, dated the 28th January 1920.

Messrs. S. M. Mullick and Satya Sunder Bose, for the Appellants.

Mr. A. K. Roy, for the Respondents.

JUDGMENT.—The plaintiffs and the defendants 2nd party are co-sharers in one of the five *Touzi* estates comprised in *Mahal* Naula, namely *Touzi* estate No. 1003; and the defendants 1st party are the proprietors of an adjacent estate also within *Mahal* Naula, namely *Touzi* No. 1061. The plaintiffs sued for a declaration of their title and for confirmation of possession in respect of their right of fishery in a tract having an area of 18 *bighas* 7 *cottahs* 12 *dhurs*. Admittedly, this land lies within *Touzi* estate No. 1003. The cause of action was stated to have been a criminal case in June 1919 concerning this fishery. The defendants who are proprietors of *Touzi* No. 1061, that is, the defendants 1st party have contested the suit as defendants in the original Court and appellants in the Appellate Court. Some of the plaintiffs' co-sharers, defendants 2nd party, appeared and filed written statements supporting the defendants 1st party. In the written statements it was asserted that the possession of the plaintiffs and defendants 2nd party of lands within *Touzi* estate No. 1003 had been altered since the institution of the suit by Civil Court partition, and it was asserted that the area of 18 *bighas* and odd had fallen within the *patti* of the plaintiffs' co-sharer. It was also asserted that the right of fishery in this area belonged to the proprietors of *Touzi* estate No. 1061 by right of prescription. I should mention here that the parties are agreed that this area of 18 *bighas* and odd consists of land which is cultivated for part of the year but during the rains goes under water and becomes one part of a long stretch of water called the *sorhni-jalkar*. The question whether the proprietors of other *Touzi* estates than estate No. 1003 had acquired any prescriptive rights to fish in the disputed land was directly raised between the parties in Issue No. 4 and was decided against them and the learned Munsif held that the plaintiff and the defendants 2nd party as proprietors of *Touzi* estate No. 1003 had the right to fish on the disputed land. It was also held that the proprietors of other *Touzi* estates were

not necessary parties. Then the learned Munsif proceeded to decide which of the plots scheduled in the plaint and comprised in the land in dispute have fallen into the plaintiffs' *patti* by partition. He found that only plot No. 7448 of *Khata* No. 51 did not appear to have fallen into the co-sharers' *patti*. His order was that "the suit be decreed in part; let the title of the plaintiffs be declared in respect of the disputed land with reference to plot No. 7448 only and let them be confirmed in possession thereof. Let it also be declared that the defendants have no right in the disputed *jalkar* and that the order passed in the criminal proceeding dated the 15th June 1916 is illegal and inoperative."

The plaintiff did not appear but the defendants 1st party brought an appeal against the declaration decreed. The first point taken before the learned Subordinate Judge who heard the appeal was that the Court of first instance, having found that all the plots but No. 7448 had fallen in *pattis* of the co-sharers, and there being no evidence that this plot No. 7448 had fallen in the plaintiffs' *patti*, the suit should have been dismissed. The learned Subordinate Judge examined the partition papers and came to the conclusion that, whilst there was some evidence that some other plots had fallen into the plaintiff's *patti*, there was no evidence at all to show in what *patti* plot No. 7448 had fallen. The learned Subordinate Judge acceded to one plea of the appellants-defendants, namely, that the lower Court should not have made so wide a negative declarations against the defendant. The order of the Subordinate Judge was as follows: "The appeal, therefore, practically fails. But the decree of the lower Court will be modified in this way. In place of the declaration made by the lower Court it will be declared that the plaintiffs have the fishery right over such of the plots mentioned in the plaint as have fallen to their *patti* by Civil Court partition and that the defendants 1st party have got no fishery right over the said plots of the plaintiffs." Against this decision in the first appeal the defendants 1st party have made a second appeal. Four points have been raised of which two can be disposed of at once. It was first urged that the decree of the

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lower Appellate Court went beyond the pleadings, but this is obviously a mistake on the part of the learned Vakil and the point was withdrawn. The second point which I propose to dispose of at once is the contention that the suit was not maintainable unless the plaintiffs had established a right of easement. It is obvious that a person cannot have an easement in the land he owns and that the plaintiff is suing only as proprietor of the lands in suit. Two other points have been argued at length. It is contended that the decision of the lower Court was beyond the jurisdiction of an Appellate Court in so far as it interfered with the decree to which the plaintiff had submitted by not appealing. The argument had reference to the terms of O. XLI, r. 33, and the case *Rangamlal v. Jhandu* (1) was cited. In connection with this contention there was a subsidiary argument that the plaintiff was not at all entitled to plot No. 7448.

Now, looking at the decisions of the two Courts it seems to me that they were both moving on the same line and were both guided by the same principle in coming to their decisions. Both Courts appear to me to have held in effect that the plaintiff was entitled to a declaration of his rights in fishery in respect of those plots which fell within his *batti*. No doubt, it would have been better if all discussion of the proprietary rights acquired by partition had been excluded, and if the plaint had been followed and a declaration granted in respect of the whole of the 18 *bighas* lying within the whole *Touzi* estate No. 1003 subject to any subsequent modifications made in the title of the parties by Civil Court partition. But as it was, each Court not only decided that the plaintiffs must have a declaration in respect of the land of which the plaintiffs were proprietors, but also referred to the partition papers to ascertain what those lands were. In this process the two Courts seem to have disagreed and the Appellate Court intended to solve the difficulty by making a general decree of the nature of that appealed against. Now, the defendants-appellants who are proprietors of *Touzi* estate No. 1061, and whom I must in this second

appeal regard as having no interest in the lands in suit, ask me to set aside the whole decree. I am not disposed to do this, because, in my opinion, it would be doing a great injustice to the plaintiffs, who would in the result be deprived of what they have been found entitled to. I am quoting as literally as possible the words of an Allahabad judgment reported as *Jawahar Bano v. Shujaat Husain Beg* (2) in which the case which I have quoted above from *Rangamlal v. Jhandu* (1) was distinguished. In my opinion the learned Subordinate Judge did not exceed the powers given him as Appellate Court by O. XLI, r. 33. He adopted the principle on which the decision of the First Court was based and he made an order which he considered ought to have been made on the basis of that principle. I, therefore, find no error of law in this respect.

As to the question whether plot No. 7448 falls within or without the plaintiff's *khasra*, the form of the Appellate Court's decree leaves the question open. It is urged that the decree in itself is indefinite, and O. XX, r. 9 was invoked. In my opinion the lands affected by the declaration are clearly indicated and there is no chance of mistake. The description is sufficient for the purpose of identification of plots when the question arises. For this reason I dismiss the appeal with costs.

W. C. A. *Appeal dismissed.*
(2) 58 Ind. Cas. 114; 18 A. L. J. 925; 2 U. P. L. R. (A.) 309; 43 A. 85.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1890 OF 1920.

June 21, 1922.

Present:—Justice Sir Asutosh Mookerji, Kt., and Mr. Justice Chotzner.

BEJOY CHANDRA SINHA — PLAINTIFF —
APPELLANT

versus

HOWRAH AMTA LIGHT RAILWAY, CO. LTD., BY THEIR MANAGING AGENTS, MARTIN & CO. — DEFENDANT — RESPONDENT.

Lessor and lessee—Repairs of leased premises—Obligations of lessor and lessee—Express obligation to make repairs on part of lessor—Failure to carry out repairs—Lessee, right of, to terminate tenancy—Damages—Lease, premature termination of, consequences of—Acceptance of surrender, if precluded.

(1) 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 1111.

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essor from suing for damages—Holding over, effect of—Notice—Transfer of Property Act (I V of 1882), ss. 106, 108, 116.

In the absence of a contract to do repairs or of an obligation imposed by Statute, there is no obligation on the part of a landlord to put premises into habitable condition or to do any repairs whatever upon them, though by neglecting to do so they become uninhabitable. In fact, the landlord has no right to go upon the premises if he desire to make repairs, and if he do so in the absence of an express power in the lease he will be guilty of a trespass and may be restrained by injunction, although the non-repair may cause a forfeiture of his own lease. On the other hand, the implied obligation of a tenant from year to year is to keep the premises wind and water-tight and to make fair and tenantable repairs as by putting fences in order or replacing windows or doors that are broken during his occupation, of cleansing drains and sewers. [p. 101, col. 2.]

Chappell v. Gregory, (1864) 34 Beav. 250; 55 E. R. 631; 145 R. R. 501; *Gott v. Gandy*, (1853) 2 El. & Bl. 845; 2 C. L. R. 392; 23 L. J. Q. B. 1; 18 Jur. 310; 2 W. R. 38; 118 E. R. 984; 22 L. T. (O.S.) 97; 95 R. R. 848; *Arlen v. Pullen*, (1842) 10 M. & W. 321; 11 L. J. Ex. 359; 152 E. R. 912; 62 R. R. 627; *Barker v. Barker*, (1828) 3 Car. & P. 557; *Stocker v. Planet Building Society*, (1879) 27 W. R. 877; *Anworth v. Johnson*, (1832) 5 Car. & P. 239; 38 R. R. 821; *Leach v. Thomas*, (1835) 7 Car. & P. 328; 48 R. R. 790; *Wedd v. Porter*, (1916) 2 K. B. 91 at p. 100; 85 L. J. K. B. 1298; 115 L. T. 243; *Cheetham v. Hampson*, (1791) 4 T. R. 318; 2 R. R. 397; 100 E. R. 1041; *Gregory v. Mighell*, (1811) 18 Ves. 328; 11 R. R. 207; 34 E. R. 341; *Russel v. Shenton*, (1842) 2 G. & D. 573; 3 Q. B. 449; 11 L. J. Q. B. 289; 6 Jur. 1059; 114 E. R. 579; 61 R. R. 249, referred to.

Where a lessor is under an obligation to effect repairs and fails to comply with the request of the lessee to do so, the latter is not entitled to terminate the tenancy. Under section 108 of the Transfer of Property Act the lessee can remedy the breach himself, after giving a reasonable notice to the lessor and recover the amount expended by him together with interest, either by deducting it from the rent or otherwise [p. 101, col. 2.]

Lister v. Lane, (1893) 2 Q. B. 212; 62 L. J. Q. B. 583; 4 R. 474; 69 L. T. 176; 41 W. R. 626; 57 J. P. 725, referred to.

A suit for specific performance of a contract to take a lease lies when the lease essential for the completion of the contract has not been executed, and if there is a valid enforceable contract, either party is entitled to call upon the other to complete the transaction by the execution and registration of the document of title. [p. 102, cols. 1 & 2.]

Byod v. Kreig, 17 C. 548; 8 Ind. Dec. (N.S.) 905; *Hemanta Kumari Devi v. Midnapore Zemindari Co.*, 53 Ind. Cas. 534; 47 C. 485; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 46 I. A. 240; 31 C. L. J. 298; 22 Bom. L. R. 488 (P. C.); *Hemanta Kumari Devi v. Midnapur Zemindari Co.*, 28 Ind. Cas. 879; 19 C. W. N. 347; 22 C. L. J. 44; *Puchha Lal v. Kunj*

Behary Lal, 20 Ind. Cas. 803; 19 C. L. J. 213; 18 C. W. N. 445; *Mahomed Musa v. Azhoie Kumar Ganjuli*, 28 Ind. Cas. 939; 17 Bom. L. R. 420; 42 C. 801; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 14; 1 L. W. 253; (1915) M. W. N. 621; 42 I. A. 1 (P. C.); *Maddison v. Alderson* (1883) 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821; *Venkayamma Rao v. Venkatanarasimha Appa Rao*, 34 Ind. Cas. 921; 39 M. 509 at p. 525; 20 C. W. N. 1054; 14 A. L. J. 797; 31 M. L. J. 58; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 24 C. L. J. 279; 43 I. A. 138 (P. C.), referred to.

Although an original lease of certain premises may be for a term of years, under section 116 of the Transfer of Property Act the effect of holding over after the expiry of the term upon payment of rent to the landlord is to create a tenancy from year to year or from month to month according to the purpose for which the property was leased as specified in section 106 of the Act. [p. 102, col. 2; p. 103, col. 2.]

A notice, though of a longer duration than 15 days, to terminate a monthly tenancy, but not expiring with the end of a month of the tenancy, is inoperative in law. [p. 103, col. 1.]

Where the term of a tenancy under which rent is payable periodically, is brought to a premature termination, the lessor is entitled to damages and not to rent for the unexpired term of the lease. Even the acceptance of surrender does not preclude the lessor from suing for damages for breach of the contract, as it does not destroy the existing cause of action. But the lessor is bound to let out the house after the lessee has vacated it and thereby to minimise the damage. [p. 103 col. 1.]

Appeal against the decree of the Additional District Judge, Howrah, in Zillah Hooghly, dated the 22nd April 1920, affirming the decree of the Subordinate Judge, Howrah, dated the 29th June 1918.

Babu Hari Charan Bineries, (with him Dr. Sarat Chandra Basak), for the Appellant.—The appellant was not at all bound to make any repairs to the house. There is no legal obligation on his part in that respect: See Transfer of Property Act, section 108, clauses (e), (f) and (m); also Woodfall's Landlord and Tenant, 20th Edition, p. 741. The respondent could have made the repairs himself if he thought that the appellant was bound to make such repairs to the house and then deduct the expenses thereof from the rent. This he did not do, but instead left the house without notice, at least legal notice; for the notice to be effective and legal it must expire with the end of a month of the tenancy: Transfer of Property Act, section 106. The notice being thus illegal and void, the appellant is entitled to the relief asked for.

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Also, from the letter of the 3rd December 1914 it is clear that there was no contract by the appellant to repair the house. This is corroborated by the fact that the respondent asked the appellant to repair the house after staying over for 6 months. It is, therefore, wrong to say that the appellant by his conduct admitted that he was bound to make repairs to the house. Besides, the learned Additional District Judge was entirely wrong in making a new case for the defendant which was not suggested in the written statement or in the evidence during the trial.

Babu Mahendra Nath Roy, (with him Babu Ambika Pada Choudhry), for the Respondent.—There was an agreement to lease in respect of the 1st as well as the 2nd period, but as the letters were neither stamped nor registered they could not be taken in evidence: *Boyd v. Kreig* (1); *Hemanta Kumari Debi v. Midnapore Zemindari Co.* (2). The notice was, no doubt, bad, but that does not entitle the landlord to a decree for specific performance. There is ample evidence that the house became uninhabitable and the respondent was compelled to leave it. Your lordships sitting in equity would not force such a house on the tenant.

Babu Hari Charan Banerjee in reply.—As regards the second period I submit that it was not a present demise, for the commencing of the period of lease was postponed to a future date, that is to say, after the expiry of the first period.

[MOOKERJEE, J.—As between the parties the letters showed a complete contract and nothing remained for the parties to do in order to give effect to it. The contract would come into force automatically after a certain period].

I submit even then it would not be a present demise. But assuming that the letters required registration, I am entitled to call upon the other party to complete the transaction by the execution and registration of the document of title.

JUDGMENT.—This is an appeal by the plaintiff in a suit for specific performance of an agreement to lease and in the alternative for damages. The subject-matter of the

litigation is a house on the Grand Trunk Road in Howrah. In 1912, the first defendant (The Howrah Amta Railway Co.) proposed to the plaintiff to hire this house as a residence for their staff. The plaintiff agreed and the final agreement was that the defendant should hold the house for a period of three years from the 1st November 1912 to the 31st October 1915 at a monthly rent of Rs. 190. No formal lease was executed. But after letters had been exchanged, the defendant entered into occupation of the house and continued in occupation till the end of the term of the lease. In July 1914, long before the expiry of the term, the defendant informed the plaintiff by a letter that the electric light wiring of the house was in a bad condition and required repairing. The plaintiff took no notice of this request. The result was that the defendant again wrote to the plaintiff and intimated that if the plaintiff did not make the repairs, the defendant would do the needful and deduct the costs from the rent. This made the plaintiff alert and in reply he intimated to the defendant that he was willing to repair the electric light wiring, provided the defendant would continue the lease for three years more from the expiry of the current term. The defendant agreed to this proposal by a letter dated the 8th December 1914 and the plaintiff executed the repairs in due course. After the expiry of the term the defendant continued in occupation, but no formal lease was executed. On the 30th June 1916 the defendant left the house. The Company had previously given notice to the plaintiff on the 9th June that they would vacate the house after the lapse of a month from that date. The plaintiff refused to accept the surrender and instituted this suit on the 26th January 1917. Messrs. Martin & Co., who were the Managing Agents of the Howrah Amta Railway Company, were also joined as defendants; but they contended that they had no liability in respect of the matter in dispute. The Courts below have dismissed the suit, but on different grounds. The Court of first instance came to the conclusion that the letter of the 8th December 1914 constituted the lease, and that, as it was neither stamped nor registered, it was not admissible in evidence. Consequently, the plaintiff could not claim

(1) 17 C. 548; 8 Ind. Dec. (N. S.) 905.

(2) 53 Ind. Cas. 534; 47 C. 485; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 421; 11 L. W. 301; 46 I. A. 240; 31 C. L. J. 298; 22 Bom. L. R. 488 (P. C.).

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specific performance. On appeal the District Judge has affirmed the decree of the Subordinate Judge on an entirely different ground. He does not discuss the question of the effect of the letters from the plaintiff to the defendant dated the 3rd December 1914 and the letter from the defendant to the plaintiff dated the 8th December 1914. He proceeds on the ground that when, on the 8th April 1916, the defendant called upon the plaintiff to repair the house thoroughly and the plaintiff did not comply with the request, the defendant became entitled to vacate the premises.

On the present appeal we have been invited to consider, whether the view taken by the District Judge is correct and whether the decree of dismissal could be supported on the ground assigned by the District Judge. In our opinion it is plain that the decree of dismissal cannot be supported on either of the grounds mentioned in the Courts below.

As regards the view taken by the District Judge, it is plain that the plaintiff was under no obligation, contractual or statutory, to effect the repairs of the house. In this connection reference may be made to clauses (e), (f) and (m) of section 108 of the Transfer of Property Act. Clause (e) is in these terms:—"If by fire, tempest or flood or violence of any army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let, the lease shall, at the option of the lessee, be void; provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision". Clause (f) is in these terms:—"If the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor". Clause (m) is in these terms:—"The lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was at the time when he was put in possession in subject only to the changes caused by reasonable wear and tear or irresistible force." It is plain

that none of these clauses entitles the lessee to call upon the lessor to repair the property. In fact, unless there is a contract to the contrary, the lessor is not necessarily bound to make any repairs whatever. This is clear from a long series of decisions of great authority.

In the absence of a contract to do repairs or of an obligation imposed by Statute, there is no obligation on the part of a landlord to put premises into habitable condition [*Chappell v. Gregory* (3)], or to do any repairs whatever upon them, [*Gott v. Gandy* (4)], though by neglecting to do so they become uninhabitable [*Arden v. Pullen* (5)]. In fact, as stated in *Barker v. Barker* (6) the landlord has no right to go upon the premises if he desire to make repairs, and if he do so in the absence of an express power in the lease he will be guilty of a trespass and may be restrained by injunction, although the non-repair may cause a forfeiture of his own lease [*Stocker v. Planet Building Society* (7)]. On the other hand, the implied obligation of a tenant from year to year is to keep the premises wind and water-tight [*Anworth v. Johnson* (8), *Leach v. Thomas* (9), *Wedd v. Porter* (10)], and to make fair and tenantable repairs [*Cheetham v. Hampson* (11), *Gregory v. Mighell* (12)], as by putting fences in order or replacing windows or doors that are broken during his occupation, of cleansing drains and sewers, *Russell v. Shenton* (13).

In the case before us there was no covenant to repair and the lessor could not be called upon by the lessee to effect any repairs. But even if the lessor was under an obligation to effect the repairs and failed to comply

(3) (1864) 34 Beav. 250; 55 E. R. 631; 145 R. R. 501.

(4) (1853) 2 El. & Bl. 845; 2 C. L. R. 392; 23 L. J. Q. B. 1; 18 Jur. 310; 2 W. R. 38; 118 E. R. 984; 22 L. T. (O. S.) 97; 95 R. R. 848.

(5) (1842) 10 M. & W. 321; 11 L. J. Ex. 359; 152 E. R. 942; 62 R. R. 627.

(6) (1828) 3 Car. & P. 557.

(7) (1879) 27 W. R. 877.

(8) (1832) 5 Car. & P. 239; 38 R. R. 821.

(9) (1835) 7 Car. & P. 328; 48 R. R. 790.

(10) (1916) 2 K. B. 91 at p. 100; 85 L. J. K. B. 1298; 115 L. T. 243.

(11) (1791) 4 T. R. 318; 2 R. R. 397; 100 E. R. 1041.

(12) (1811) 18 Ves. 328; 11 R. R. 207; 34 E. R. 341.

(13) (1842) 2 G. & D. 573; 3 Q. B. 449; 11 L. J. Q. B. 289; 6 Jur. 1059; 114 E. R. 579; 61 R. R. 249.

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with the request of the lessee, the lessee was not entitled to terminate the tenancy. Under section 108 he could remedy the breach himself, after giving a reasonable notice to the lessor and to recover the amount expended by him together with interest either by deducting it from the rent or otherwise. It is not suggested that if a tenant had taken a house which is out of repairs, he should put it in repairs when the lease comes to an end; but he is bound to maintain and restore the property in the condition in which it was when it was leased out to him. If the building, when demised, was an old one, and there was a covenant to repair it is not necessary that the old building should be delivered up in a renewed form: *Lister v. Lane* (14). The position is thus clear that the lessee was not entitled to terminate the lease on the ground assigned by the District Judge.

We have next to consider the ground assigned by the Subordinate Judge. The Subordinate Judge has held that there was a completed contract for the lease and that consequently the letter of the 8th December 1914 should not be received in evidence, as it was neither stamped nor registered. In support of this proposition he has placed reliance upon the decisions in *Boyd v. Kreig* (1), *Hemanta Kumari Debi v. Midnapur Zemindari Co.* (15) and *Hemanta Kumari Debi v. Midnapore Zemindari Co.* (2). The letter of the 3rd December 1914 was in these terms: "I beg to inform you that I shall be glad to do the necessary electric wiring on your assuring me that you will continue to be tenant for a further period of three years after the expiration of the lease. I require this assurance, as on the present terms of the lease, I have not to do any repairs or works in the building as long as the current agreement lasts." The reply dated the 8th December was in these terms: "I am prepared to continue the lease for three years and would like sanction at once to start work on the electric wiring, as at present it is unsafe." Let us assume that the effect of this correspondence was to create a present demise, subject to the reservation that the commencement of the lease was postponed till the date

(14) (1893) 2 Q. B. 21; 62 L. J. Q. B. 583; 4 R. 474; 69 L. T. 176; 41 W. R. 626; 67 J. P. 725.

(1) 28 Ind. Cas. 879; 19 C. W. N. 347; 22 C. L. J. 44.

of expiry of the term then current. Assume also that this document required registration. Still, that does not furnish an answer to the suit for specific performance. A suit for specific performance lies when the lease essential for the completion of the contract has not been executed, and if there is a valid enforceable contract, either party is entitled to call upon the other to complete the transaction by the execution and registration of the document of title; *Puchha Lal v. Kunj Behary Lal* (16), *Mahomed Musa v. Aghore Kumar Ganouli* (17), *Maddison v. Alderson* (18) and *Venkayamma Rao v. Venkatanarasimha Appa Rao* (19). From this point of view, the conclusion of the Subordinate Judge cannot be supported.

But we are of opinion that, in the events that have happened, this is not a case in which we should make a decree for specific performance. The condition of the house in 1916 was such that no Court of Equity would force it upon the intending lessee. The evidence makes it abundantly clear that the roofs of some of the rooms came down during the rains of 1916. We have no information as to the present condition of the house, and it is impossible for us to decree specific performance of the agreement which forms the foundation of the claim. This, however, does not justify the conclusion that the plaintiff is not entitled to any relief. As the agreement cannot be specifically enforced, the defendant Company cannot claim the position which they would have occupied if the requisite document had been executed and registered. Their position in law, consequently, was that after the expiry of the lease on the 31st October 1915 they were tenants from month to month. They held over upon payment of rent to the landlord. Hence under section 116, Transfer of Property Act, the lease was renewed from year to year or from month

(16) 20 Ind. Cas. 803; 19 C. L. J. 213; 18 C. W. N. 445.

(7) 28 Ind. Cas. 930; 22 C. 801; 21 C. L. J. 231; 17 Bom. L. R. 420; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. (P. C.)

(18) (1883) 8 App. Cas. 467; 52 L. J. Q. B. 737; 9 L. T. 303; 31 W. R. 820; 47 J. P. 821.

(19) 34 Ind. Cas. 121; 39 M. 509 at p. 525; 20 C. W. N. 1054; 14 A. L. J. 797; 31 M. L. J. 58; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 24 C. L. J. 279; 43 I. A. 138 (P. C.).

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to month according to the purpose for which the property was leased as specified in section 106. Thus, although the original term was for three years, the defendant Company became tenant from month to month under section 116 read with section 106; *Troilokya Nath Roy v. Sarat Chandra Banerjee* (20). That tenancy could be terminated by a notice to quit as prescribed in section 106. Under that section a lease of immoveable property from month to month is terminable, on the part of either lessor or lessee, by 15 days' notice expiring with the end of a month of the tenancy. In the present case, the notice which was served was no doubt a notice of a longer duration than 15 days. But it did not expire with the end of a month of the tenancy. The notice was thus inoperative in law and the tenancy had not been legally terminated when the defendant Company vacated the premises. In these circumstances, the plaintiff is entitled, not to rent for the remainder of the term, but only to damages, as explained in the case of *Jogendra Krishna Roy v. Kurpa Harshi & Co.* (21). Where the term of a tenancy, under which rent is payable periodically, is brought to a premature termination, the lessor is entitled to damages and not to rent for the unexpired term of the lease. Even the acceptance of surrender does not preclude the lessor from suing for damages for breach of the contract; it does not destroy the existing cause of action. This conclusion is in conformity with the decision in *Gray v. Owen* (22). The plaintiff was bound to let out the house after the defendant Company had vacated it, even though unlawfully, and thereby to minimise the damage. We are consequently of opinion that the plaintiff is entitled to damages inasmuch as the defendant Company vacated the premises before the lease had been lawfully terminated. We assess the damages at Rs. 400.

The result is that the decree of the District Judge is set aside and the suit is decreed for Rs. 400. Each party will pay his own costs in all the Courts. Costs, if already recovered, will be refunded.

B. N.

Decree set aside.

- (20) 32 C. 123; 8 C. W. N. 901.
 (21) 68 Ind. Cas. 593; 49 C. 345; 35 C. L. J. 175; (1923) A. I. R. (C) 63.
 (22) (1910) 1 K. B. 622; 79 L. J. K. B. 389; 102 L. T. 187; 26 T. L. R. 297.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 913 OF 1920.

March 14, 1922.

Present:—Mr. Justice Ayling and Mr. Justice Krishnan.

SUNDARESAM CHETTIAR *alias*
SUNDARAM CHETTIAR—APPELLANT
*versus*VISWANATHA PANDARASANNADHI
AND ANOTHER—RESPONDENTS.

Hindu Law—Religious Endowment—Matathi-pathi borrowing money for temple necessities—Temple properties, liability of—Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 10—Legal representative—Trust properties—Amendment of plaint—Power of Courts to allow legal representatives to raise new pleas.

Where a Pandarasannadhi, the *ex-officio* trustee of a temple, borrows money on a bond for necessary purposes agreeing to re-pay the same out of the trust funds, a decree can be properly passed against the temple properties. [p. 106, col. 1.]

Lakshmindrathirtha Swamiar v. Raghavendra Rao, 59 Ind. Cas. 287; 43 M. 795; 12 L. W. 139; 39 M. L. J. 174; (1920) M. W. N. 568; 28 M. L. T. 269, *Srimath Daiwasikamani Pandarasannidhi v. Noor Mahomed Routhan*, 31 M. 47; 17 M. L. J. 553; 3 M. L. T. 95, relied on.

Swaminatha Aiyar v. Srinivasa Aiyar, 38 Ind. Cas. 172; 32 M. L. J. 259; 21 M. L. T. 91; 5 L. W. 323; (1917) M. W. N. 278, distinguished.

Strickland v. Symons, (1884) 26 Ch. D. 245; 53 L. J. Ch. 582; 51 L. T. 406; 32 W. R. 889, *Johnson, In re, Shearman v. Robinson*, (1880) 15 Ch. D. 548; 49 L. J. Ch. 745; 43 L. T. 372; 29 W. R. 168, considered.

In a case where an institution is represented at different stages of the suit by different representatives, one not claiming under the other, the provision of law applicable is O. XXII, r. 10 and not O. XXII, r. 3 of the Civil Procedure Code, and the Courts have in such a case a wider discretion to allow amendments and new pleas to avoid multiplicity of suits, provided the character of the suit is not changed and the opposite side is not prejudiced and the trial embarrassed. [p. 104, col. 2.]

Inaganti Venkatarama Row v. Venkatalingama Nayanim, 68 Ind. Cas. 703; 30 M. L. T. 204; 15 L. W. 72; (1922) M. W. N. 42; 42 M. L. J. 43; (1922) A. I. R. (M.) 49, distinguished.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 232 of 1918, presented against the decree of the Court of the Subordinate Judge of Mayavaram, in Original Suit No. 67 of 1915.

Mr. T. V. Muthukrishna Aiyar and N. Muthuswami Ayyar, for the Appellant.

Mr. S. Ranganadha Ayyar, for Respondent No. 2.

JUDGMENT.

Krishnan, J.—This second appeal arises from a suit brought by the plaintiff against

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the late Pandarasannadhi of Vedaraniam Devastanam for money due on a bond executed by him to plaintiff's deceased grand-uncle. Plaintiff claimed a decree against the defendant personally and against the trust funds as he alleged that the money was borrowed for Devastanam purposes. The defendant raised several pleas which are not material now but did not set up any plea that the debt was not binding on the Devastanam properties.

The Subordinate Judge decreed the suit as brought in plaintiff's favour and gave him a decree for payment by the defendant personally and out of the temple funds. The Pandarasannadhi appealed, and, besides raising objections to the findings of the Trial Court, pleaded that he was not in any event personally liable. He did not specifically object to the liability cast on the temple properties. Pending this appeal the Pandarasannadhi was removed from office in another suit and the contesting 2nd respondent before us was appointed receiver of the temple properties. He was added as party appellant on his own motion and he asked for leave of Court to file a new ground of appeal, *viz.*, that the temple funds were in any event not liable for the bond amount. Leave was given on condition that the point was to be argued as a pure question of law whether, in the absence of an express charge on the temple property for bond amounts, such property could be made liable. No question of fact was to be raised and it was to be conceded that the borrowing was for temple necessity and within the powers of the trustee and that by the contract of borrowing itself it was arranged that the debt was to be paid from the trust funds. These conditions were accepted and the new ground was allowed to be raised. There is no question now before us whether these conditions should have been insisted on; having accepted them it is not open to the Receiver now to go back upon what he did and ask for a trial on facts on the point. For the purpose of this second appeal we must take the points set out above as the basis of our decision, even though it is not very clear from the terms of the bond that the re-payment of the whole debt was to be made from the temple funds.

The learned District Judge has held that whatever the nature of the debt and of the contract regarding it might be, no decree could be given against the trust property because no express charge had been created on that property by the trustee, and he relies on *Swaminatha Aiyar v. Srinivasa Aiyar* (1) as the authority for his view. It is urged by the appellant-plaintiff that this view is not right.

Before considering that point it is necessary to consider the objection that the lower Appellate Court should not have allowed the new plea to be raised in appeal by the Receiver who had been added as the legal representative of the Pandarasannadhi when it had not been raised in the suit or in the grounds of appeal by the latter. In support of this contention the ruling in *Inaganti Venkatarama Row v. Venkatalingama Nayanam* (2) is relied on. That was a case under O. XXII, r. 3, Civil Procedure Code. It was, no doubt, ruled there that a legal representative could only ask for such amendment as the deceased or the person whose representative he is could have asked for. It is not necessary to express an opinion whether this rule should be strictly followed in all cases under r. 3 or whether there is not a discretion left in the Court to allow further amendment; for, it may be pointed out, the present case is one where an institution is represented at different stages of the suit by different representatives, one not claiming under the other and the rule applicable is r. 10 of O. XXII and not r. 3. In such a case the Court must be held to have a wider discretion to allow amendments and new pleas to avoid multiplicity of suits provided the character of the suit is not changed and the opposite side is not prejudiced and the trial embarrassed. Such difficulties do not arise here.

But even if we assume that the rule laid down in the case cited strictly applied to the present case, the leave to raise the new plea under the conditions insisted on was not improperly given; for it was

(1) 38 Ind. Cas. 172; 32 M. L. J. 259; 21 M. L. T. 91; 5 L. W. 323; (1917) M. W. N. 278.

(2) 68 Ind. Cas. 703; 30 M. L. T. 204; 15 L. W. 72; (1922) M. W. N. 42; 42 M. L. J. 43; (1922) A. I. R. (M.) 49.

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open to the Court to allow the Pandarasannadhi himself to raise such a plea on appeal as a pure question of law. The objection, therefore, fails and must be overruled.

Turning now to the main question argued, whether, in the absence of an express charge on the temple properties, a decree could be given against such properties or not, it seems to me the learned District Judge's view that it could not be given is not correct on the facts of this case. He has based his judgment entirely on the ruling in *Swaminatha Aiyar v. Srinivasa Aiyar* (1), which I am inclined to think is not properly applicable here. In that case though the debtor was a trustee and the loan was intended and utilized for the benefit of the trust the only contract between him and the lender was contained in a promissory-note pledging only his personal credit for the debt. The learned Judges say that he (the creditor) did not obtain any charge on the property but only a promise on the part of the debtor to re-pay the debt. In other words, no obligation had been imposed on the trust funds either by contract or by deed of charge. They do not, however, consider the position where a trustee acting within his powers of borrowing for necessary purposes of the trust has created by his contract a right of resort to the trust funds for re-payment of the debt which is the case before us. The English cases cited, *Strickland v. Symons* (3) and, *Johnson, In re, Shearman v. Robinson* (4), the observations in which are relied on by the learned Judges, do not seem to be in point here. The first was a case where a trustee carried on the business of a Lunatic Asylum when the marriage settlement which created the trust only authorised the sale of it for the benefit of the wife and children of the settlor. He had borrowed moneys for the business, but the carrying on of the business itself was unauthorised. The trustee, therefore, could not have validly borrowed on the credit of the trust funds and had not purported to do so. In such a case, as the Lord Chancellor, the Earl of Selbourne, points

out: "there is no principle or authority for saying that if a trustee makes himself personally liable for goods the creditor thereby obtains a lien on the trust property." There was in this case "no dedication or application of the trust property to trade purposes and no provisions that the business was to be carried on by the trustee," as the Lord Chancellor says. These observations obviously do not apply to a case like the present where the head of a temple having to carry on, in the proper discharge of the duties of his office, the worship in the temple finds himself without the necessary funds to do so and borrows with an express stipulation that the creditor should be repaid from the temple properties. The second case referred to by the learned Judges, *Johnson, In re; Shearman v. Robinson* (4), was one of an executor under the Will of a trader, who was directed to carry on the trade employing a specific portion of the estate for the purpose. He had incurred debts in the course of that trade and for trade purposes. It was not disputed that the executor was personally liable for those debts, the argument being only that as he was entitled to be indemnified from the estate of the testator earmarked for the trade, the creditors could also have direct recourse to such assets for payment of their debts. Jessel, M. R., held that the creditors were only entitled to stand in the place of the executors, as the debts were created on his personal responsibility, and claim payment from such assets only when the executor himself is not in default and is entitled to the indemnity. This is the principle of subrogation which obviously cannot be availed of without reference to the estate of the account between the trustee and the cestuique trust. That case again seems to have no bearing on the case before us.

On the other hand, there is a recent decision of this Court in *Lakshmindra-thirtha Swamiar v. Raghavendra Rao* (5) which is in point. There, as here, the debt was incurred by a Pandarasannadhi, the head of a Mutt, who is necessarily a *Sanyasi* and for purposes binding on the

(3) (1884) 26 Ch. D. 245; 53 L. J. Ch. 582; 51 L. T. 406; 32 W. R. 889.

(4) (1880) 15 Ch. D. 548; 49 L. J. Ch. 745; 43 L. T. 372; 29 W. R. 168.

(5) 59 Ind. Cas. 287; 43 M. 795; 12 L. W. 139; 39 M. L. J. 174; (1920) M. W. N. 568; 28 M. L. T. 269.

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Mutt. There was no charge on the Mutt properties. It was nevertheless held that those properties could be held liable for the debt. There was no evidence there that the debt was borrowed on the credit of the Mutt properties, as we should take it there is in the present case; the learned Judges, however, presumed it from the fact that the trustee was a *Sanyasi*. It is not necessary to decide whether we should follow them in raising that presumption, for here we have proof that it was arranged that the debt was to be met from the Mutt funds. But it is an authority for holding that for a debt properly borrowed on the credit of Mutt funds, Mutt properties can be made liable; and to that extent I am prepared to follow it, though I should not be taken as concurring in all the observations of the learned Judges.

We have again the case of *Srimath Daivasikamani Pandarasannidhi v. Noor Mohamed Routhan* (6), where a decree was given against the Mutt properties for the price of articles purchased by the Mutadhipati for the use of the Mutt. There was no question raised there that the purchases were on the personal credit of the Mutadhipati, on the other hand I think it was assumed that the purchases were on the credit of the Mutt funds. The learned Judges refused to follow the rule as to executors and pointed out that the powers of a trustee or manager of a temple in borrowing were similar to those of a guardian of an infant heir following the observations of the Privy Council in *Konwar Doorganath Roy v. Ram Chunder Sen* (7). A debt incurred for the purpose of carrying on the worship in the temple is clearly for a necessary purpose and is, in my opinion, recoverable from the temple funds. Though doubt has been thrown on the correctness of the decision in *Srimath Daivasikamani Pandarasannidhi v. Noor Mahomed Routhan* (6), in *Swaminatha Aiyar v. Srinivasa Aiyar* (1) above cited, it has been followed by Spencer, J. in *Lakshmindrathirtha Swamiar v. Raghavendra Rao* (5) and I am also inclined to follow it where the debt is not incurred

purely on the personal liability of the debtor.

For the above reasons I would set aside the decree of the District Judge and restore that of the Subordinate Judge with costs here and in the Court below payable out of the temple funds.

Ayling, J.—I agree.

V. N. V.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 146 OF 1922.

February 16, 1923.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

SHAH MUHAMMAD EHSANULLAH—
APPLICANT—APPELLANT

versus

THE PEOPLES, INDUSTRIAL BANK,
LTD., ALLAHABAD IN LIQUIDATION—
OPPOSITE PARTY—RESPONDENT.

Companies Act (VI of 1882), s. 69—
Ex parte order—*Application to set aside*—
Limitation.

The limitation of three weeks prescribed in section 159 of the Indian Companies Act does not apply to an application to set aside an *ex parte order*. [p. 107, col. 1.]

Mussoorie Bank Ltd. v. Himalaya Bank Ltd., 16 A. 53; A. W. N. (1893) 205; 8 Ind. Dec. (N. S.) 35, followed.

Appeal from an order of the District Judge, Allahabad, dated the 7th July 1922.

FACTS.—The Peoples' Industrial Bank Ltd., Allahabad, having gone into liquidation, the liquidator applied to the Court to put the appellant's name on the list of contributories. A notice was served on the appellant who filed objections through a Vakil on the 11th November 1916. No date for the hearing of the objections was fixed for a long time, but ultimately the 13th August 1920 was fixed, notice of which was served on the Vakil. On the date fixed neither the Vakil nor the objector appeared, and on the 13th August 1920 the District Judge dismissed the objections

(6) 31 M. 47; 17 M. L. J. 553; 3 M. L. T. 95.

(7) 4 I. A. 52; 2 C. 431; 3 Sar. P. C. J. 681;
1 Ind. Dec. (N. S.) 508. (P. C.).

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ex parte. On the 22nd March 1922 the appellant applied to the District Judge for setting aside the *ex parte* order and for hearing the objections on the ground that in spite of his repeated enquiries, he did not come to know when and what date was fixed. The application was dismissed on the ground that time for presenting it was only 3 weeks from the date of the order (section 169 of the Indian Companies Act VI of 1882) and, therefore, the application was time-barred.

Mr. Janaki Prasad, for the Appellant.

Mr. A. Sanyal, for the Respondent.

JUDGMENT.—We have decided that it would be in the interests of justice to set aside the *ex parte* order and to remit this case to the learned District Judge to hear the application on the merits. Our grounds for doing so are as follows:—It is not desirable to disturb the established practice. The learned Judge's attention was drawn to section 169 of the old Act of 1882 which governs the Peoples' Industrial Bank Ltd. in liquidation, but his attention was not drawn to the authorities, such as they are, under that section. In 1894 the Bombay High Court* decided that section 169 did not apply to an application to set aside an *ex parte* order. Sir George Knox decided much the same thing in the year 1893 reported in the case of *Mussoorie Bank Ltd. v. Himalaya Bank Ltd.* (1). In England the view taken under the same section is that a certain amount of latitude is allowed, because in these matters of winding up, the previous orders of the Court are not based upon issues which have been formulated as they are in an ordinary suit with pleadings, and the time for appealing is very short. In view of this consistent practice, we have come to the conclusion that the learned Judge, although it was a very natural view to take and we might have taken it ourselves if it had not been for the view which has been taken in the past, was wrong in holding that section 169 was an absolute bar. The costs of this appeal must abide the result of the applica-

tion to the learned Judge on the merits, which should be restored to his list and be disposed of as soon as he conveniently can. The costs will include fees on the higher scale.

It would be a great hardship to bind an alleged contributor by the representation by a Vakil engaged four years before since when, presumably, everybody had forgotten all about it.

M. A. A.

Appeal allowed.

LAHORE HIGH COURT.

CIVIL APPEAL, No. 2352 OF 1922.

February 12, 1923.

Present:—Mr. Justice Martineau.

BARKHURDAR AND ANOTHER —DEFENDANTS—APPELLANTS
versus

KARAM DIN—PLAINTIFF—RESPONDENT.

Indian Soldiers (Litigation) Act (IX of 1918), s. 11, applicability of.

Section 11 of the Indian Soldiers (Litigation) Act applies only to those cases where the plaintiff is an Indian Soldier on the date of the institution of the suit, and has no application to a case where the plaintiff has been an Indian Soldier but has ceased to be one on the date of the institution of the suit. [p 108, col. 1.]

Second appeal from the decree of the District Judge, Jhelum, dated the 10th June 1922, reversing that of the Munsif, First Class, Jhelum, dated the 18th March 1922.

Mr. Sagar Chand, for the Appellants.

Mr. P. N. Rozdon, for the Respondents.

JUDGMENT—The land in suit formerly belonged to the plaintiff and his brother Nizam-ud-Din. In 1900 during the plaintiff's minority, his mother acting as his guardian and Nizam-ud-Din orally sold the land to the 3rd defendant and had mutation effected. The plaintiff brought his suit, challenging the validity of the sale, on the 2nd July 1921. He was born on the 4th October 1894 so that he attained majority on the 4th October 1912 but he contends that under Act IX of 1918 the time during

(1) 16 A. 53; A. W. N. (1893) 205; 8 Ind. Dec. (N. S.) 35.

*See *Parvati Shankar v. Ishar Das Jagjivandas*, 19 B. 208—[Ed.]

RAM NATH *vs.* MATA SAHAI.

which he was serving under War conditions is to be excluded in computing the period of limitation, that time began on the 18th March 1915 and that the suit is, therefore, not barred by limitation.

The First Court dismissed the suit, finding that it was barred by limitation as the plaintiff's War Service began on the 9th June 1916, and also that the sale was necessary and for the plaintiff's benefit.

The District Judge on appeal has differed from the First Court on both points and given the plaintiff a decree. On the point of limitation he holds that the period commencing from the 1st March 1915, the date of the plaintiff's enlistment in the army is to be excluded.

The first two defendants, who purchased the land from the third defendant, have preferred a second appeal.

The learned District Judge is wrong in thinking that the period during which the plaintiff was serving under War conditions commenced when the plaintiff joined the army. It commenced when he was ordered on Field Service, as is clear from section 3 of Act IX of 1918. So that if he were entitled to army deduction for the period during which he was serving under War conditions it would be for a period commencing on the 9th June 1916; as held by the First Court. But, as a matter of fact, Act IX of 1918 does not apply at all and no deduction can be allowed, as the plaintiff does not appear to have been a soldier at the time of the institution of the suit. Section 11, under which the period during which a plaintiff has been serving under War conditions is to be excluded, applies only where the plaintiff is an Indian Soldier. In this case the plaintiff, though he was formerly a soldier, had apparently ceased to be a soldier when he brought the suit.

The suit is barred by limitation having been instituted more than three years after the plaintiff had attained majority.

I accept the appeal, reverse the decree of the lower Appellate Court and restore that of the First Court dismissing the suit. The respondent will pay the appellants' costs throughout.

Z. K.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1376 OF 1921.

February 19, 1923.

Present:—Mr. Justice Daniels.

RAM NATH—DEFENDANT—APPELLANT
*versus*MATA SAHAI AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Landlord and tenant—Trees planted by tenant, ownership in—Tenant's house—Transfer to one Zemindar—Suit for possession by others, whether maintainable.

The presumption about the ownership of trees planted by a tenant is that they belong to the tenant and he has a right to cut and sell the same. [p. 109, col. 1.]

Jaleswar Sahu v. Raj Mangal, 63 Ind. Cas. 437; 19 A. L. J. 616; 43 A. 606, followed.

If a tenant illegally transfers his house to one of the *zemindars*, the others, even if they do not comprise the entire body of proprietors, are entitled to sue for joint possession with the transferee. [p. 109, col. 2.]

Second appeal against the decree of the Second Additional Subordinate Judge of Cawnpore, dated the 1st of August 1921.

Mr. Mangal Prasad Bhargawa, for the Appellant.

Mr. Kailas Chandra Mital, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by some of the *zemindars* for possession of certain trees and the site of a house which belonged originally to a tenant named Jagan Nath and which were sold to the defendant by his widow Musammât Hiria. The Court below has found that the four trees which were in dispute belonged to Jagan Nath and that his widow had a right to sell them. In this respect it overruled the Trial Court which had decreed the entire suit. As regards the house both Courts have found that Musammât Hiria had no right to sell and have decreed the suit. The defendant Ram Nath appeals. The plaintiffs Mata Sahai, Gulzari and Darshan Singh have filed cross-objections.

The appellant set up a custom entitling tenants to sell their houses. The Courts below found that, though some instances of sale have occurred, no such custom is established. This is a finding of fact based on evidence and the appellant is not entitled to challenge it in second appeal. The pleas put forward in the memorandum of appeal are :

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(1), That the defendant being one of the proprietary body he has a right to purchase.

(2) That by custom the tenants have a right of transfer.

(3) That the plaintiffs alone could not sue without joining the other *zemindars* of the village.

(4) Estoppel under section 115 of the Evidence Act.

(5) That the plaintiffs are not entitled to sue for the share of the house sold without partition.

The second ground of appeal has already been dealt with. As regards the first plea, if the tenant has no transferable right it does not matter whether the purchaser is one of the proprietary body or an outsider. As regards the third plea, if some of the proprietors do not wish to join in the suit it does not prevent the plaintiffs from claiming joint possession.

As regards the fourth plea, it has not been shown in what way any question of estoppel arises.

The fifth plea has not been argued. All the grounds of appeal fail.

Some of the cross-objections challenge the finding that Jagan Nath was the owner of these four trees, but as the respondents are not in a position to aver that there was no evidence to support this finding it must be accepted.

It is next argued that in the absence of proof of special custom Jagan Nath, though in possession of the trees, had no right to transfer them. The lower Court relies on the ruling in *Jaleswar Sahu v. Raj Mangal* (1), and I agree with the lower Court that whatever views may formerly have been held the presumption now is that a tenant has a right to cut and sell trees planted by him.

Thirdly and lastly, it has been argued that the order of the Court below is not in accordance with the intention of the judgment. It appears from the Munsif's judgment that there were more than four trees in the grove but that it was admitted by the defendant's witness that only four trees belonged to Jagan Nath. The learned Subordinate Judge has also stated clearly

that only four trees are in dispute, but he seems to have thought that the groves consisted of those four trees only. On a comparison with the Munsif's judgment and with the pleadings this appears to be incorrect. Accordingly, accepting the cross-objections in part, modify the decree of the Court below to this extent that the decree given by the Munsif for joint possession of the grove will hold good except to the extent of four trees. If more than four trees remain and if any dispute should arise as to the identity of these trees it will be settled in the execution department. In other respects the cross-objections are dismissed. The appeal is also dismissed with costs.

As most of the cross-objections have been dismissed the parties will bear their own costs of the cross-objections.

M. A. A.

Appeal dismissed.

Cross-objection partly allowed.

MADRAS HIGH COURT.

APPEAL, SUIT NO. 306 OF 1921.

November 8, 1922.

Present:—Mr. Justice Krishnan and Mr. Justice Ramesam.

LAKSHMINDRA THIRTHA SWAMIAR
OF SIRUR MUTT, MINOR, BY GUARDIAN
ad litem P. RAJAGOPALACHARYA
—DEFENDANT—APPELLANT

versus

VIBHUDAPRIYA THIRTHASWAMIAR

OF ADMURMUTT—PLAINTIFF—RESPONDENT.

Hindu Law—Mutt—Debt incurred by head of mutt, whether binding on successor—Legal necessity—Expenses incurred on festivals.

A *shēbat* or *malathipathi* cannot alienate mutt properties unless constrained to do so by unavoidable necessity. The same rule applies to the creation of debts binding on mutt properties, for the enforcement of such debts may result in the alienation of such properties through Court-sale. [p. 112, col. 1.]

In order to establish necessity for a debt it must be shown that the debt was incurred for a legitimate purpose and there was financial necessity to borrow to the extent to which the debt was incurred. [p. 113, col. 1.]

(1) 63 Ind. Cas. 437; 19 A. L. J. 616; 43 A. 606.

LAKSHMINDRA THIRTHA SWAMIAR v. VIBHUDAPRIYA THIRTHASWAMIAR.

A *Matathipathi* is not justified in borrowing money for the performance of the *Pariyaya* or any other ceremonies or festivals unless it is shown that the amount borrowed is reasonably necessary for the performance of the ceremony and the *Matathipathi* has no funds in his hands to meet the expenses. [p. 115, col. 1.]

(Case-law discussed.)

Per Krishnan, J.—A *Matathipathi* has a large dominion over his surplus income and he is not bound to account for it. His discretion to use it as he likes is unfettered. [p. 114, col. 1.]

Per Ramesam, J.—The Swamis have a wide power over their income, and Courts do not ordinarily scrutinise their manner of exercising it so long as they do not seek to bind their successors. If a successor is sought to be bound the borrowing must be for justifiable necessity. [p. 116 col. 2.]

A *mutt* is not bound by custom to feed every Brahmin that comes to the *Pariyaya*. [p. 116, col. 2.]

Palaniappa Chetty v. Sreemath Devastkamony Pandara Sannadhi, 39 Ind. Cas. 722; 40 M. 709; (1917) M. W. N. 507; 44 I. A. 147; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; 26 C. L. J. 153; 6 L. W. 222 (F. C.), followed.

Appeal against a decree of the Court of the Subordinate Judge, South Kanara, in Original Suit No. 44 of 1919.

Mr. A. Krishnanswami Iyer, for the Appellants.—The question is whether a debt incurred by a prior *Matathipathi* is binding on the *mutt* assents in the hands of his successor. The debt was incurred during the *Pariyaya* period, when the head of one of the 8 *Udipi mutts* in his turn takes charge of the worship of the Krishna temple. The income from the *mutt* itself is over Rs. 15,000 and that from the temple nearly Rs. 25,000, in all Rs. 40,000 a year. The plaint debt of Rs. 15,000 and odd is alleged to have been incurred during the *Pariyaya* period for feeding Brahmins.

There was no legal obligation on the head of a *mutt* to conduct feeding on such a lavish scale and hence the purpose is not legitimate. The income itself is ample and there was no financial necessity to borrow either. A *Matathipathi* must bear his expenses only from the current income over which he has full powers. An alienation of the *mutt* properties could only be justified for unavoidable necessity, since otherwise the trust itself will be extinguished. *Konwar Doorganath Roy v. Ram Chunder Sen* (1),

(1) 2 C. 341; 4 I. A. 52; 3 Sar. P. C. J. 681; 1 Ind. Dec. (N. S.) 508, (F. C.)

Nallayappa Pillian v. Ambalavana Pandara Sannadhi (2).

The creation of debts binding on the institution stands on the same footing. The head of a *mutt* cannot borrow merely for maintaining its dignity, *Pasupatia Pillai v. Sundarappier* (3), nor for carrying on pompous festivities, *Adiraja Arsu v. Budan Sahib* (4).

Their Lordships *Coutts-Trotter* and *Ramesam, JJ.*, have recently held that feeding Brahmins during *Pariyaya* period is not a necessary purpose.

Secondly, even if the debt was for a necessary purpose, in the absence of a charge or a contract, the lender cannot have direct recourse against the *mutt* properties. His right is only to be subrogated to the trustees' rights of re-imbursement, if any: see *Strickland v. Symons* (5). The English Law is well-settled.

A specific charge is essential to render trust estate liable: see *Johnson, In re, Shearman v. Robinson* (6), *Evans, In re, Evans v. Evans* (7), *Farhall v. Farhall* (8). The English law has been followed in a series of decisions in this Court. *Swaminatha Aiyar v. Srinivasa Aiyar* (9), *Ammalu Ammal v. Namagiri Ammal* (10), *Batchu Ramijogaya v. Vajjula Jaganmadham* (11).

The provisions of section 32 of the Trusts Act also support the same principle. *Byramji Rustumji Heerabai* (12); see also *Walling v. Lewis* (13); *Farhall v. Farhall* (8).

(2) 27 M. 465; 14 M. L. J. 81.

(3) 17 M. L. J. 615; 2 M. L. M. 268.

(4) 44 Ind. Cas. 815; 34 M. L. J. 358; 23 M. L. T. 278; (1918) M. W. N. 331.

(5) (1884) 26 Ch. D. 245 at p. 248; 53 L. J. Ch. 582; 51 L. T. 406; 32 W. R. 889.

(6) (1880) 15 Ch. D. 548; 49 L. J. Ch. 745; 43 L. T. 372; 29 W. R. 168.

(7) (1887) 34 Ch. D. 597; 56 L. T. 768; 35 W. R. 586.

(8) (1872) 7 Ch. App. 123; 41 L. J. Ch. 146; 25 L. T. 685; 20 W. R. 157.

(9) 38 Ind. Cas. 172; 32 M. L. J. 259; 5 L. W. 323; 21 M. L. T. 91; (1917) M. W. N. 278.

(10) 43 Ind. Cas. 760; 6 L. W. 722; 22 M. L. T. 391; 33 M. L. J. 631; (1918) M. W. N. 110.

(11) 49 Ind. Cas. 872; 42 M. W. N. 185; 25 M. L. T. 23; 9 L. W. 229; 36 M. L. J. 29; (1919) M. W. N. 148 (F. P.).

(12) 2 Ind. Cas. 161; 11 Bom. L. R. 250.

(13) (1911) 1 Ch. 414; 80 L. J. Ch. 242; 104 L. T. 132.

LAKSHMINDRATHIRTHA SWAMIAR v. VIBHUDAPRIYA THIRTHA SWAMIAR.

Even where a document is executed by trustees as such, direct recourse can be had only against the person and not against the trust estate. *Robinson's Settlement, In re, Gant v. Hobbs* (14).

The case relating to the liability of *mutt* properties for debts contracted by heads of *mutt*, reported in *Sundarasam Chettiar v. Viswanatha Pandarasannadhi* (15), is based on the existence of a specific contract. No such contract is pleaded in the present case. The decision in *Lakshmindrathirtha Swamiar v. Raghavendra Rao* (16) is wrong and is opposed to principle.

Mr. T. Rangachariar:—The liability of the *mutt* properties and the binding character of the debts depend on the necessities of the institution which are governed by custom. An alienation or debt, if in accordance with the usage of the institution, will be binding. The test is whether the obligations are imposed by the practice of the institution. *Peary Mohan Mukerji v. Norendra Nath Mukerji* (17).

The powers of the *Matathipathi*, as recognised by the decisions, are:—

(1) to spend all income for carrying on the worship,

(2) to pledge all income present and future for the purpose,

(3) to alienate for necessary purposes *ex corpore*. See *Prosunno Kumari Debye v. Golab Chand Baboo* (18); *Ramayyan-gar v. Krishnayyengar* (19); *Konwar Doorganath Roy v. Ram Chunder Sen* (1); *Pandara Sannadhi v. Karutha Ravuthan* (20);

Palaniappa Chetty v. Sreemath Deivast-kamony Pandara Sannadhi (21); *Ram Parkash Das v. Anand Das* (22).

The practice of this *mutt* as well as of the other seven *Udipi mutts* has been to feed the Brahmins on particular occasions and this practice furnishes the only guide in ascertaining the necessity of the transaction. See *Srimath. Daivasikamani. Pandarasannadhi v. Noor Mahomed Routhan* (23), *Laksh-mindrathirtha Swamiar v. Raghavendra Rao* (16). The observation in *Vidyapurna Thirtha Swami v. Vidyannidhi Thirtha Swami* (24); as to necessity for expenses is *obiter*.

The debt in this case was incurred for a purpose regarded as legitimate by the usage of all the *mutts*. It has been incurred for a *mutt* purpose, hence the debt is *prima facie* binding on the *mutt* properties.

In this case the *Matathipathis* accumulated the income during non-*Pariyaya* period and spent for *Pariyaya* periods. He may contemplate discharge of debt by future income. See *Peary Mohan Mukerji v. Norendra Nath Mukerji* (17).

The origin of the principle of giving decree only against trustee or executor personally is explained in *Muir v. City of Glasgow* (25) as based on the presumption of personal contracts under the English Law. The question is really one of intention of parties and construction of contracts. See *Sundaresam Chettiar v. Viswanatha Pandarasannadhi* (15); *Regulla Jogayya v. Venkatarathnamma* (26). There is no doubt that in the present case when head of one *mutt* executes a note to the head of another, the *mutt* properties are intended to be rendered liable because process against person is not contemplated. See also *Srimath. Daivasikamani Pandarasannadhi v. Noor Mahomed Routhan* (23).

(14) (1912) 1 Ch. 717 at p. 720; 81 L. J. Ch. 393; 106 L. T. 443; 28 T. L. R. 298.

(15) 72 Ind. Cas. 103; 45 M. 703 at p. 705; 31 M. L. T. 66; 16 L. W. 83; 43 M. L. J. 147; (1922) M. W. N. 444; (1922) A. I. R. (M) 402.

(16) 59 Ind. Cas. 287; 43 M. 795; 12 L. W. 139; 39 M. L. J. 174; (1920) M. W. N. 568; 28 M. L. T. 269.

(17) 5 Ind. Cas. 494 37 C. 229 at p. 234; 14 C. W. N. 261; 7 A. L. J. 125; 7 M. L. T. 63; 11 C. L. J. 220; 12 Bom. L. R. 257; 20 M. L. J. 171; 37 I. A. 27 (P. C.).

(18) 2 I. A. 145; 14 B. L. R. 450; 3 Sar. P. C. J. 449; 23 W. R. 253; 3 Suth. P. C. J. 102 (P. C.).

(19) 10 M. 185; 3 Ind. Dec. (N. S.) 881.

(20) 9 Ind. Cas. 150, 21 M. L. J. 129; 9 M. L. T. 327.

(21) 39 Ind. Cas. 722; 40 M. 709; (1917) M. W. N. 507; 44 I. A. 147; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 557; 22 M. L. T. 1; 26 C. L. J. 153; 6 L. W. 222 (P. C.).

(22) 33 Ind. Cas. 583; 43 C. 707; (1916) 1 M. W. N. 406; 20 C. W. N. 802; 14 A. L. J. 621; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267; 43 I. A. 73 (P. C.).

(23) 31 M. 47; 17 M. L. J. 553; 3 M. L. T. 95.

(24) 27 M. 435; 14 M. L. J. 105.

(25) (1879) 4 A. C. 337; 40 L. T. 339; 27 W. R. 603.

(26) 5 Ind. Cas. 271; 20 M. L. J. 412; 7 M. L. T. 112; 33 M. 492; (1910) M. W. N. 142.

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The judgments beginning from *Swaminatha Aiyar v. Srinivasa Aiyar* (9) and *Ammathu Ammal v. Namagiri Ammal* (10) are inapplicable to the case of *mutts*. *Sundaraesam Chettiar v. Viswanath Pandaraannadhi* (15) establishes this. The expenses are legitimate and necessary and in accordance with the usage of the institution and are, therefore, binding not only on the income in the hands of the successor but also on the corpus.

JUDGMENT.

Krishnan, J.—This is an appeal by the defendant against the decree of the Subordinate Judge of South Kanara in Original Suit No. 44 of 1919 on his file. The suit was brought by the Swami of Adamar *mutt* in Udipi against the present Swami of Sirur *mutt* to recover from the assets of that *mutt* the amount claimed to be under a "*Samprathi-patti*" or settlement of accounts signed by the late Swami and marked as Exhibit A. The defendant denied the genuineness of Exhibit A and the existence of the debt and the admissibility of the document in evidence and he further pleaded that even if the debt was true it was not binding on the *mutt* or its properties as it was not contracted for any necessity or benefit of the *mutt*, the *mutt* having ample income to meet all its legitimate expenses.

On these pleadings two issues were framed, namely, whether the *patti* sued on was true and valid and receivable in evidence and whether the debt was binding on the defendant's *mutt*. The Subordinate Judge found both these issues in plaintiff's favour and gave him a decree as sued for. The appellant before us has not attacked the finding on the first issue; his learned Vakīl, however, contended that the finding on the second issue should have been in the negative and in his client's favour and the suit should have been dismissed.

We have thus to consider in this appeal whether the debt sued on was borrowed by the late Swami of Sirur for a purpose binding on the *mutt* properties in his successor's hands. Now, it is clear law that a *shebait* or *Matahipathi* cannot alienate *mutt* properties unless constrained to do so by unavoidable necessity, and the same rule must apply to the creation of debts binding on *mutt* properties, for the enforcement of such debts may result in the alienation of such properties through Court-sale.

The rule regarding alienation is laid down very clearly by the Privy Council in the recent case of *Palaniappa Chetty v. Sreemath Deivasikamony Pandara Sannadhi* (21). Their Lordships refer to the previous decisions in *Prosunno Kumari Debya v. Golab Chand Baboo* (18), *Koowar Doorganath Roy v. Ram Chunder Sen* (1) and *Hunoomanpersaud Panday v. Babooee Munraj Koonweree* (27) and explain that the expression "benefit to the estate" as used in them, though not capable of a precise definition, meant, "the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation and such like things" see page 718*. Here we have no question of benefit to the estate but only whether there was no necessity to incur the debt.

The position of the head of a *mutt* and his powers were considered by the Privy Council in deciding whether he could be described as a trustee within the meaning of Art. 134 of the Limitation Act in *Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar* (28), and in that judgment their Lordships again affirm the proposition that, except for unavoidable necessity, the head of a *mutt* cannot create any interest in the *mutt* property to enure beyond his lifetime.

There is no doubt an observation in *Sammantha Pandara v. Selappa Chetti* (29) that: "Acting for the whole institution, he (the *matahipathi*) may contract debts for purposes connected with his *matam*, and debts so contracted might be recovered from the *matam* property, and would devolve as a liability on his successor to the extent of the assets received by him" and this passage has been quoted by their Lordships of the Privy Council in *Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar* (28). Reliance has been placed

(27) 6 M. I. A. 393; 18 W. R. 81n; Sevestre 253 n.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 B. R. 147.

(28) 65 Ind. Cas. 161; 44 M. 831 at pp. 834, 835; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

(29) 2 M. 175 at p. 179; 3 Ind. Jur. 558; 1 Ind. Dec. (N. S.) 393.

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on it by the learned Vakil for the respondent for his argument that it is sufficient that the debt is shown to be incurred for *matam* purposes and not for the *matathipathi's* private purposes to make it binding on *matam* properties and that it was not necessary to prove any necessity for the borrowings. In my opinion this is a clear misreading of the observation. I understand it to refer to necessary purposes connected with the *matam* and that is the proposition established by the authorities.

I do not think it necessary to discuss all the authorities cited to us, as these recent Privy Council rulings are clear on this point. It follows that we cannot uphold the plaintiff's claim to have the plaintiff's debt paid out of the *mutt* properties in the defendants' hands, unless there is clear proof of necessity for the borrowing. There are two things to be considered in this connection. The borrowing may be for a purpose which is not in itself justifiable at all; again, the purpose may be a legitimate one, but nevertheless the *matathipathi* having enough funds of the *mutt* in his hands at the time there might be no necessity to borrow at all to meet the expenses; in other words, the question may be one of the legitimacy of the purpose for the debt or of the financial necessity to borrow. Now, it was argued for the respondent that it was only the question of financial necessity which would depend upon the amount of money available to the late Swami to meet the expenses that was put in issue in the lower Court and not the legitimacy of the expenses themselves. I am unable to accept this argument. The defendant's written statement, paragraph 3, says, after pleading that the *mutt* had ample funds to meet all necessary expenses, that "the debts are not valid and binding against the defendant's *mutt* or its properties, as they were not and could not have been contracted for the benefit of the *mutt*," and the wording of Issue No 2 is wide enough to include both objections.

I shall now turn to consider whether debts in question are proved to have been incurred for necessary purposes. Exhibit A is a settlement of accounts of the borrowings less re-payments from July 1902 to August 1916. The total amount of debt with interest was Rs. 27,435-10-11. The re-payments

with counter interest came to Rs. 11,463-6-3, leaving a balance of Rs. 15,971-10-8 for which Exhibit A was executed. A perusal of the accounts and receipts in Exhibit B shows that the most part of this balance was borrowed during what is known as *Pariyaya* period of the Sirur Swami and in connection with the *Pariyaya* expenses and for building a *Bhojanasala* or dining hall during that period, the previous borrowings having been mostly re-paid. To understand the case it is necessary to explain what is meant by the term *Pariyaya*. There are in the town of Udipi in South Kanara eight *mutts* presided over by eight *matathipathies*.

Plaintiff and defendant are two of those *matathipathies*. Affairs of each *mutt* are looked over by its own *matathipathi*. They are all endowed with separate properties of considerable value. Besides these *mutts* there is a Krishna temple in the same place in which there is an idol of Sri Krishna which is worshipped. This temple is also richly endowed; but there is no Swami or Dharmakartha to manage its affairs. Its affairs are managed by the eight *matathipathies* in rotation, each taking the management for two years at a time, beginning from January 15th of one year and ending in the January 15th of the third year. The turn of each Swami is fixed according to custom. This method of management is called the *Pariyaya* system and the Swami who is for the time being the manager is called the *Pariyaya Swami* for those years and the period of two years during which he is the manager is called his *Pariyaya* period. The tradition about the way in which these eight *mutts* and its temple came to be founded and the way in which their affairs are carried on is given in the South Kanara District Manual. It is obligatory on each Swami, when his turn comes, to perform the *Pariyaya* for the two years of his period. During that time he is entitled to get all the income of the Krishna temple which, besides the income from its lands, includes certain payments from the British and Mysore Government and also Kanikais or offerings from the devotees and pilgrims who come to the temple to worship. It is also in evidence that the Swamis are able to save every year substantial sums of money from the income of their own *mutt* properties after meeting their current

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expenditure. It would seem that the Swamis were in the habit of adding these moneys also to their income from the Krishna temple during the *Pariyaya* period to meet the *Pariyaya* expenses. It is the plaintiff's case that all these moneys are insufficient to meet the *Pariyaya* expenses and that it is necessary and usual for each Swami to borrow Rs. 30,000 to Rs. 40,000 to make up the deficiency for the two years. Plaintiff says that the plaintiff debt was mainly incurred in this manner to meet the *Pariyaya* expenses of the Sirur Swami.

It is in evidence that the income of Krishna temple from all sources would amount to about Rs. 25,000 to Rs. 30,000 a year or Rs. 50,000 to Rs. 60,000 for the two years. The income of the Sirur *mutt* is said to be about Rs. 10,000 to Rs. 15,000 a year, from which about Rs. 5,000 to Rs. 6,000 could be saved in ordinary years. During the *Pariyaya* period the Swami brings away his own idol from his *mutt* to the Krishna temple and the expenses of his own *mutt* are thus reduced. The Swami was thus in a position to utilise Rs. 10,000 to Rs. 15,000 of the income of his own *mutt* during the two years for the *Pariyaya* expenses. It is also in evidence that the Sirur Swami had about Rs. 30,000 in hand saved from his *mutt* income for the previous years which he added to the other moneys. As explained by this Court in *Sammantha Pandara v. Sellappa Chetti* (29) and other cases and accepted by the Privy Council in *Vidya Varulhi Thirtha Swanngal v. Balusami Ayyar* (28), the *matathipathi* has a large dominion over his surplus income and he is not bound to account for it and his discretion to use it as he likes is unfettered. It was thus open to the Sirur Swami to use that accumulated amount for the *Pariyaya* expenses. Thus it would seem that the Sirur Swami had about a lakh of rupees at least to meet the *Pariyaya* expenses for his term of two years. Plaintiff, however, contended that this amount was insufficient for the purpose, as the expenses came to about Rs. 1,30,000 at least and borrowing was necessary. It may be conceded that all the moneys the late Sirur Swami got from his income and his earnings and his borrowings he spent for his *Pariyaya* expenses, and for building the dining hall. But before we can justify his borrowing it must be shown that he was under a legal

obligation to incur expenditure in the manner and to the extent that he did. The Subordinate Judge has not considered the case from this point of view at all.

There are no doubt certain *Poojas* and ceremonies which have necessarily to be performed and any reasonable expenditure incurred for carrying them out, will be binding on the *mutt*. But there is no obligation to have the ceremonies performed on the scale that the Sirur Swami did. It was argued for the respondent that the scale on which the ceremonies should be conducted must be taken to be fixed by the long continued practice of the institution. Even so, there is no evidence on which we can find that any definite and clear practice existed with regard to that. It is more likely, as one of plaintiff's own witnesses P. W. No. 4, says that there is "no rule to the effect that any particular amount should be spent for the *Pariyaya*, but all the ceremonies should be performed according to *mamool* (or usage). The different *mutts* are not equally wealthy, the poorer ones must necessarily perform the ceremonies on a smaller scale so long as no ceremony is omitted. One main item of expenses incurred is the feeding of the Brahmins in large numbers every day throughout the year. That evidently is a very elastic item over which much money could be spent or considerable economy exercised."

There is really no evidence in the case on which we can rely to show that it was necessary to borrow to meet the legitimate expenses of the *Pariyaya*. All that is attempted to be shown is that the money has been spent and that other Swamis have also been in the habit of borrowing during their time. Such evidence is quite inadequate in my view to show that there was necessity for borrowing the plaintiff debts.

As regards the *Bhojanasala*, the Sirur Swami not only seems to have re-built but put an upstairs to it. Surely it is not shown that there was any necessity to do all these. A sum of Rs. 1,000 of the plaintiff debt was borrowed for the construction of this dining hall, but it is not shown whether it was borrowed for the construction of the hall downstairs or for the room upstairs. There was clearly no necessity to build the upstairs as it never existed before. It follows, there-

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fore, that for this debt also necessity is not shown for borrowing.

The failure to produce the accounts of the Sirur *mutt* was commented upon by the learned Vakil for the respondent and we were asked to draw from that fact an inference that the borrowing was for necessity. It is not very clear on the evidence that the defendant is in possession of those documents and is wilfully keeping them back. Secondly, it is difficult to see how these accounts will help to show that the money borrowed for the *Pariyaya* expenses were borrowed for necessity. In the view I am taking, for all legitimate expenses the funds in hand were sufficient.

As regards the debts borrowed just prior to the *Pariyaya* period there is no evidence why they were wanted. It follows that there was no necessity proved to borrow the plaint amount and the plaintiff is not, therefore, entitled to recover it from the *mutt* lands.

The learned Vakil for the appellant also contended that in any event plaintiff is not entitled to have direct recourse to the *mutt* properties for his debt, as there was no express charge or mortgage for it on them, and he relied on *Swaminatha Aiyar v. Srinivasa Aiyar* (9) and also certain English cases of executors and trustees such as *Strickland v. Symons* (5) and *Evans, In re, Evans v. Evans* (7), *Farhall v. Farhall* (8), *Robinson's Settlement, In re, Gant v. Hobbs* (14) and *Johnson, In re, Shearman v. Robinson* (6). But it has been held in India that this rule does not apply to the case of *matathi-pathies*; See *Shankar Bharati Swami v. Venkapa Naik* (30), *Srimath Datvasikamani Pandarasannidhi v. Noor Mahomed Routhan* (23), *Lakshmindrathirtha Swamiar v. Raghuvendra Rao* (16) and *Sundaresam Chettiar v. Viswanatha Pandara Sannadhi* (15). In the view I am taking it is not, however, necessary to decide this question.

It was finally contended that, as the debt was found to be true and subsisting, it is binding on the debtor, the late Swami, personally and a decree should, therefore, be given against his personal assets, if any. There is no express prayer to this effect in the plaint but the defendant's Vakil does not object to such a decree being passed and I think, therefore, such a relief may be given.

(30) 9 B. 422; 5 Ind. Dec. (N. S.) 281;

In the result the decree of the lower Court is modified by confining it to a decree only against the personal assets, if any, of the late Sirur Swami in defendant's hands. The plaintiff will pay defendant's costs in both Courts, as he has failed in his claim against the *mutt*, but he will get his costs from the personal assets of the late Swami.

Ramesam, J.—The plaintiff is the Swami of Adamar *mutt* in Udipi (South Kanara District). The defendant is the Swami of the Sirur *Mutt* in the same place. He is now a minor represented by a guardian *ad litem*. These two and the six other *mutts* were founded according to the tradition by Madwacharya, the founder of the *duel* or *Dwaita* philosophy. Each *mutt* is presided over by a Sanyasi or Swami and has its own separate endowments. Besides the eight *mutts*, there is, at Udipi, a temple of Krishna with income of its own. Each Swami takes charge of the temple for a period of two years, so that the term (technically called *Pariyaya*) of a particular Swami recurs once in 16 years. The evidence in the case shows that the Swamis have taken to the celebration of the respective *Pariyaya* in recent times on a grand scale. It is said that the defendant's predecessor had borrowed from the plaintiff, among others, for the expenses of the last *Pariyaya* of the Sirur *mutt* of (January 1914-1916) and on accounts being taken, it was found that the Sirur Swami, was indebted to the plaintiff to the extent of Rs. 15,971-10-8 on the 14th August 1916, (Exhibit A). The present suit is brought to recover the said amount with interest. The Subordinate Judge gave a decree to the plaintiff and the defendant appeals.

The appellant has not pressed before us the grounds relating to the genuineness of Exhibit A. He confined himself to two points, (1) that the debt has not been shown to be for justifiable necessity and, therefore, not binding on the defendant's *mutt* and (2) in any event, the *mutt* is not liable, as the debt was not charged on the properties on the *mutt*.

The first point was the subject of the second issue. The evidence of the plaintiff's third, fourth and seventh witnesses shows that the Krishna temple gets a *Tasdiak* (or allowance) of 13 thousand

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rupees from the British and Mysore Governments. Rs. 500 cash and 500 *muras* of rice (after paying Government revenue) from its immoveable property and Rs. 10,000 or more by way of offerings from pilgrims (A *mura* of rice is said to be Rs. 6). The item of offerings from pilgrims is a variable figure. The income of the Krishna temple may be taken to be about Rs. 26,500 per annum in the years in question. The income of the Sirur *mutt* according to P. W. No. 4 is 2,200 *muras* of rice (out of which 1,200 *muras* are spent for the ordinary expenses of the *mutt*) and a cash rent of Rs. 7,000. There remains a net income of Rs. 13,000. Accepting these estimates, the combined income of the temple and the *mutt* amounted to Rs. 39,500 per annum. It is said that this income was not adequate for the expenses of the *Pariyaya* and the Sirur Swami had to borrow for defraying them. A list of his debts amounting to Rs. 25,000 is given by P. W. No. 4. As the Sirur Swami had in his hand savings to the extent of Rs. 30,000 he must have spent more than a lakh and Rs. 30,000 towards his *Pariyaya* expenses. The question is whether this expenditure can be regarded as justified so as to make the *mutt* in the hands of his successor liable for the amounts borrowed. It is conceded for the plaintiff, P. W. No. 4, that there is no rule to the effect that a particular amount must be spent for the *Pariyaya*. But all the *vinayogas* should be performed without omission according to *mamool*.

P. W. No. 3 says that two lakhs of rupees are required for the expenses. P. W. No. 4 similarly says that 15,000 *muras* of rice and one or $1\frac{1}{4}$ lakh of rupees are required. P. W. No. 8, the Swami of another *mutt*, gives details. About 15,000 *muras* of rice, firewood costing Rs. 6,000, plantain tree garden costing 500 *muras* and provision costing Rs. 62,000 are required. Of these about 12 *muras* of rice are required for the *naivedya* (see P. W. No. 4), the ceremony of dedicating food to the deity. After the formal dedication the food is distributed to Brahmins. Now, it is well-known that the religious ceremony of the *naivedya* can be performed at an expenses of an anna or Rs. 10,000 according to the capacity of the worshipper. This is conceded by the learned Vakils for the plaintiff. No Hindu text has been

cited to show that a particular quantity of food must be offered for the *naivedya*. It depends on the capacity and on the charitable disposition of the worshipper, for the offering ultimately feeds the poor. Beyond the evidence that P. W. No. 8 spent a similar amount or his *Pariyaya* and that the deceased Sirur Swami contracted a debt of Rs. 30,000 for earlier *Pariyaya* there is nothing to prove a *mamool* or usage. The 8th witness says that at the *Pariyaya* festival (first 15 days of the period) about 10,000 persons were fed every day. During the other festivals about 2,000 persons are fed per day and 1,000 persons are fed daily at other times (see P. W. No. 4). It is obvious that the feeding charges have been responsible for the enormous increase in recent times of the *Pariyaya* expenses. It is idle to pretend that the feeding could have gone on anything like this scale in all the six centuries during which these *mutts* existed or even in the earlier years of the last century. When the witnesses say so many *muras* are required for the expenses, all that they mean and could mean is that the quantities stated are required, if the festival is to be carried on in the manner the *Swamis* are now doing it. In my opinion no usage or custom is proved. As their Lordships of the Privy Council pointed out in *Palaniappa Chetty v. Sreemath Devaskamony Panararasannadhi* (21) it would be an instance of the misapplication of the word 'custom' and of forgetfulness of the essentials of a custom which modifies the ordinary law to say that the *mutts* are bound by custom to feed every Brahmin that comes to the *Pariyaya* (as is stated in the South Kanara Manual). The numbers may increase as the years roll on and the result of carrying on the ideal of feeding every one that comes may be the destruction of the institutions themselves. The *Swamis* have a wide power over their income and Courts do not ordinarily scrutinize their manner of exercising it so long as they do not seek to bind their successors. If a successor is sought to be bound the borrowing must be for justifiable necessity.

In *Abhuram Goswami Mohant v. Shyama Charan Nandi* (31) their Lordships of the

(31) 4 Ind. Cas. 449; 36 C. 1003; 36 I. A. 148; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.).

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Privy Council observe: "It is well-settled law that the power of the *Mahant* to alienate *debutter* property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity" citing *Prosunno Kumari Debya v. Golab Chand Baboo* (18), and *Konwar Doorganath Roy v. Ram Chander Sen* (1). In these two cases, the leading case of *Hunoomanpersaud Panday v. Eabooee Munraj Koonweree* (27) a case of dealing with the manager of infant heir was relied on as the guide in respect of dealings with *debutter* property. See also *Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar* (28). The present appeal is not a case of conferring benefits on the estate; such as the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portion from injury or deterioration by inundation and such like things. See *Palaniappa Chetty v. Sreemath Devasi Kamony Pandarasannadhi* In *Pearcy Mohan Mukerji v. Norendra* (21), *Nath Mukerjee* (17) the expenses in respect of which the *shebait* sought reimbursement, were either incurred in defending his position as *shebait* or performing the obligation imposed upon him by the original Will. In this case there is no proof of the obligation imposed upon the *mutts* at the time of the foundation. The learned Vakil for the plaintiffs relies on the following sentence in *Sammantha Pandara v. Sellappa Chetti* (29): "Acting for the whole institution he may contract debts for purposes connected with his *matam*, and debts so contracted might be recovered from the *matam* property and would devolve as a liability on his successor to the extent of the assets received by him." I do not think that the learned Judges who decided *Sammantha Pandara v. Sellappa Chetti* (29) or the Judicial Committee who quoted the whole paragraph in *Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar* (28) for a different purpose, meant to lay down that a debt, however extravagant and unnecessary it may be, incurred in the performance of festivities and ceremonies of the *mutt*, are binding on the *mutt* in the hands of a successor. Such a position would be inconsistent with the *ratio decidendi* of *Prosunno Kumari Debya v. Golab Chand Baboo* (18) and *Konwar Doorganath Roy v. Ram Chandra*

Sen (1) applied to *mutts* in *Abhiram Goswami Mohant v. Shama Charan Naid* (31) and *Palaniappa Chetty v. Sreemath Devasikomany Pandarasannadhi* (21). In *Murugesam Pillai v. Manickansaka Desika Gnan* (32) it was found that the head of the *mutt* at the very outset of his career was handicapped by two litigations costing nearly two lakhs. In my opinion, the suit debt is not binding on the *mutt* and this is the conclusion of my learned brother Coutts-Trotter, J., and myself in Second Appeal No. 1899 of 1920, (a case relating to a debt of the same *mutt* incurred for the same *Parityaya* of 1914-1916.) In *Lakshmindra Thirtha Swamiar v. Raghavendra Rao* (16) and *Srimathi Devasikamany Pandarasannadhi v. Noor Mahomed Roultan* (23) the cases came upon second appeal with a finding that the debt was incurred for necessary purposes. It may be that the law was too narrowly laid down in *Vidyapurana Thirtha Swami v. Vidyamidhi Thirtha Swami* (24) but this was set right in *Devasigamany Pandarasannadhi v. Palaniappa Chetti* (33), affirmed by the Privy Council in *Palaniappa Chetty v. Sreemath Devasikamony Pandarasannadhi Pandara* (21).

It is said that the Swami of Sirur *mutt* spent Rs. 24,000 for the repair of *Bhojanasala*. Apart from the fact that it is the duty of all the Swamis of the eight *mutts* to contribute to the expense of repairing the dining hall, the fact that an extension in the form of an upstairs was added to the old building disentitles the plaintiff from relying on this item. It is also conceded that only Rs. 1,000 out of the suit loan was spent on this item. I do not think this aspect of the plaintiff's case improves it.

Some complaint was made for the respondent that the question of justifiable necessity was not taken in the First Court. I think it was taken in paragraph 3 of the written statement. If this paragraph is not more explicit, this was because the allegation in the plaint is not more explicit and makes no reference to *Pariyaya*. The plaintiff had to prove necessity (on the second issue) and was not

(32) 39 Ind. Cas. 659; 40 M. L. J. 288; 32 M. L. J. 369; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 759; 21 C. W. N. 761; 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487; 44 I. A. 98 (P. C.).

(33) 9 Ind. Cas. 281; 34 M. L. J. 83; 20 M. L. J. 969; (1911) 2 M. W. N. 154.

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prejudiced by any vagueness in the plea in the written statement. The defendant was not the borrower and was not bound to plead more clearly. In the view of the conclusion on the first point, I do not think it necessary to express an opinion on the second point on which there is some conflict of opinion in this Court. The cases in *Srimath Daivasikamani Pandarasannidhi v. Noor Mahomed Routhan* (23) and *Sundaresam Chettiar v. Viswanatha Pandarasannadhi* (15) are against the appellant, but he is supported by the decision in *Swaminatha Aiyar v. Srinivasa Aiyar* (9). A number of English decisions have been cited before us relating to trusts and trustees: *Strickland v. Symons* (5), *Johnson, In re, Shearman v. Robinson* (6), (*Jessell, M. R.*) *Farhall v. Farhall* (8), *Robinson's Settlement, In re, Gant v. Hobbs* (14) in effect reversing *Walling v. Lewis* (13). After the expression of opinion in *Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar* (28) that *mutts* are not in the nature of trusts in English Law it is not profitable to discuss these cases.

In the result the appeal is allowed so far as the *mutt* properties are concerned. But the plaintiff will be entitled to a decree for the suit sum against the assets of the late Swamiar in the hands of the defendants, such as uncollected arrears since collected or investments of the late Swami which have not been incorporated with the *mutt* properties.

I agree with my learned brother's order as to costs.

V. N. V.

Decree modified.

Z. K.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 769 OF 1922.
September 12, 1922.

Present:—Sir Lallubhai Shah, Kt., Acting
Chief Justice and Mr. Justice Crump.

FATTECHAND ANANDRAM
MARWADI—PLAINTIFF—APPELLANT
versus

UMAJI VALUJI MAHAR—
DEFENDANT—RESPONDENT.

*Registration Act (XVI of 1908), ss. 34, 72, 77—
Delay in presenting document for registration—
Refusal by Registrar to condone delay—Subsequent
refusal to revise order—Suit to compel registration,
maintainability of.*

Where a Registrar, acting under section 34 of the Registration Act, refuses to sanction the acceptance of a penalty for a belated admission of execution, and to condone delay in presenting a document for registration; in consequence of which registration is refused by the Sub-Registrar, an application made to the Registrar to revise his previous order is equivalent to an appeal under section 72 of the Act, and an order by him refusing such application is in substance an order under that section refusing to direct the registration of the document, and a suit for a decree directing the registration of the document is maintainable under section 77 of the Act. [p. 120, col. 2.]

Second appeal from the decision of the First Class Subordinate Judge A. P. at Nasik, in Appeal No. 39 of 1921, confirming a decree passed by the Second Class Subordinate Judge at Nasik, in Civil Suit No. 154 of 1920.

Mr. P. B. Shingne, for the Appellant.

Mr. Alex A. Pais, for the Respondent.

JUDGMENT.

Shah, Actg. C. J.—The question of law that arises in this appeal, relates to the interpretation of the provisions of the Indian Registration Act. The facts which have given rise to it are these. Apparently a sale-deed was executed in favour of the plaintiff by the defendants on November 20th 1919. It was presented by the plaintiff on March 20th 1920 for registration to the Sub-Registrar. The Sub-Registrar accepted it and issued notice to the defendants. The defendants appeared on April 7th 1920 and they made a statement which may be briefly described as admission of execution subject to the proviso that the sale was subject to the agreement that the plaintiff was to re-convey the property on payment of the amount mentioned in the sale-deed. He also accepted, in accordance with the rules under the Indian Registration Act, the penalty which was leviable in consequence of the admission of execution of the document not having been made within the time allowed by law under section 34 of the Indian Registration Act subject to the sanction of the Registrar, who would have power under the proviso to that section in case of urgent necessity or unavoidable accident to condone the delay. The Registrar did not sanction the acceptance of the penalty and did not condone the delay, with the result that, on April 15th 1920, the Sub-Registrar endorsed

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on the document his order refusing to register it on the ground that the Registrar had not given the necessary sanction for accepting the fine and for registering the document. Thereafter, the plaintiff made an application to the Registrar, but he saw no reason to revise the order already passed by him and refused the application on May 5th.

The present suit was filed by the plaintiff on May 19th 1920 under section 77 of the Indian Registration Act, for a decree directing the document to be registered. The defendants resisted the plaintiff's claim, and the Trial Court dismissed the suit on the ground that the suit was outside the scope of section 77 of the Indian Registration Act, and, therefore, not maintainable.

The plaintiff appealed to the District Court, and the First Class Subordinate Judge with appellate powers, who heard the appeal, came to the same conclusion and affirmed the decree of the Trial Court.

The plaintiff has appealed to this Court, and his contention briefly stated is, that the suit is within the scope of section 77 of the Indian Registration Act. On the other side, the contention is that it is outside the scope of section 77, because the order made by the Registrar is not covered by either clause (a) or clause (b) of section 76. It is urged that there is no refusal on the part of the Registrar to register the document within the meaning of clause (a), and that there is no refusal to direct the registration of the document under clause (b). By way of reply to these contentions it is urged on behalf of the appellant that the case is governed by clause (a) of subsection (1) of section 76, because in effect there is a refusal by the Registrar to register the document, and further that, in any event, it is covered by clause (b).

It is clear that, in order that the suit may be treated as maintainable under section 77, the order must be one of refusal to order the document to be registered under section 72 or section 76. I do not think that the order in question can be treated as a refusal to register by the Registrar within the meaning of section 76 (1) (a). We have to consider whether it amounts to a refusal to direct the document to be registered under section 72 as provided in section

76 (1) (b): I may mention here that it is difficult to appreciate the need for referring to section 72 in section 77, as the order of refusal by the Registrar under that section is included in section 76. The point is not easy to decide under the provisions of the Indian Registration Act. But it seems that the true answer to the question that arises is to be found in the correct interpretation of the facts as they occurred before the Sub-Registrar and the Registrar. It appears that the document was accepted for registration under section 24 of the Indian Registration Act, as it was presented within the time allowed by law. But the registration was refused by him on April 15th 1920 as the persons executing the document did not appear before the Registering Officer within the time allowed for the presentation of documents and as the Registrar did not condone the delay. We have not got on the record the copy of the application made by the plaintiff to the Registrar thereafter. But we have got a certified copy of the order which the Registrar made on that application. We have also got a certified copy of the entry made by the Sub-Registrar on April 15th in his own book, though it does not appear in terms whether that is Book No. 2 referred to in section 51 of the Indian Registration Act. From the nature of the extract put in, it appears to me that that Sub-Registrar really refused on April 15th 1920, to register this document on the ground stated in the endorsement. It is clear that the refusal to register was endorsed on the document, and there was also an entry in Book No. 2 of the reasons for such an order as required by section 71. Therefore, so far as the act of the Sub-Registrar is concerned, in spite of the previous reference to the Registrar which is referred to in his endorsement, it seems to me that it must be treated as an order under section 71. So far there is no difficulty.

The further step that is necessary to consider is, whether the application made by the plaintiff to the Registrar after that was an appeal under section 72 of the Indian Registration Act, and whether the order rejecting the application is an order refusing to direct the registration of the document under section 72. Section 72 is not

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referred to in terms in this order, and we do not know whether it was referred to in the application which the present plaintiff made to the Registrar on May 3rd. But under section 72 the refusal of the Sub-Registrar, such as we have in this case, is open to appeal to the Registrar; and no particular form of appeal is prescribed, at least none has been brought to our notice. The rules under the Act which have been referred to are not shown to contain any particular form in which the appeal provided by section 72 is to be made. We may, therefore, treat the application made by the plaintiff as an appeal. It is true that when the District Registrar refuses to direct the registration of the document under section 72, he has to record reasons for such order in his Book No. 2 as provided in section 76 (1). It does not appear on the record of this case that any such entry of the order was made by the Registrar in Book No. 2, and we must assume for the purposes of the present appeal that no such entry was made. It is conceivable that the Registrar merely dealt with the plaintiff's application as an application to revise the order which he had already communicated to the Sub-Registrar on the April 15th. But the omission of the Registrar to refer the order to the proper section of the Indian Registration Act, and to make the necessary entry in Book No. 2 as required by that Act, would not be a sufficient justification for our refusing to refer that order to the proper section, if it could be so referred.

After a careful consideration of the nature of the order and the steps taken in this particular case before the Sub-Registrar and the Registrar, I have come to the conclusion that the order made by the Registrar on May 5th was in substance an order under section 72 refusing to direct the registration of the document which the Sub-Registrar had already refused to register. It is no doubt a somewhat anomalous position that the power which the District Registrar has under the proviso to section 34 to condone the delay should be exercised by him in the first instance on a reference by the Sub-Registrar, which might be, for all that we know, without any knowledge of, and in the absence of, the parties concerned

and that the parties should have a right to appeal to the same authority practically to re-consider the decision so arrived at by him at an earlier stage. But under section 72 the party has the right of appeal in the case of refusal, except when the refusal is based on the ground that the execution is denied, with which exception we are not concerned and for which exception a different procedure is provided. The present refusal of the Sub-Registrar to register the document would clearly be one in respect of which there could be an appeal to the Registrar. As there was an application to the Registrar after the refusal by the Sub-Registrar, it seems to me to be fair to treat that application as an appeal, and the order thereon as an order by the Registrar refusing to direct the registration of the document in question. When the order is read in that manner, it is quite clear that the suit is well within the scope of section 77. That is the view which I take of the nature of the orders made by the Sub-Registrar and the Registrar, and I am, therefore, of opinion that the suit is maintainable under section 77 of the Indian Registration Act.

I desire to add a word with reference to the argument based on the provisions of section 34 that no document shall be registered under the Act unless the persons executing such document, or their representatives, assigns or agents authorized as aforesaid, appear before the Registering Officer within the time allowed for presentation by the provisions of sections 23 to 26. It is urged that where the Registrar refuses to excuse the delay under the proviso to that section, the document cannot be registered and that, therefore, the suit for the registration of such a document is outside the scope of section 77. It is true that if section 34 is literally read, it does present an apparent difficulty; but it seems to me that section 34, which is subject to the provisions of various sections including section 77, is not intended to lay down any limitation upon the effect of sections 71 to 77 with which I have already dealt. It simply provides that the document shall not be registered unless the delay is excused. But where there is

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an order made by the Sub-Registrar refusing the registration as in the present case, and where the Registrar has refused to direct the registration of the document on an application which, as I have already stated, may be treated as an appeal, I do not see how the final order of the Registrar can be said not to satisfy the requirements of section 72 of the Indian Registration Act. In spite of the difficulty, which no doubt does arise in view of the apparent conflict between the provisions of section 34 and those of sections 71 to 77, I think that the present suit should be treated as falling within the scope of section 77 of the Indian Registration Act.

I would, therefore, allow the appeal, discharge the decrees of the lower Courts, and remand the suit to the Trial Court for disposal according to law. All costs up to date to be costs in the suit.

Crump, J.—I concur.

W. C. A.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 5 OF 1921.

January 2, 1923

Present:—Mr. Prideaux, A. J. C.

RUPA BAI AND OTHERS—DEFENDANTS—

APPELLANTS

versus

RODBA AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Bengal Regulation (XVII of 1806), ss. 7, 8—Anomalous mortgage—Suit for foreclosure, whether necessary to complete mortgagee's title—Limitation.

Under the Bengal Regulation XVII of 1806 a mortgagee of an anomalous mortgage, viz., a combined mortgage by conditional sale and usufructuary mortgage, is bound to institute proceedings for foreclosure within 12 years from the expiry of the period stipulated for redemption; and his title is incomplete until it is confirmed by a regular suit. [p. 127, col. 1.]

Appeal against a decree of the District Judge, Wardha, in Civil Appeal No. 55 of 1920, decided on 30th October 1920.

Sir B. K. Bose, Messrs. V. Bose and T. J. Kedar, for the Appellants.

Dr. H. S. Gour, for the Respondents.

JUDGMENT.—This is a claim for the redemption of a mortgage and for the recovery of Rs. 4,099-3-6 excess profits said to have been taken by the mortgagee. The plaintiff recites that Narayan, the deceased father of the first plaintiff and of defendant No. 2, executed a mortgage-deed in favour of Sadasukh wald Parashram Marwadi, the deceased husband of Rupa, defendant No. 1, for Rs. 400 on 8th January 1872 and a sale-deed in respect of a two-anna share *malguzari* of Mauza Saoda for Rs. 275 the same day. Only the share was sold, no land.

By the mortgage a two-anna *malguzari* share in the village of Saoda was mortgaged, interest at Re. 1-4-0 per cent per mensem was payable, and the amount was to be re-paid on the 10th January 1876 and in default of payment the property was to stand foreclosed. The mortgagee was to manage the share, and take its profits towards interest from year to year and then towards principle.

The following fields unclaimed or given up by tenants came to defendant No. 1's deceased husband since he began to manage the share:—

Old field No.	New field No.	Area	Present	Year in which the field came in possession.
68	32	15-27	Str	1872-73
60	42	13-23	"	"
64	43	14-12	"	"
56	75	2-32	"	"
0	31	7-92	"	1899-1900
0	14	9-69	Khudkasi	1917-18
0	52	23-45	"	"

Of these, field No. 75 was sold to Jago Wani in 1902-03 for Rs. 275 after being in Sadasukh's possession from 1872-73. In the account for 1902-03 half share of the sale was credited by plaintiffs in their accounts. Similarly, defendant No. 1 took field No. 14 under a *razinama* in 1328 Fasli. Half of the consideration of that *razinama* being deducted from the plaintiffs' profits, possession of half of that share is also asked for. The plaintiffs filed with the plaint

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three statements A, B and C, A containing an account of the mortgage-deed and details of the net amount due to plaintiffs from defendant No. 1 after deducting annual re-payments. Statement B gives details of village profits of the share, and statement C gives details of the years in which fields came to the first defendant.

Plaintiff No. 1 and the second defendant have sold on the 19th May 1919 a 1-anna 6-pie share out of the 2-anna share to plaintiffs Nos. 2, 3 and 4. They have thereby acquired the right to redeem. The second defendant, the brother of plaintiff No. 1, refused to join as a plaintiff; he is arrayed among the defendants. The third defendant is added, as he claims to be the adopted son of Vithoolal, son of Raootmal, Raootmal being the adopted son of Sadasukh.

The prayer clause of the plaint has been translated thus:

"A decree may be passed in favour of plaintiffs Nos. 1, 2, 3 and 4, and defendants Nos. 1 and 3 for release of the mortgaged property from their possession for recovery from defendant No. 1 of Rs. 4,099-3-6 out of the income of the mortgaged property found due from defendants Nos. 1 and 3 and for possession of two-anna *malguzari* share of *Mouza* Saoda, *Mouza* No. 423, Tahsil Arvi, District Wardha, with all rights and half share of fields:

New No.	Area.	Right.
32	15-27	Sty.
42	13-23	
43	14-12	
31	7-92	
14	9-69	Khud-Kast.
52	23-45	

of the said *mouza*.

"If any amount is found due to defendant No. 1 from the plaintiffs on account in Court, the plaintiffs are willing to pay the same and redeem the mortgaged property. Hence the defendant Nos. 1 and 3 may be ordered to take the same, and the mortgaged property may be released from the mortgage.

"Any other relief besides this which the Court may deem fit to grant may be granted to the plaintiffs."

Defendants Nos. 1 and 3 contended that the mortgage was foreclosed in the year 1880,

if not earlier, under the proceedings under the Bengal Regulation, XVII of 1806, and that since then the first defendant is holding as an absolute owner and not as a mortgagee. It was further stated that the *malguzari* share was mutated in favour of Raootmal, the heir of the original mortgagee, and by consent of the mortgagor's heirs in 1882, and it was pleaded that defendants had been in adverse possession for over 12 years before suit. The plaintiffs denied all knowledge of the proceedings under the Bengal Regulation and stated that the first plaintiff was no party to these proceedings and was not represented therein and the mortgagee's possession could never be adverse. Even under these Regulations the mortgagee was bound to institute a suit for the declaration of his title, and that was not done. The following preliminary issues were struck for trial:—

1. Whether the mortgage in suit was finally foreclosed in 1881 in the manner provided for by sections 7 and 8 of the Bengal Regulation, XVII of 1806, as pleaded by the defendants?

2. Whether the mortgagee was bound to institute a suit for a declaration of his title as the absolute owner of the property under the mortgage and has failed to do so?

3. Whether the service of notice and the subsequent proceedings against the mortgagor would bind his sons and legal representatives?

4. Whether the defendants have been in adverse possession of the property for over 12 years and this suit for redemption of the mortgage is barred by limitation?

5. What Court-fee should be payable in this suit?

The Trial Court's findings are these:—Proceedings were taken in the Court of the Deputy Commissioner, Wardha, in 1880 under the Bengal Regulation quoted above and the copy shows full compliance of the requirements with sections 7 and 8 of the Regulation. The actual notice served on the mortgagor is not forthcoming, but there is proof of its service, as the copy of the application under section 7 and the record of the admissions of the mortgagor and his heirs was sufficient proof of due service. The Judge holds that the mortgagor was duly served with the mortgagee's

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petition dated 3rd February 1880 and it was notified to him that if he did not redeem within one year from 14th February 1880 the mortgage would be finally foreclosed under the Bengal Regulation. It was impossible, at this length of time, to produce direct evidence of the service of notice, and the plaintiff's own schedule A shows that the mortgagor was at least indebted to the extent of Rs. 8 in 1881 on the expiration of one year's period of grace. The Judge is of opinion that the Regulation required no further action on the part of the mortgagee to perfect his title. He holds that the mortgagor's right of redemption was barred after the proceedings under the Regulation without a suit and that defendants were not bound to institute any suit to defeat the plaintiff's suit for redemption. As the original mortgagor's right of redemption was barred, his heirs could not maintain this suit. It was found that defendant Ramji and his mother accepted some land from out of the mortgaged property and parted with the property in suit in favour of the mortgagee's heir by way of a compromise. It was found that the first plaintiff has failed to prove that he was born before service of notice under the Regulation of 1806 on the mortgagor. Even if the Rodba, the first plaintiff, was born before service he was bound by the proceedings under the authority of *Bajirao v. Gulabsingh* (1). Defendant's possession was found to have become adverse to the mortgagor on the expiration of the period of grace and since then, that is far more than 12 years, they have been holding adversely. The plaintiff's suit was found barred by time. The conditional sale of the property in suit, as evidenced by the mortgage-deed, executed itself under the provisions of the Bengal Regulations. The Court-fee paid was found sufficient.

The right of redemption being barred by limitation, the suit was dismissed. On appeal, the learned District Judge, Wardha, has come to a different conclusion. Dealing with the conditions of the plaintiffs with regard to the alleged foreclosure of the mortgage according to the provisions of the Bengal Regulation, XVII of 1806, that all

the requirements of sections 7 and 8 of the Regulation were not complied with, that the mortgagee failed to prove service of notice on the mortgagor and that without a suit under the Regulation the mortgagee could not acquire complete title to the mortgaged property and that the mortgage of 1872 could not execute itself, the Judge writes:—

"It is clear from the cases reported in *Laxaman Devideen v. Bajubai* (2) and *Gokul Das v. Kirparam* (3) that, though the Bengal Regulation of 1806 was not actually extended to the Central Provinces by Act XX of 1875 (see also paragraph 1233 at page 842 of Dr. Gour's Law of Transfer, 4th Edition, Volume 2). The mortgagee in the present case was, therefore, bound to follow the procedure for foreclosure of his mortgage as laid down by the Bengal Regulation of 1806. The contention of the learned Pleader for the respondents that the mortgage executed itself and the mortgagee became absolute owner of the mortgaged property upon failure of the mortgagor to pay the mortgage money on the stipulated date has, therefore, no force."

The Judge finds that the proceedings taken under the Regulation in the present case would not make the mortgagee absolute owner of the mortgaged property upon the expiry of the one year's period of grace allowed under section 8 of this Regulation. The cases relied upon by the lower Court were found only to lay down that the mortgagor's right of redemption was lost under those circumstances, and the case of *Forbes v. Ameerconissa Begum* (4) shows that, though the right of redemption is lost in such a case, the mortgagee's title is not complete until he has brought a suit either for recovery of possession of the mortgaged property or to obtain a declaration of his title to it. And, as in the present case the mortgagee did not institute a suit to perfect his title by a foreclosure of the mortgage and as he could not do so when the present suit was filed as the right was barred by limitation,

(2) 8 C. P. L. R. 113.

(3) 13 B. L. R. 205; Sar. P. C. J. 279 (P. C.)

(4) 10 M. L. A. 340; 5 W. R. P. C. 47; 1 Suth. P. C. J. 621; 2 Sar. P. C. J. 153; 1 Ind. Jur. (N. S.) 117; 19 E. R. 1002.

(1) 17 Ind. Cas. 141; 8 N. L. R. 136.

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his possession continued to be that of a mortgagee and was not converted into that of an absolute owner in spite of the expiry of the period of grace allowed to the mortgagor through Court, and as long as the mortgagee continues in possession as a mortgagee the mortgagor can exercise the right of redemption inseparable from a mortgage having a period of sixty years within which to bring a suit for redemption. The mortgage in suit was found to be a combination of usufructuary mortgage and mortgage by conditional sale, and as soon as the mortgagee was put in possession of the mortgaged property he was liable to render account of the usufruct, at least until the date of the expiration of the period of grace, and to show that the mortgage-debt was not fully satisfied. The mere issue of notice under the Bengal Regulation did not perfect the mortgagee's title. The Judge thinks it unnecessary to go into the question of legality or validity of the notice issued under section 8 of the Regulation, as this question would only arise if the mortgagee takes necessary steps by a suit to get the foreclosure made absolute. The Judge writes that, if he found it necessary to go into the question, he will presume upon the certified copies of the proceedings filed that the notice was legal and valid. The question whether *Rodba* was in existence on the date of the mortgage or in 1880 was immaterial; but if it is material proper statements of the parties have to be recorded and issue has to be framed and evidence recorded on the point before a proper finding can be given. The plea of adverse possession was held against the defendants as far as *Rodba*, plaintiff No. 1, was concerned. A mere oral agreement and mutation of names in the revenue papers could not effect a valid release of the equity of redemption and could not make the mortgagee an absolute owner of the property and his possession adverse to the mortgagor: *Khiarajmal v. Diam* (5). The lower Appellate Court reversed the decree of the First Court and remanded the suit for trial on the merits. Against that order the present appeal has been lodged by defendants Nos. 1 and 3.

(5) 32 C. 296 at p. 312; 9 C. W. N. 201; 2 A. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.).

It is here contended that the lower Appellate Court has failed to observe that provisions of section 8 of the Bengal Regulation No. XVII of 1806 have been duly complied with by the mortgagee and no redemption having taken place during the period of grace prescribed therein the mortgage has become finally foreclosed and the conditional sale has become absolute, even though no suit in that behalf was instituted by the mortgagee and a decree absolute for foreclosure obtained as required under the present law. It is further contended that after the expiration of the period of grace prescribed and the notice issued under section 8 of the Regulation aforesaid, the mortgagee's possession was automatically converted into possession as full owner and the same having continued for more than 12 years, the present suit, even if otherwise maintainable, is barred by the twelve years' rule of limitation.

The question awaiting my decision is, whether under the Bengal Regulation of 1806 it was necessary for the mortgagee in the present case, after giving notice and after the expiry of the year of grace, to institute a suit declaring his title, or whether, after expiry of the period of grace, the mortgagee automatically became full owner of the mortgaged property.

It is argued for the appellants that the view advanced by the lower Appellate Court is against the case reported as *Forbes v. Ameeroomissa Begum* (4), already cited. That case lays down very clearly that, "The general effect of these Regulations is, that if anything be due on the mortgage and the mortgagor makes no deposit, or an insufficient one, the right of redemption is gone at the expiration of the year of grace. But the title of the mortgagee is not completed, he must bring a suit to recover possession . . . or obtain a declaration by the Court of his title if he is in possession, and in that suit the mortgagor may contest the validity of the conditional sale, or the regularity of the proceedings taken under Regulation XVII of 1806, in order to make it absolute, or he may prove that nothing is due, or that the deposit is sufficient to cover what is due; but the issue, so far as the right of redemption is concerned,

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will be whether anything remained due to the mortgagee at the end of the year of grace, and if so, whether the necessary deposit had been made. If that is found against the mortgagor, the right of redemption is gone."

The question is said to have come up before the Allahabad High Court in *Tawakkul Rai v. Lachman Rai* (6) which lays down that "On the expiration of the year of grace allowed by Regulation XVII of 1806 the ownership of the mortgaged property vested absolutely in the mortgagee, even though he might not have obtained a decree establishing or declaring his right." This case referred to the decision of their Lordships of the Privy Council in *Forbes v. Ameeroonissa Begum* (4).

Apart from the Statute, it was argued, that under a mortgage by conditional sale the mortgagee becomes an absolute owner and *Thumbarasamy Moodelly v. Hossain Rowthen* (7) and *Dinonath Gangooly v. Nursingh Pershad Doss* (8) were quoted. In the last case which deals with Regulation No. XVII of 1806, it was laid down that a mortgagee by conditional sale has a right of entry immediately after default and the Regulations do not debar him from the stipulated possession. Limitation runs from the date of such default; no new cause of action arising upon foreclosure. It is argued that in the present case the mortgage stated: "I will satisfy the amount in full in 4 years hence, that is, by the 10th January 1876, without any objection. If the amount is not satisfied at the above stipulated time the property shall stand foreclosed." The document gave the mortgagee, it is argued, power to take possession and he has held adversely from that date, the suit, therefore, being barred by time. But the mortgage was also usufructuary mortgage and under it the mortgagee was bound to account.

Another case quoted is *Lolf Hossein v. Abdool Ali* (9), where it was held that the lapse of more than 12 days from the year

of grace bars the right of redemption. It was held in *Girahari Lal v. Jugru* (10) that "When once the notice of foreclosure had issued under the Regulation, the mortgagee was entitled to the estate unless the mortgage-money was paid within the year of grace. The effect of the notice was the same so far as this case is concerned as though a decree had been passed for foreclosure."

Macpherson in his *Law of Mortgage*, at page 16, writes:—

"In mortgages by conditional sale the mortgagor is liable to lose his estate, and when he does so, it passes at once to the mortgagee.

"If the debt is not paid as stipulated, the mortgagee must, wherever Bengal Regulation XVII 1806 is applicable, proceed to foreclose according to certain prescribed rules, converting the conditional sale into an absolute one, and obtaining possession. Until he takes such proceedings, the mortgagor remains in possession, and enjoyment of the property, and has the right of redemption on paying off what is due on the mortgage; but on foreclosure, that right ceases, and the property passes wholly from the mortgagee.

"A mortgage by conditional sale has under the Regulations in Bengal and the North Western Provinces an operation different from what such transactions originally had. It is there to be regarded as a mortgage redeemable at any time by the mortgagor or those claiming under him in privity with his title as mortgagor. Apart from legislation, the essential characteristic of a mortgage by conditional sale was that on breach of the condition, the contract executed itself and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them. This was the character of such transactions before Bengal Regulation XVII of 1806 came into force; and this was the character given to them up to the years 1858 and 1864, respectively, by the Courts in the Presidencies of Madras and Bombay where no enactment like Bengal Regulation XVII of 1806 has ever been in force."

(6) 6 A. 344; A. W. N. (1884) 110; 4 Ind. Dec. (N. S.) 23.

(7) 1 M. L. J. 211; 2 I. A. 241, 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531; 1 Ind. Dec. (N. S.) 1 (P. C.).

(8) 22 W. R. 90 at p. 96.

(9) 8 W. R. 476.

(10) 2 C. P. L. R. 130.

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Their Lordships of the Privy Council in *Thumbusawmy Moodelly v. Hossain Rowthen* (7) write:—

"The state of the authorities being such as has been described, it may obviously become a question with this Committee in future cases, whether they will follow the decision in the 13th Moor's Indian Appeals, which appears to them based upon sound principles, or the new course of decision that has sprung up at Madras and Bombay which appears to them to have been, in its origin, radically unsound.

"On a stale claim to redeem a mortgage, and disposes a mortgagee who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course. In the case of a security executed since 1858, there would be strong reasons for recognizing and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted. Their Lordships abstain from expressing any opinion upon this question until the necessity for determining it shall arise."

In a case from Calcutta, *Prannath Roy v. Rookea Begam* (11), their Lordships in dealing with a mortgage by conditional sale held that such a mortgage "is redeemable like an ordinary mortgage, and is subject to foreclosure. When a mortgagee seeks for foreclosure, he must effect that object according to the mode prescribed by Bengal Regulations III of 1793, section, 14; II of 1803, section, 3; and XVII of 1806, sections 7 and 8." In that case it was further held:—

"The service of notice of foreclosure on the occupant of the mortgaged property a party who claimed as purchaser from the mortgagor, but who had not established his title), does not estop the mortgagee from disputing the occupant's title to redeem the mortgaged premises."

And section 7 of Bengal Regulation XVII of 1806 is said to provide for the equitable right of redemption to the mortgagor and the owner of such property or his legal representatives.

Dr. Gour in his book, the Law of Transfer, in paragraph 1228, dealing with

(11) 7 M. I. A. 323; 4 W. R. P. C. 37; 1 Suth. P. C. J. 367; 1 Sar. P. C. J. 692; 19 E. R. 331.

the previous law as to conditional sale writes:—

"Anterior to the year 1806, the rights of a holder of *bai-bil-wafa* (conditional sale) were enforceable according to the strict terms of the agreement. It was then necessary for the mortgagor, if he wished to save his estate from forfeiture, to pay the amount when due, or to pay it into Court, pursuant to the provisions of Regulation I of 1798, within the stipulated period for the re-payment of the loan, and on default, the property passed to the mortgagee without any further act on his part, or the intervention of the Court. The mortgagor had then no right of redemption, and the transaction once closed could not be re-opened. By the Bengal Regulation XVII of 1806, founded upon the practice of the English Courts of Equity, a modification of this strict rule of the rights given to the holder of such a contract was introduced. The seventh section gave the mortgagor a right of redemption within one year commencing from an application by the mortgagee to the Court under the eighth section for the foreclosure of his mortgage. Under the Regulations, the mortgagee could not acquire absolute title over the property mortgaged to him without an order of the District Judge to that effect foreclosing the mortgage. After such an application the mortgagor must either pay or tender the money lent, or the balance then due, or he must make a deposit pursuant to Bengal Regulation I of 1798, section 2. The general effect of these Regulations was that if anything remained due on the mortgage, and the mortgagor made no deposit, or an insufficient one, the right was gone at the expiration of the year of grace. But the title of the mortgagee was not completed, he had to bring a suit to recover possession, or obtain a declaration by the Court of his title if he was in possession, and in that suit the mortgagor could contest the validity of the conditional sale or the regularity of the proceedings taken under Regulation XVII of 1806, in order to make it absolute, or he might prove that nothing was due; or that the deposit was sufficient to cover what was due; but the issue, so far as the right of redemption is concerned, was whether any

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thing remained due to the mortgagee at the end of the year of grace, and if so, whether the necessary deposit had been made. If that was found against the mortgagor, his right of redemption was then effectually shut out * * *. The provisions of the Regulations were so strictly enforced that the mortgagor was held not to have entirely lost his right to redeem unless all its terms had been duly complied with, though parties were free to contract themselves out of the Regulations."

The case of *Hub Ali v. Wazir-un-nissa* (12) seems pertinent. It has to be remembered that in the present case it was a combined mortgage: mortgage by conditional sale and usufructuary mortgage, that is, an anomalous mortgage. It seems to me that under the Regulation the mortgagee was bound to institute proceedings for foreclosure within 12 years and that the time for foreclosure did not arise till the period stipulated in the proviso for redemption had expired; and it seems to me that the mortgagee's title must be held to be incomplete until it was confirmed by a regular suit. Before the 12 years were over the Transfer of Property Act of 1882 came into force and the transaction was subject to section 60 of that Act. It is doubtful whether the Regulation of 1806 applied to a usufructuary mortgage. It seems to me that the weight of authorities is on the side of the view taken by the lower Appellate Court and that, therefore, its remand order is correct. This appeal, therefore, fails and stands dismissed with costs.

G. R. D.

Appeal dismissed.

(12) 28 A. 436; 3 C. L. J. 601; 10 C. W. N. 778; 3 A. L. J. 712; 1 M. L. T. 297; 33 L. A. 107 (P. C.).

BOMBAY HIGH COURT.

CIVIL APPLICATION NO. 827 OF 1921.

November 13, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

APPAYA PADADAYA GURU MAHA-DEVAYYA—PLAINTIFF—

APPLICANT

versus

LAKHAMGOWDA BASAVANPRABHU

SARDESAI—DEFENDANT—

OPPONENT.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Value of subject-matter of suit.

Where the final order involves directly or indirectly some claim or question relating to, or respecting property worth over Rs. 10,000, a certificate for leave to appeal to the Privy Council ought to be granted even though the value of the appellant's interest may be very much less than that amount.

Manilal Jugaldas v. Banubai Framji, 63 Ind. Cas. 588; 23 Bom. L. R. 374, referred to.

Application for leave to appeal to the Privy Council.

FACTS appear from the following order of the High Court:—

The plaintiff asked for relief in his plaint with regard to two properties A and B, which he valued at Rs. 5,000. Then with regard to property C, he asked for an injunction restraining the defendant from interfering with the plaintiff's possession. The Court made an order that property C, which may now be taken as represented by the open space in the compound and the well, should be used equally by both parties. The question is whether that order has prejudiced the interests of the plaintiff to the extent of Rs. 5,000. If so, then taken with the value of the properties A and B, the subject-matter of the suit would be worth more than Rs. 10,000. We, therefore, direct an enquiry under O. XLV, r. 5 (Civil Procedure Code) to determine whether the interests of the plaintiff have been prejudiced to the extent of Rs. 5,000, or over, by the direction given by the Court in the decree that both parties were equally entitled to the user of the open space in the whole compound and the well.

Mr. S. Y. Abhyankar, for Mr. Nilkanth Atmaram, for the Applicant.

Mr. S. S. Patkar, for the Opponent.

BAIDYA NATH CHOTTOPADYA v. PANCHANANI DASSEE.

JUDGMENT.—We think that, considering the judgment of their Lordships of the Privy Council in *Manilal Jugaldas v. Banubai Framji* (1) granting special leave to appeal after a certificate had been refused by this Court [*Manilal Jugaldas v. Banubai Framji* (1)] we must grant a certificate in this case. The order made therein involved a question respecting the compound and the well which has now been found by the lower Court to be worth more than Rs. 5,000 and, therefore, that must be the value to be taken when applying the provisions of section 110, Civil Procedure Code, although the value of the appellant's interest appears to be very much less. We think the Rule must be made absolute and a certificate must be granted on the ground that the final order involves directly or indirectly some claim or question relating to or respecting property worth over Rs. 10,000 in value. Costs will be costs in the appeal.

W. C. A.

Rule made absolute.

(1) 63 Ind. Cas. 588; 23 Bom. L. R. 374.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No.
2290 OF 1920.

July 11, 1922.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Chotzner.BAIDYA NATH CHOTTOPADYA—
DEFENDANT—APPELLANT

versus

Sreemati PANCHANANI DASSEE,
WIDOW OF GANESH CHANDRA PANJA,
AND ANOTHER—PLAINTIFFS AND ANOTHER—

Pro forma DEFENDANT—RESPONDENTS.

Award—Omission to file award in Court—

Character of award, if affected.

If an award is valid, it is operative, even though neither party has sought to enforce it by a regular suit or by the summary procedure. This conclusion is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to the judgment of a Court of last resort. The award is in fact a final adjudication by a Court of the parties' own choice and until impeached upon sufficient grounds in an appropriate proceeding, an award which is on the face of it regular is binding. [p. 130, col. 1.]

Bhajahari Saha Banikya v. Behary Lal Basak,
33 C. 881; 4 C. L. J. 162, referred to.

Appeal against a decree of the Subordinate Judge, 2nd Court, Hooghly, dated the 16th of July 1920, modifying the decree of the Munsif, 3rd Court, Serampore, dated the 18th July 1919.

Dr. Jadunath Kanjilal, for the Appellant.—The defendant No. 1 is the appellant. The appeal arises out of a suit for recovery of possession on establishment of title. The plaintiff's case was that she was entitled to the property by virtue of her purchase from the defendant No. 2 on 29th September 1916. My defence is that the plaintiff is not entitled to the property, inasmuch as her vendor had no title at the date of sale. On 9th September 1916 defendants Nos. 1 and 2 referred their dispute relating to this property to arbitration. On 24th September 1916 the arbitrator awarded the property to defendant No. 1 alone. I then applied to Court for a decree in accordance with the award. The decree was made on 16th December 1916. The plaintiff is alleged to have purchased from defendant No. 2 on 29th September 1916 on the basis of an agreement made on 21st September 1916. The first Court dismissed the suit. On appeal the Subordinate Judge has decreed the suit. I submit that at the date of the conveyance defendant No. 2 had no title nor was he entitled to enter into an agreement when the matter was in arbitration. The award is valid and binding on the defendant and as a matter of fact he has never challenged it. See *Mahammad Nawaz Khan v. Alam Khan* (1). I submit the learned Judge was seriously in error in decreeing the suit.

(1) 18 C. 414; 18 I. A. 73; 15 Ind. Jur. 284; 6 Sar.
P. C. J. 26; 70 P. R. (1891) 9 Ind. Dec. (N. S.) 270
(P. G.).

BAIDYA NATH CHATTOPADYA v. PANCHANANI DASSEE.

Babu Narendra Kumar Das (with him Babu Satindra Nath Mookerjee), for the Respondent.—I submit my title is not affected by the decree, inasmuch as my purchase was long before the decree. I am not bound by the award to which I was no party and which would not be operative till it is sanctioned by the Court's decree. The Sub-Judge was right in his judgment.

JUDGMENT.—This is an appeal by the first defendant in a suit for recovery of possession of land on establishment of title by purchase. The case for the plaintiff is that the property belonged to second defendant who conveyed it to her on the 29th September 1916 pursuant to an agreement made eight days earlier. The case for the first defendant is that the claim is unfounded, inasmuch as he had become entitled to the property by virtue of an award made on the 24th September 1916 in an arbitration proceeding between himself and his brother, the second defendant. The Court of first instance held that the plaintiff had acquired no valid title by her purchase from the second defendant and dismissed the suit as against the first defendant. The Court, however, made a decree for Rs. 175 against the second defendant who, it was found, had obtained that sum from the plaintiff as consideration for the conveyance. Upon appeal, the Subordinate Judge has held that the title to the property was vested in the first two defendants, and that the plaintiff had consequently acquired a good title to one-half share of the property. On this basis a decree has been made in favour of the plaintiffs for one half share of the property and also for mesne profits.

On the present appeal, the first defendant has contended that the conveyance executed by the second defendant in favour of the plaintiffs could not transfer a good title to the property inasmuch as the vendor had no title thereto. We are of opinion that this contention is well-founded.

It appears that on the 9th September 1916, the first two defendants made a reference to arbitration in respect of this property. On the 24th September 1916 the arbitrator made his award whereby this property was declared to be the property of the first defendant alone. On the 29th September

1916, that is, after the award had been made, the second defendant conveyed the property to the plaintiff on the basis of the alleged agreement made eight days earlier. The first defendant thereafter applied to the Court to make a decree in accordance with the award. That proceeding was instituted only against the second defendant who was a party to the arbitration proceedings. The consequence was that a decree was made on the 16th December 1916. On these facts it has been urged that, as this decree was made long after the conveyance, the title of the plaintiff was not affected thereby. In our opinion this view is manifestly erroneous.

The effect of the award of the arbitrator was to vest the title to the property in the first defendant. From that date, the second defendant could not set up a claim to that property. The consequence was that on the date when the second defendant purported to transfer interest in the property to the plaintiff he had no interest to convey. The effect of an award was considered by the Judicial Committee in the case of *Muhammad Nawaz Khan v. Alam Khan* (1). In that case *A* and *B* had referred certain matter in difference between them to *X*. *X* made his award in favour of *A*. *A* made an application under section 525 of the Code of 1882 to file the award and it was dismissed. *B* then brought a suit to recover the property which had formed the subject-matter of arbitration. *A* set up the award in answer to the claim. The Judicial Committee held that the award was valid and was binding upon *B*; and that, although the application under section 525 was refused, that merely left the award to have its ordinary legal validity. It could not be successfully contended that an award was not valid because the party in whose favour it was had never applied to have it filed in Court. The refusal to file an award or of an application made to do so would not have the effect that the award could never be relied upon in any suit relating to the subject-matter dealt with by it. The Judicial Committee then examined the grounds upon which the validity of the award was sought to be impeached and found them to be unsustainable, with the consequence that the plaintiff, who had asked for recovery of the property in contra-

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vention of the title created by the award, failed. It was pointed out by this Court in the case of *Bhajuhari Saha Banikya v. Behary Lal Basak* (2) that this decision of the Judicial Committee clearly shows that, if an award is valid, it is operative, even though neither party has sought to enforce it by a regular suit or by the summary procedure. This conclusion is based upon the elementary principle that, as between the parties and their privies an award is entitled to that respect which is due to the judgment of a Court of last resort. The award is in fact a final adjudication by a Court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award which is, on the face of it, regular is binding. The position consequently is that on the 24th September 1916, the title of the second defendant, if any, to the property in suit was extinguished and under the award the property vested finally in the first defendant. The result follows that the plaintiff did not acquire any title to the property by her conveyance taken from the second defendant. In the present suit, no grounds have been made out to establish the invalidity of the award. We hold accordingly that the plaintiff has failed to make out her alleged title to the property.

The result is that this appeal is allowed, the decree of the Court of Appeal below set aside and that of the Court of first instance restored with costs both here and in the lower Appellate Court.

B. N.

Appeal allowed.

(2) 33 C. 881, 4 C. L. J. 162.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION

No. 57 OF 1922.

November 7, 1922.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice
Crump.

BAPURAO SAKHARAM KARMARKAR

versus

SADHU BHIVBA GHOLAP.

Limitation Act (IX of 1908), Sch. I, Art. 164,
meaning of.

The meaning of Art. 164 of Schedule I to the Limitation Act is, that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed against him in a particular Court in favour of a particular person for a particular sum.

Application from an order passed by the Judge of the Court of Small Causes, Poona, in Miscellaneous Application No. 24 of 1921.

Mr. D. A. Tuljapurkar, for the Applicant.

Mr. K. H. Kelkar, for the Opponent.

JUDGMENT.—We think that the learned Judge was wrong in refusing to entertain the applicant's petition for setting aside the *ex parte* decree passed against him. Under Art. 164 of the Indian Limitation Act the defendant had thirty days from the date of the decree, or where the summons was not duly served, when the applicant had knowledge of the decree. The petitioner alleges that the summons had not been duly served, and that he had no knowledge of the decree until execution was levied against him. The plaintiff's reply was that the defendant had knowledge of the decree because he (the plaintiff) had asked two persons to tell him about the decree and asked him to settle. Those two persons were examined on commission. We do not think that their evidence is sufficient to impose knowledge of the decree on the defendant within the meaning of Art. 164. We think the words of the Article mean something more than mere knowledge that a decree had been passed in some suit in some Court against the applicant. We think it means that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed against him in a particular Court in favour

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of a particular person for a particular sum. A judgment-debtor is not in such a favourable position as he used to be when he had thirty days from the time when execution was levied against him. But we do not think that the Legislature meant to go to the other extreme by laying down that time began to run from the time the judgment-debtor might have received some vague information that a decree had been passed against him. We think, therefore, that the Rule must be made absolute and the Judge should now decide the application to set aside the *ex parte* decree on its merits. Costs will be costs in the application.

W. C. A.

Rule made absolute.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1310 OF 1921.

November 13, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Wallace.

PARA DEKKAN alias PERIA PACHAI
AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Khan Bahadur T. AMEERUDDIN SAHIB,
BY AGENT T. S. RAGHUPATHY AIVER

—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 26, applicability of—Claim by tenant to hold at lower rent—"Lawful rate payable," meaning of.

Section 26 of the Madras Estates Land Act deals with cases where there has been an actual prior rent greater than the rent claimed by the tenant and does not deal with a case where a *raiyyat* is setting up that *ab initio* the rent payable was the lower rent and that the terms of tenancy always had been the lower rent, to be increased to the higher rent in certain eventualities. [p. 132, col. 2.]

Karuppa Goundan v. Narayana Chettiar, 45 Ind. Cas. 406; 7 L. W. 376; (1918) M. W. N. 188; 24 M. L. T. 35, *Palani v. Paramasiva*, 13 M. 479; 4 Ind. Dec. (N. S.) 1046, distinguished.

Per Wallace, J.—“The lawful rate payable” in section 26 (3) of the Madras Estates Land Act is not necessarily or invariably the *faisal* rate fixed by the Government, but may be a contract rate on which the occupancy is based. [p. 133, col. 1.]

Second appeal against a decree of the District Court, North Arcot, at Vellore,

in A. S. No. 141 of 1920, preferred against a decree of the Court of the Sub-Collector, Tirupattur Division, in S. S. No. 25 of 1918.

Mr. A. C. Sampath Aiyangar, for the Appellants.

Mr. A. Viswanatha Aiyar, for the Respondent.

JUDGMENT.

Schwabe, C. J.—This is an appeal from the judgment of the District Judge of North Arcot who reversed the decision of the Sub-Collector of Tirupattur, Mr. V. P. Row. The suit was by *raiyyats* to compel the *mittadar* under whom they held the land to grant them *patta* at a rent of Rs. 12-1-3 per annum. The defendant's claim was that they were only entitled to have the land at a rent of Rs. 25-7-10.

It appeared on the evidence that, so far as could be traced back, the amount actually paid has always been Rs. 12-1-3 and not Rs. 25-7-10. But it also appeared from certain documents produced that the Rs. 12-1-3 was arrived at by a deduction from the sum of Rs. 25-7-10. The *mittadar* set up that the reason of this was that the land had originally been held by a *karnam* or a *gomashita*, and that in consideration of services rendered in those capacities the full rent of Rs. 25-7-10 had been reduced to Rs. 12-1-3. The *mittadar* wholly failed to prove any such case. In fact it was established quite clearly on the evidence that this lower amount of rent had been paid by persons, who were not in the position either of *karnams* or *gomashitahs* who enjoyed the land. Another reason for the payment of lower amount was given in the evidence on behalf of the plaintiffs. Their account was that a considerable part of the land owing to its saline nature, was not under cultivation and never had been under cultivation and that throughout the terms of the occupancy were that, although the full amount of rent for the whole land at the local current rate for cultivable lands would be Rs. 25-7-10, so long as the part remained, owing to its saline nature, uncultivable, the amount payable should be Rs. 12-1-3. The learned Sub-Collector who heard the case and heard the evidence accepted that view and, in my judgment, he was perfectly right to accept it on the

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evidence, that he received, of the value and the condition of the land and the way in which this lower rate has been received for a very long time.

It was then contended on behalf of the *mittadar* that in certain documents apparently of a recent date, the word used for describing the deduction was '*Riyayat*' and that this word means, and can only mean, a "voluntary remission by the land-holder or by Government." As to this, the learned Sub-Collector did not attach any weight to the use of the word. He said that the exact meaning was not beyond doubt and that to translate it as "remission" was to prejudice its nature, for remission is *prima facie* a matter of grace and indulgence. He said he would prefer to translate it as 'deduction'. When the case came before the District Judge, he based his whole judgment on the meaning of this word, and in order to ascertain the meaning of it he turned to Macleene's Manual of Administration in Madras, where the word is somewhat differently spelt, and stated to be derived from Arabic '*rau*' meaning 'to abstain' and is then translated "favour, specially a remission of the Government claim." The District Judge read that to mean a voluntary remission. Having so satisfied himself that it was the only meaning of the word, he decided the case accordingly. A little further investigation into other recognised works of reference might have resulted in his considering that the point was not quite so clear, for in the "Manual of North Arcot District" the word is merely translated as "an abatement of assessment", and in Wilson, the words used are capable of meaning an "abatement" either in the sense of voluntary or compulsory remission of rent. In any view, there is no help to be gained in the proper decision of this case from the use of the word '*Riyayat*'.

There were then two other words which appeared in the document of 1885, the words being '*Istamulla varayil*' (meaning "so long as it pleases") and they are put with the words '*riyayat*' against the figure showing the whole amount of remission allowed in the case of this village. The only evidence as to this document is that of the writer of part of it. It was an account of the rents of this village written in Telugu

and a summary of these was written in Tamil by the witness, D. W. No 2, who says that he wrote it while he was sixteen years old and was learning with his father to be a *karnam*, the father at that time being the *karnam* in charge. That he or his father had any knowledge of these remissions or deductions or that they ever considered whether any and which of these were voluntary or involuntary does not appear and I agree with the view taken by the Sub-Collector that the use of those words in that particular document does not carry the matter any further.

It was then argued before us and our attention has been called to cases in support of this argument that under section 26 (1) and (3) of the Madras Estates Land Act, it was not open to the plaintiffs in this case to prove the agreement they alleged, namely, that the rent should be so much so long as the land remained saline and so much more if it became cultivable. I do not think that the cases cited to us, *Karuppa Goundan v. Narayana Cheunar* (1) and *Palani v. Paramasiva* (2) decide any thing of the kind. Nor do I think that that is the proper interpretation of the section in the Madras Estates Land Act of 1908. Section 26 is dealing with cases where there has been an actual prior rent greater than the rent claimed by the tenant and does not deal with a case where a *raiyyat* is setting up that *ab initio* the rent payable was the lower rent and setting up that the terms of tenancy always had been the lower rent but to be increased to the higher rent in certain eventualities. In my judgment, it makes no difference that in various documents it is described as a higher rent reduced to a lower amount, those eventualities not having happened.

A point was taken under the limitation clause of the Madras Estates Land Act but the point was not raised by the pleadings or in the Court of first instance. An attempt was made to raise the point before the District Judge and the District Judge, in my judgment, perfectly rightly refused to go into it, for he pointed out that if it had been raised, the plaint might

(1) 45 Ind. Cas. 406; 7 L. W. 376; (1918) M. W. N. 188; 24 M. L. T. 35.

(2) 13 M. 479; 4 Ind. Dec. (N. S.), 1046;

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perhaps have been amended, or the suit withdrawn at once and a fresh suit filed then and there. Now, I do not wish unnecessarily to discuss to what extent this Court ought to listen to points under the Limitation Act not taken in the Court below. We must strongly be inclined not to do so, but where a point of limitation of this nature, which is a mere objection to the suit then before the Court, does not in the least affect the rights of the parties, because it is admitted in this case that if the point had been taken and succeeded a fresh suit could have been brought the next day, I should hesitate very much before I should allow the point to be taken, because the presumption that I should make is this: that for some reason of which we have no knowledge, it has been definitely decided by the appellant in the first instance not to raise the point knowing either that a good answer might be made to it if taken or knowing that if he takes it and succeeds he will have to face a fresh suit the next day with the same result but that additional costs will have to be incurred by both parties. In these circumstances, I do not think it is a proper case for us to allow the raising of such points at this stage.

It follows from the view that we take of this case that if the saline portion of the land becomes cultivable it will be open to the *mittadar* to take proper steps to have the rent increased.

For these reasons, in my judgment, the judgment of the Sub-Collector was right and the judgment of the District Judge was wrong. This appeal must be allowed with costs.

Wallace, J.—I agree.

I only wish to say as regards the interpretation of section 26 (3) that it does not seem to me that "the lawful rate payable" is necessarily or invariably the *faisal* rate fixed by Government, but may be a contract rate on which the occupancy is based. This is a matter which has to be proved, and in this case, on the evidence, it appears to me that the lawful rate payable was the contract rate, *viz.*, Rs. 12-1-3, a permanent deduction from what would have been the rent if the whole land was cultivable having been allowed because it was saline and so long as it remained so.

I, therefore, agree the *patta* is a proper *patta* in terms of Exhibit B and the plaintiff's suit must be allowed.

v. N. v.

Appeal allowed.

PATNA HIGH COURT.

CIVIL REVISION NO. 79 OF 1922.

November 29, 1922.

Present :—Mr. Justice Das and
Mr. Justice Adami.

BHAGWAN DAS AND ANOTHER—
PETITIONERS

versus

THE EAST INDIAN RAILWAY COMPANY—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 72—Risk-Note—'Package,' meaning of.

The word "package" in a Railway Risk-Note means both that which is packed and that in which it is packed, that is, its covering or receptacle.

East Indian Railway Co. v. Nilkanta Roy, 22 Ind. Cas. 679; 41 C. 576; 19 C. L. J. 142; 19 C. W. N. 95, *Kali Das Mullick v. East Indian Railway Co.*, 40 Ind. Cas. 626; 21 C. W. N. 815, relied upon.

Appeal from a decision of the Subordinate Judge, Hazaribagh.

Mr. *Siveswar Dayal*, for the Petitioners.

Mr. *Sivanarain Bose*, for the Opposite Party.

JUDGMENT.—The view of the learned Judge in the Court below is supported by two decisions of the Calcutta High Court, the case of *East Indian Railway Co. v. Nilkanta Roy* (1) and the case of *Kali Das Mullick v. East Indian Railway Co.* (2). According to the decision of Mr. Justice Woodroffe in *Kali Das Mullick v. East Indian Railway Co.* (2) the word, "package" seems to mean both that which is packed and that in which it is packed, its covering or receptacle. We are unable to say that the view taken in the two cases to which we have referred is wrong.

We must, accordingly, dismiss this application but in the circumstances without costs.

Z. K.

Application dismissed.

(1) 22 Ind. Cas. 679; 41 C. 576; 19 C. L. J. 142; 19 C. W. N. 95.

(2) 40 Ind. Cas. 626; 21 C. W. N. 815.

DWARKA RAM V. JHULAI PANDE.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 110 OF 1921.

February 22, 1923.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

DWARKA RAM AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

JHULAI PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Sale by father—Consideration partly for necessity—Suit by son to set aside sale—Decree, form of.

In a suit by a Hindu son to set aside a sale by the father, if it be found that a part of the sale consideration was valid and a part invalid, the decree to be passed should be one for possession in favour of the plaintiff subject to his paying to the purchaser so much of the consideration as was required for legal necessity.

Appeal, under section 10 of the Letters Patent, from the judgment of Mr. Justice Stuart, dated the 21st July 1921.

Mr. Shiva Prasad Sinha, for the Appellants.

Mr. Harmandan Prasad, for the Respondents.

JUDGMENT.—This was a suit brought by the son of a vendor who sold certain property for Rs. 1,400. A claim for pre-emption was put forward in regard to this property and the property was pre-empted by the defendant, Jai Govind Singh. The Court below has found that half of the property sold by the plaintiff's father was non-ancestral property and the claim has, therefore, been dismissed as regards that half. As regards the remaining half the learned Judge of this Court has made a decree to the effect that Jai Govind Singh should pay to the plaintiff Rs. 200 which was found not to have formed valid consideration for the sale, inasmuch as it was required for family necessity. According to the finding Rs. 1,200 out of the Rs. 1,400 was for family necessity. Therefore, out of the consideration for half the property Rs. 600 was required for family necessity and is to be deemed to be valid consideration for the sale. As, however, a part of the consideration was not valid, the plaintiff would be entitled to a decree for possession subject to his reimbursing to the purchaser the amount in respect of which the sale was a valid sale. If any part of the consideration was invalid

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and not binding on the plaintiff, the plaintiff would be entitled to have the sale set aside. But if a portion of the consideration was good and binding on the plaintiff, he would be entitled to reimburse it to the defendant. The form of the decree in a case of this kind should, therefore, be a decree for possession in favour of the plaintiff subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family. This is the form of the decree in a suit of this kind which has always been maintained. In the present case the plaintiff is entitled to a decree for half of the property on condition of his paying Rs. 600 which, as we have said above, was required for family necessity in respect of half the property. We, therefore, vary the decree of this Court and make a decree in the plaintiff's favour for possession of the property claimed by him on condition that he pays to Jai Govind Singh, defendant, Rs. 600 within six months from this date, otherwise the claim will stand dismissed with costs. The appellant will have his costs of this appeal.

M. A. A.

Decree modified.

MADRAS HIGH COURT.

REFERRED CASE NO. 8 OF 1922.

November 6, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice, Mr. Justice Coutts-Trotter and Mr. Justice Ramesam.

ARULANANDAM—PETITIONER—

versus

ARUL PRAKASAM AND ANOTHER—
CO-RESPONDENTS—RESPONDENTS.

Divorce Act (I V of 1869), ss. 7, 10—Application for divorce—Evidence.

In an application for divorce, under the Indian Law, which conforms with the English law, the evidence of the husband or wife alone must never be accepted without some corroboration either by a witness or by strong surrounding circumstances. [p. 135, col. 1.]

Case referred by the District Judge, Madura, in his letter No. 2096, dated the 5th April 1922, for confirmation by the High

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Court under section 17 of the Indian Divorce Act (Act IV of 1869) of the decree *Nisi* passed in O. S. No. 2 of 1922, on the file of the District Court, Madura.

JUDGMENT.—This is a petition for divorce which comes before us under section 17 of Act IV. of 1869 asking us to confirm the decree of the District Judge of Madura to dissolve the marriage between petitioner and the respondent. Under section 7 of that Act, subject to the other provisions of that Act, "the High Court and the District Court shall, in all suits and proceedings thereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court of Divorce and Matrimonial Causes of England for the time being acts and gives reliefs". The evidence and the only evidence before the Court in this case was that of the petitioner himself. He swears that he went to his house one day and on gaining admission into his house he found his wife there with the co-respondent. He also swears that she left him that evening and has been living with the co-respondent and that a child has been born to her which is not his child. It is an absolutely fixed Rule of Practice in the Divorce Court in England that the evidence of the husband or the wife alone is never accepted without some corroboration either by a witness or at least by strong surrounding circumstances. The reason for that Rule of Practice is that divorce is a matter which lends itself very easily to collusion, for a petitioner may come and say, 'my wife or my husband is unfaithful or my husband has been cruel' and the other party desiring the divorce may take the simple course of not attending and letting the matter go by default, and so a divorce may be obtained. It is, therefore, the established practice that there must be in these cases corroboration for the Court to act. In this case there was none, and, therefore, it is necessary that the case should be referred back to the District Judge so that he may hear such evidence as the petitioner may be advised to call before him in corroboration of his own evidence. It would seem in this case a simple matter to obtain corroboration of these facts, if they are facts. That his wife has left him and is living with

somebody else is a matter which can easily be proved, and probably evidence can easily be given of the registration of the birth of the illegitimate child.

V. N. V.

Case sent back.

PATNA HIGH COURT.

CIVIL REVISION No. 199 OF 1922.

January 9, 1923.

Present:—Mr. Justice Ross.

RAM SUNDAR AND ANOTHER—PETITIONERS

versus

AMRIT PAJIYAR AND ANOTHER—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Art. 85—Mutual, current and open account, what is.

Defendants were in the habit of purchasing grain from the plaintiffs by means of letters through their *gomashia* and paid the price thereof from time to time. There was occasionally a balance in the defendants' favour. Plaintiffs sued defendants for a certain sum due on a balance of the account:

Held, that the account between the parties was not a mutual, current and open account and the suit was not, therefore, governed by Art. 85 of Schedule I to the Limitation Act.

Revision.

Mr. Manohar Lal. for the Petitioner.

Mr. Mohammad Hasan Jan, for the Opposite Party.

JUDGMENT.—This is an application by the defendant in a suit brought in the Small Cause Court of Darbhanga. The plaintiffs carry on business in Darbhanga and the defendants carry on business in Allahabad. According to the allegations in the plaint business was conducted between the parties on condition that the defendants purchased grain from the plaintiffs firm by means of letters and through the defendants' *gomashia* and paid the price thereof from time to time. The suit was for a sum of Rs. 435 due on the balance of the account. The plaint alleges that the cause of action arose on various dates, these dates being the dates on which the different items were debited in the account. The learned Counsel for the petitioners points

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out that six items on the debit side and two items on the credit side were barred by time when the suit was brought, and that if these items are excluded there is actually a balance in the defendants' favour. The learned Vakil for the opposite party did not contest the facts but argued that this was a case governed by Art. 85 of the Limitation Act, being a claim on the balance of a mutual, open and current account where there have been reciprocal demands between the parties. It is clear on the authority of *Ram Pershad v. Harbans Singh* (1) and *Velu Pillai v. Ghose Mahomed* (2) that this is not a mutual account, even if there may have been occasionally a balance in the defendants' favour, as appears from some of the letters. It is unnecessary to discuss the other points and the suit must clearly, therefore, fail. The application is allowed and the suit is dismissed with costs.

Hearing fee one gold mohur.

Z. K.

Application allowed.

(1) 6 C. L. J. 158.

(2) 17 M. 293; 4 M. L. J. 140; 6 Ind. Dec. (N. S.) 203.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1171 OF 1920.

May 16, 1922.

Present.—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

JANAKI BALLAV ROY AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

ENAT MONDAL—DEFENDANT—
RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 29 proviso (1)—Suit for rent at increased rate—Landlord when entitled to succeed.

In a suit to recover rent at an increased rate the landlord is not entitled to the benefit of the first clause to the proviso to section 29 of the Bengal Tenancy Act, unless he brings himself within the precise language of that clause. [p. 137, col. 1.]

The plaintiff brought a suit for rent at an increased rate for four years beginning with 1321 B. S. The rent was not enhanced by writing registered as required by clause (a) of section 29 of the Bengal Tenancy Act. No increased rent was paid in 1320,

but rent at the increased rate was actually paid from 1314 to 1319 B. S.:

Held, that the requirements of the first clause of the proviso to section 29 of the Bengal Tenancy Act had not been fulfilled, inasmuch as rent at the increased rate had not been paid for a continuous period of three years immediately preceding the period for which rent was claimed. [p. 137, col. 1.]

Mohini Kanta Saha v. Preo Nath Neogy, 67 Ind. Cas 381; 35 C. L. J. 309; (1922) A. I. R. (C.) 141; 49 C. 661, distinguished.

Appeal against a decree of the Additional Subordinate Judge, Maldah, in Rajshahye, dated the 14th February 1920, modifying a decree of the Munsif, Second Court at Maldah, dated the 3rd February 1919.

Babu D. N. Bagchi, for the Appellants.—The plaintiffs are the appellants. The appeal arises out of a suit for rent. We claimed rent at an increased rent for 1321-25 on the ground that there were changes in area and that rent has been increased. First Court decreed the suit. On appeal, however, the suit has been dismissed. I submit I am entitled to realise increased rent under section 29 proviso (2) of the Bengal Tenancy Act. Rents for 1314 to 1319 B. S. have been paid at the increased rate. I submit the learned Court of Appeal below has erroneously dismissed my suit.

Dr. Dwarkanath Mitter (with him Babus Bireswar Bagchi and Narayan Chandra Kar), for the Respondent, was not called upon to reply.

JUDGMENT.—The only substantial question argued in this appeal is, whether the Subordinate Judge has rightly dismissed the claim for the increased rent of Rs. 2-5-6 *gandas* claimed by the plaintiffs in addition to the pre-existing rent of Rs. 18-11-12 *gandas*. It is conceded that the rent was not enhanced by writing registered as required by clause (a) of section 29 of the Bengal Tenancy Act. Consequently, the plaintiffs are driven to rely upon the first clause to the proviso which runs as follows: "Nothing in clause (a) shall prevent a landlord from recovering rent at the rate at which it has been actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed." This proviso, however, is of no assistance to the plaintiffs. The first of the four years for which rent is claimed in this suit is 1321.

GOPALASWAMI IYER v. RAMACHANDRA IYER.

To entitle them to the benefit of the provision contained in the proviso, the plaintiffs must establish that the increased rent which they now claim has been actually paid for a continuous period of not less than three years immediately preceding 1321. But it is not disputed that the increased rent was not paid in 1320. The plaintiffs contend, however, that, as rent at the increased rate was actually paid from 1314 to 1319, the requirements of the proviso have been fulfilled. We are of opinion that there is no foundation for this contention, which is opposed to the plain language of the Statute. The argument of the appellants is based upon the fallacy that if rent has been paid at the increased rate for three years or longer, the rent of the holding has become permanently increased as if there had been an increase by writing registered. That is not the effect of the proviso. The true effect of section 29 is that there is no permanent enhancement when there is an attempt to increase rent without writing registered. But still the Legislature allows the landlord to realise rent at the increased rate, provided rent at that rate has been actually paid for a continuous period of not less than three years immediately preceding the period for which rent is claimed. If the landlords do not bring themselves within the precise language of this clause, they are not entitled to the benefit. In the Court below, reliance was placed by way of analogy upon section 50 of the Bengal Tenancy Act; but, as the Subordinate Judge correctly pointed out, whereas section 50 contemplates a case where a tenancy has been held at a certain rate, *Mohini Kanta Saha v. Preo Nath Neogy* (1), section 29 applies only to a case where rent has been actually paid for a period of three years. We are of opinion that the claim for enhanced rent has been rightly disallowed.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

B. N.

Appeal dismissed.

(1) 67 Ind. Cas. 387; 35 C. L. J. 309; (1922) A. I. R. (C.) 141; 49 C. 661.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 613 OF 1922.

December 12, 1922.

Present:—Mr. Justice Wallace.

K. GOPALASWAMI IYER—PETITIONER

versus

O. S. RAMACHANDRA IYER, OFFICIAL RECEIVER, TANJORE—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, rr. 4, 9—Application to bring legal representatives on record—Delay—Sufficient cause—Petition to excuse delay, refusal of—Revision.

In an application to excuse delay in bringing on record the legal representatives of a deceased defendant or respondent, the essential point to consider is whether the petitioner's ignorance of the death of the defendant or respondent was justified and afforded sufficient cause for the belated application. [p. 138, col. 1.]

Where a Court in considering such an application comes to a conclusion on no evidence and even then omits to consider the one point which the law directs it to decide, namely, whether there was sufficient cause for delay in representation, it acts with material irregularity in the exercise of its jurisdiction and its order is liable to be set aside in revision if the aggrieved party has been seriously prejudiced thereby. [p. 138, col. 1.]

Thandayuthapani v. Chinnathal, 24 Ind. Cas. 872, distinguished.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court, East Tanjore, at the Negapatam, dated the 14th July 1922, in I. A. No. 333 of 1922, (in I. P. No. 2 of 1917 on the file of the District Court, Tanjore).

Mr. K. Rajah Iyer, for the Petitioner.

Mr. B. Somayya, for the Respondents.

JUDGMENT.—Petitioner seeks for revision of the order of the lower Court excusing the delay of 8 months by the Official Receiver, Tanjore, in bringing on record the legal representative of a deceased alienee from an insolvent in the matter of a petition by the Official Receiver to have that alienation set aside. The District Judge has excused the delay on the short ground that the Official Receiver had no means of knowing about the death of the alienee; and presumably, though he does not say so, that he considered that sufficient cause for the application being belated.

The evidence before him was contained only in two affidavits, one by the Official Receiver that he did not know earlier of the death, and one by the legal representative

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that the Official Receiver did know earlier of it from the insolvent's power-of-attorney agent. The District Judge had, therefore, before him no evidence whatever that the Official Receiver did not, as a matter of fact, know earlier. He has not said so. His order is thus based on no evidence. Beyond that he has not considered the essential point whether the Official Receiver's ignorance of the death was justified and afforded sufficient cause for his belated application.

3. The next question is, whether this Court is called on to interfere under section 115 of the Civil Procedure Code. Respondent relies on the ruling in *Thandayuthapani v. Chinnathal* (1), holding that the order in that case on a petition to excuse delay in presenting an appeal was not open to revision. I take it that no question of gross irregularity in the exercise of jurisdiction arose in that case, *i.e.*, that the Trying Court had considered the point of law which it was its function to decide and had decided on the evidence before it, rightly or wrongly, that there was not sufficient cause for delay in presentation. But when the Court has first of all come to its conclusion on no evidence and has even then omitted to consider the one point which the law directs it to decide *viz.*, whether there was sufficient cause for delay in presentation, I must hold that it has acted with material irregularity in the exercise of its jurisdiction, if the aggrieved party has been seriously prejudiced thereby.

5. In the present case, the Court's conclusion was based on no evidence, and, therefore, it failed to consider properly whether sufficient cause for delay had been shown. Since, if sufficient cause has not been shown, the Official Receiver's petition to set aside the alienation in favour of petitioner's deceased father will have to be dismissed, I consider that petitioner has been seriously prejudiced by the lower Court's irregular exercise of jurisdiction.

5. I, therefore, set aside the order of the District Judge and direct that the petition be re-heard according to law. Petitioner will get his costs in this Court.

Z. K.

Order set aside.

(1) 24 Ind. Cas. 872.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 249 OF 1921.

January 30, 1923.

Present:—Mr. Justice ROSS.

PARMESHWAR PRASAD SINGH AND
OTHERS—PLAINTIFFS—APPELLANTS
versus
NARSINGH RAI—DEFENDANT—
RESPONDENT.

Res judicata—*Renti-decree*—*Presumption*.

While a decree for rent finally decides the rent payable for the years in suit, it is merely presumptive evidence of the rent of future years and the presumption may be rebutted [p. 139, col. 1.]

Kali Roy v. Pratap Narain, 5 C. L. J. 92, relied upon.

Maharaja Radha Kishore Manikya Bahadur v. Umed Ali, 12 C. W. N. 904; *Upendra Kumar Chakravarti v. Sham Lal Mondol*, 11 C. W. N. 1100; 6 C. L. J. 705; 34 C. 1020, distinguished.

Appeal from a decision of the District Judge, Muzaffarpur, dated the 10th August 1920, affirming a decision of the Munsif, Hajipur, dated the 8th June 1920.

Mr. S. C. Mitter, for the Appellants.

Mr. Nirsu Narain Sinha, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs against the decree of the District Judge of Muzaffarpur affirming a decision of the Munsif of Hajipur by which he dismissed the plaintiff's suit for a declaration that the holding of the defendant is a *bhaoli* holding and not a holding at a cash rent. The suit was not tried but was dismissed on the preliminary ground that it was barred by the rule of *res judicata*. The only question in this appeal is whether the Courts below were right in applying this rule to the facts of this case.

It appears both from the judgment of the Munsif in the present suit and from the judgment in the previous litigation that the Record of Rights shows that this is a *bhaoli* holding. In Rent Suit No. 1508 of 1916 the plaintiffs sued the defendant for *bhaoli* rent for 1320 to 1323. The second issue in that suit is whether the land is *bhaoli* or *nakdi*. A compromise decree in a suit between the lessee of the village and the defendant was produced in evidence. The Munsif, rightly stating the question to be whether the entry in the Record of Rights had been rebutted by this decree, held that it had not. The District Judge came to the opposite decision and dismissed

RAMA PATTAR v. KUMURAN CHIDAYATH KASHAVAN.

the suit for produce rent. The Courts below have held that that decision was conclusive in the present litigation.

The present case is on all fours with *Kali Roy v. Partap Narain* (1). There the plaintiff relied on the Record of Rights which showed *bhaoli* rent. The defendant relied on a previous rent-decree at a cash rental. It was held that the decision in a previous rent suit as to the amount of rent payable does not operate as *res judicata* in a suit for the rent of the subsequent years, although it may give rise to a presumption under section 51 of the Bengal Tenancy Act that the rents for subsequent years remained the same. This decision answers the argument of the learned Vakil for the respondent to the effect that a decision that rent is cash rent must be *res judicata*, because a cash rent cannot change to a produce rent. The rule is that while the decree finally decides the rent payable for the years in suit it is merely presumptive evidence of the rent of future years and the presumption may be rebutted. The cases referred to by the learned Vakil for the respondent, *Maharaja Radha Kishore Manikya Bahadur v. Umed Ali* (2) and *Upendra Kumar Chakravarti v. Sham Lal Mondoi* (3), have no bearing on the present question. In the decision of this Court relied on by the District Judge the principal question was the question of area. I hold, therefore, that the decisions of the Courts below are wrong and I decree this appeal with costs and set aside the decrees of the District Judge and the Munsif and remand the case to the Munsif for trial.

Z. K.

Case remanded.

(1) 5 C. L. J. 92.

(2) 12 C. W. N. 904.

(3) 11 C. W. N. 1100; 6 C. L. J. 715; 34 C. 1020.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 92 TO 95
OF 1922.

November 30, 1922.

Present:—Mr. Justice Ramesam.

RAMA PATTAR AND OTHERS—PETITIONERS
versusKUMURAN CHIDAYATH KASHAVAN
AND ANOTHER—RESPONDENTS.

Transfer of Property Act (I V of 1882), s. 6—

Assignment of rent of future renewals of lease, validity of.

An assignment of rent cannot operate in respect of future possible leases that may come into existence as a result of renewal. [p. 140, col. 1.]

Allen v. Bryan, (1826) 5 B. & C. 512; 1 L. J. K. B. (o. s.) 210; 29 R. R. 307; 108 E. R. 191, *Williams v. Hayward*, (1859) 1 El. & El. 1040; 28 L. J. Q. B. 371; 5 Jur. (N. S.) 1417; 7 W. R. 563; 117 R. R. 503; 120 E. R. 1200, distinguished.

Petitions under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Alatur, dated the 17th September 1921, in S. C. S. Nos. 458 to 461 of 1921 respectively.

Messrs. T. R. Ramachandra Iyer, T. R. Krishnaswami Iyer and A. S. Venku Iyer, for the Petitioner.

Mr. C. V. Ananthakrishna Iyer, for the Respondent.

JUDGMENT.—These are revision petitions against the judgments of the District Munsif of Alatur in four small cause suits. The facts out of which the suits arose are practically admitted. The plaintiff is the *karnavan* of a *tavazhi* known as the Kumaran-chidayuthu house. Besides this, there were in the *tarwad* two other *tavazhis*, viz., Eravamannattil house and the Puliaankalath house. In a litigation of 1887, there was a compromise between all the *tavazhis* by which "the *michavaram* collected from the tenants of "Kuzhalmannom" was allotted for the expenses of the members of the first house. (Exhibit A). Relying on the compromise the present suits are filed for recovering the *michavaram* from the four of the *kannom* tenants in Kuzhalmannom-amsom. The tenants pleaded that the rents were paid to the *karnavan* of the *tarwad* who is D. W. No. 1, and that the plaintiff is not entitled to the rents.

The District Munsif thought that plaintiff's claim falls within the exception to the rule that "strangers to a contract cannot enforce it." It is conceded before me by Mr. Ananthakrishna Iyer, the learned Vakil who appeared for the respondents, that neither the rule nor the exception have any application to the cases. The payment of *michavaram* under the contracts (which are contained in Exhibit F series) was not to third persons but to the *karnavan* of the *tarwad* in whose favour the *kychils* were taken. But Mr. Ananthakrishna Iyer argues that Exhibit A amounts to an assignment of the right

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to collect the *miclavaram*. I agree with him that Exhibit A ought to be construed to be an assignment of the right of the main *tarwad*. Mr. Ramachandra Iyer, who appeared for the petitioner, does not seriously dispute this; but he contends that the assignment could be operative only in respect of the *miclavaram* due for the remaining years of the *kanoms*, existing in 1888 and cannot operate for the *miclavaram* due in respect of renewed *kanoms* as it was dependent on the possibility of renewal.

I agree with this contention. The cases relied on by Mr. Ananthakrishna Iyer, *viz.*, *Allen v. Bryan* (1) and *Williams v. Hayward* (2), do not help him, as in those cases the assignments of rents for definite periods (being in each case the remainder of the term of the lease) were in question. I do not think that an assignment of rent can operate in respect of future possible leases that may come into existence as the result of renewal (section 6 of the Transfer of Property Act). Mr. Ananthakrishna Iyer tried to get over the difficulty by arguing that the transfer was of an interest in immoveable property. I do not think that the difficulty can be got rid of in this way. The interest transferred includes possibilities and is very indefinite.

In the result, the revision petitions are allowed and the plaintiff's suits are dismissed with costs throughout.

V. N. V.

Petitions allowed.

(1) 1826) 5 B. & C. 512; 4 L. J. K. B. (o. s.) 210; 29 R. R. 307; 108 E. R. 191.

(2) (1859) 1 Bl. and El. 1040; 28 L. J. Q. B. 374; 5 Jur. (N. s.) 1417; 7 W. R. 563; 117 R. R. 563; 120 E. R. 1200.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 870 OF 1921.

January 26, 1923.

Present.—Mr. Justice Rafique and Mr. Justice Piggott.

SHIB LAL—DEFENDANT—APPELLANT
versus

BIDHA SINGH—PLAINTIFF AND RUP SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption suit—Gift to defeat pre-emption—Vendee becoming co-sharer before decree—Suit, maintainability of—Pleadings—Genuineness of document not challenged in First Court—Document, whether may be attacked in appeal.

A suit for pre-emption cannot be maintained where the vendee, though a stranger on the date of the institution of the suit, obtains a gift of some property in his favour and becomes a co-sharer in the village before the date of the decree even though the gift be obtained with a view to defeat the right of pre-emption.

If the genuineness of a document is not challenged when it is produced in the Court of first instance, and no evidence is adduced to rebut the evidence given in proof of the document by the party producing it, it is not open to the opposite party to attack the document in appeal, nor is it open to the Appellate Court to ignore it.

Second appeal from a decree of the First Additional Judge, Aligarh, dated the 3rd March, 1921.

Dr. K. N. Katju, for the Appellant.

Mr. Ambika Prasad for Mr. N. C. Vaish, for the Respondents.

JUDGMENT.—On the 24th July 1919 one Rup Singh executed a sale-deed of his share in favour of Shib Lal in lieu of Rs. 2,000. The same day Shib Lal hypothecated the said share to third parties in lieu of Rs. 1,600. On the 30th March, 1920 the plaintiffs-respondents brought the suit out of which this appeal has arisen against Shib Lal for pre-emption. On the 23rd April, 1920 after the summonses to the defendants had been issued and served, one Ram Prasad, a co-sharer in the village, executed a deed of gift in favour of Shib Lal in respect of a very small amount of the property in the village. The vendee, Shib Lal, after obtaining the deed of gift in his favour resisted the claim of the plaintiffs-respondents on the ground among others that he (Shib Lal) was already a co-sharer in the village and, therefore, no suit of pre-emption was maintainable against him. The Court of first instance dismissed the claim. On appeal the learned District Judge set aside the decree of the first Court and holding that the deed of gift was fictitious, decreed the claim of the plaintiffs-respondents.

In Second Appeal before us it is contended that the finding of the learned Judge with regard to the character of the deed of gift is unsupported by any evidence and is, therefore, bad in law. It appears that the deed of gift when produced in the Court of first instance was not challenged on the ground that it was fictitious or fraudulent. Shib Lal gave evidence as to its due execution and the mutation of names in his favour on the basis of it. No evidence in rebuttal on behalf of the plaintiffs-respondents

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was given. The learned Judge considers that the circumstances of the execution of the deed of sale were such that it must have been fictitious. The circumstances that he relies upon are that the donor is of a different caste to the donee, that the deed of gift was given after the institution of the suit and the smallness of the property gifted. These circumstances would go to show that Shib Lal, the vendee, persuaded the donor to execute the deed of gift in order to defeat the plaintiffs-respondents' right of pre-emption. The circumstances would not show that the deed of gift was fictitious nor can the presumption of fictitiousness be based upon those circumstances. If the plaintiffs-respondents intended to challenge the deed of gift they should have said so in their pleadings and given some evidence in support of the allegations of fraud and fictitiousness against the character of the deed. In the absence of any pleadings challenging the deed it was not open to the lower Appellate Court to ignore it. We, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the first Court with costs throughout including fees in this Court on the higher scale, if any.

M. A. A.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 182 OF 1922.
November 20, 1922.

Present:—Mr. Justice Spencer and
Mr. Justice Venkatasubba Rao.

LATIFA BI AND ANOTHER—PETITIONERS—
APPELLANTS
versus

MOTTAI AMMAL AND OTHERS—
RESPONDENTS.

Madras City Tenants' Protection Act (III of 1922), s. 9, whether retrospective—Ejectment, decree for, passed before Act—Application under section, whether maintainable.

Section 9 of the Madras City Tenants' Protection Act has no retrospective effect, and where a decree has been passed before the Act came into force for the ejectment of a tenant, the latter

cannot apply for an order under section 9 of the Act to direct the landlord to sell the land to him.

Appeal against an order of the City Civil Court, Madras, dated the 23rd March, 1922 in O. S. No. 278 of 1919, on its file, (City Civil Court Appeal No. 32 of 1920 on the file of the High Court).

Mr. S. Krishnamachariar, for the Appellants.

Mr. C. Veeraraghava Iyer, for the Respondents.

JUDGMENT.

Spencer, J.—The City Civil Judge's order, so far as he referred the petitioners to separate proceedings for a declaration that they were entitled to whatever rights their mother possessed at the time of her death from her status as tenant, cannot be supported. They were entitled to have the question whether the interest of their mother had devolved on them decided by the Court to which they made their application. Another obstacle to appellants' success, however, exists. The application was one under section 9 by persons claiming to be tenants under Madras Act III of 1922. Section 9 speaks only of tenants "against whom a suit in ejectment has been instituted."

In this case a decree was passed against petitioners' mother in the City Civil Court on 13th August 1920 and was confirmed on appeal in this Court on 7th February 1922, that is, before the Act came into force.

The general frame of the Act including section 10 makes it clear that section 9 was not intended to enable tenants to apply for sale of the land to them under this section after the ejectment suit, to which they were parties, had been decreed.

Section 10 permits sections 4, 5, 6 and 8 to be applied to suits in which decrees had been passed for ejecting tenants before the Act came into force but not executed. Section 5 provides the manner in which the amount of compensation to be paid to tenants is to be determined and subsequently modified. Section 6 provides for the determination of a reasonable rent when the landlord cannot or will not pay compensation. Section 4 deals with the effect of suits for ejectment being dismissed and

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section 8* with the effect of rents being determined.

There is a noticeable omission of section 9 from mention in section 10. It is suggested that this may be due to section 9 having been inserted in the Act after the other sections had been incorporated, and that but for an oversight section 9 would have found mention in section 10.

Whatever may be the explanation, the Act, as it has been enacted, gives no retrospective effect to section 9; consequently, where a decree has been passed before the Act came into force for the ejectment of a tenant, it is too late for the tenant to apply to the Court that passed the decree for an order directing the landlord to sell the land to him. On this ground the application must fail and the appeal is, therefore, dismissed with costs.

Venkatasubba Rao, J.—I am also of the opinion that the appeal should be dismissed with costs.

The suit was in ejectment and the City Civil Court passed a decree on the 13th August 1920 and it was confirmed in appeal by the High Court on the 7th February 1922. The Madras City Tenants' Protection Act, III of 1922, came into operation on a subsequent date. See section 81 of the Government of India Act, 1915. The defendant was a Muhammadan woman. Her daughters applied to the City Civil Court on the 27th February 1922, sometime after the Act came into force, for an order under section 9 to direct the plaintiff to sell the land on which the superstructure stands for a price fixed by the covenant. The learned City Civil Judge dismissed the application on the ground that the petitioners should get their title declared to succeed to their mother, apparently being of the opinion that he could not decide in the proceedings before him the question as regards their title to represent the deceased defendant. In this he was obviously wrong. It was his duty to have adjudicated on their title if there was any contest regarding it. The defendant was either a tenant liable to pay rent or a person who continued in possession after the termination of the tenancy [see section 2 clause (4)]. The legal representatives of the defendant would be entitled to the same rights as herself.

But the appeal may be disposed of on another ground which is fatal to the appellants. Section 9 refers to a tenant against whom a suit in ejectment has been instituted. The words "has been" are material. I do not think a tenant, against whom a decree for ejectment was passed prior to the coming into force of the Act, can apply under section 9. Section 10 places the matter beyond doubt. It refers to suits "which are pending or in which decrees for ejectment * * * have been passed but have not been executed before the coming into force of this Act." A distinction is made between suits which are merely pending and those in which decrees in ejectment have been passed. Section 10, while stating that sections 4, 5, 6 and 8 shall apply to suits which are pending or in which decrees for ejectment have been passed, makes no reference to section 9.

I, therefore, hold, that the appellants are not entitled to make an application under section 9.

V. N. V.

Appeal dismissed

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 42 OF 1921.

December 20, 1922.

Present:—Mr. Dalal, A. J. C., and

Mr. Daniels, A. J. C.

BHAGIRATHI AND OTHERS—PLAINTIFFS—
APPELLANTS*versus**Pandit* ONKAR NATH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Mortgage by father or grandfather—Antecedent debt—Foreclosure decree—Omission to implead sons and grandsons, effect of—Redemption—Transfer of Property Act (IV of 1882), s. 85.

A son or grandson in a Hindu joint family, although not impleaded by name in a suit for foreclosure on foot of a mortgage executed by his father or grandfather, for purposes binding on the family estate, is nevertheless deemed in law to be properly represented by such father or grandfather and is, consequently, bound by a decree passed against them. [p. 144, col. 2.]

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Sheo Shankar Ram v. Jaddo Kunwar, 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 958; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.) and *Ganpat Lal v. Bindbasini Prashad*, 56 Ind. Cas. 274; 47 I. A. 91; 47 C. 924; 18 A. L. J. 555; (1920) M. W. N. 382; 12 L. W. 59; 39 M. L. J. 108; 2 U. P. L. R. (P. C.) 103; 24 C. W. N. 954; 28 M. L. T. 330; (P. C.), relied upon.

Suraj Bansi Koer v. Sheo Persad Singh, 6 I. A. 88; 5 C. 148; 4 C. L. R. 226; 4 Sar P. C. J. 1; 3 Suth P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705. *Basdeo Lal v. Mahabir*, 59 Ind. Cas. 570; 23 O. C. 344; 8 O. L. J. 18; 3 U. P. L. R. (O.) 1 and *Lachhman Shukul v. Ram Kishore*, 64 Ind. Cas. 220; 24 O. C. 218, referred to.

For the purposes of section 85 of the Transfer of Property Act it is not necessary to implead the sons by name in a suit against the father of a Hindu joint family, inasmuch as the latter sufficiently represents his sons in the litigation. [p. 145, col. 2.]

Hori Lal v. Nimman Kunwar, 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819, followed.

Drigpal Singh v. Sukhnandan Lal, 56 Ind. Cas. 299; 7 O. L. J. 164; 2 U. P. L. R. (O.) 96, and *Jadu Nath Singh v. Afzal Khanam*, 57 Ind. Cas. 526; 8 O. L. J. 191; 2 U. P. L. R. (O.) 118; 7 O. L. J. 362, dissented from.

It is open, however, to a son who is not made a party to such a suit to show that the debt was not antecedent or that if antecedent, it was for a purpose either illegal or immoral. [p. 145, col. 1.]

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), referred to.

Appeal against the decree of the Additional Subordinate Judge, Fyzabad dated 14th of July 1921.

Messrs. A. P. Sen, M. Wasim and Imtiaz Ali, for the Appellants.

Mr. E. R. Kedwai, for Respondent No. 1.

Mr. Niamat-Ullah, for Respondents Nos. 1 to 3.

JUDGMENT.—This is a case in which the plaintiffs seek redemption of a mortgage executed by their respective fathers and grandfathers on 27th April 1897 for a sum of Rs. 19,000, notwithstanding the existence of an absolute foreclosure decree on foot of this mortgage, which was passed on 3rd September 1900. The sole ground on which they seek

to set aside the decree is, that certain members of the family were not properly represented in the suit. The original ancestor of the family, Pekhani Tewari, had five sons, one of whom died without issue, so that there are four branches of the family of which survivors now remain. The four surviving branches were separated in estate.

The heads of each of these four branches joined in the mortgage in question. It is not disputed, and has never been disputed in this litigation, that the mortgage was properly executed for purposes which were binding on the joint family estate. The three pleas, which were taken in appeal were:—

1. that certain persons who were alive at the execution of the mortgage were not made parties to the foreclosure suit, and that they were not sufficiently represented by their fathers or grandfathers who were made parties;

2. that the legal representatives of one of the original mortgagors, Dwarka, were not properly brought on the record,

3. that two persons, Jokhu and Ram Charan, were sued as of age, though they were in reality minors.

The third plea was not argued, and was expressly abandoned at the hearing before us.

The facts on which the first plea is based are these. During the pendency of the foreclosure suit, the defendant Dwarka, died leaving two sons, Bhagirathi and Mahadeo, and Sada Parshad, a grandson by a deceased son. An application was made to bring his legal representatives on the record, and the Court ordered notices to issue to them. The contention of the appellants is, that it is not proved that these notices were ever served. The learned Subordinate Judge has relied on the well-known presumption recognised in section 114 (c) of the Indian Evidence Act, that judicial acts have been regularly performed, and has said that it is found that the Court after ordering issue of notice did bring on the record Dwarka's representatives, it must be presumed that they had been properly served. The appellants have certainly failed to show the contrary. They neither summoned the record of the case, nor have they produced either the

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original notices or a copy of them. It is not even known whether these are still in existence. It is impossible to draw any conclusion from the copies of orders on the order-sheet, and from the fact that the order-sheet does not specifically mention service having been effected, that it was not so effected. The appellants have argued that service could not having been effected, on one of the representatives, Mahadeo, because there is evidence that at that time he was in Rangoon. Notices were ordered to be issued on 25th May 1900, and the legal representatives were brought on the record on 23rd June. All we have as to Mahadeo is, that he was mentioned as being in Rangoon in an application filed on 7th April and that one Sheo Dayal Bharghi, who wished to purchase the property, spoke of him as being in Rangoon on 3rd September 1900. There is nothing whatever to show that he may not have returned to his village between these two dates, or that service may not have been effected on him in one or other of the ways recognised by the Code of Civil Procedure. If there is any oral evidence on the point, we have not been referred to it. This suit was not filed till 21 years after the decree complained of was passed, and evidence of small details of procedure cannot be expected after so long an interval. The fact that no attempt has been made to summon the original notices, or to show that they have been destroyed, is significant. The plaintiffs have entirely failed to make out their case on this issue, and we have no hesitation in concurring with the learned Subordinate Judge.

It has been argued that there is no presumption that any particular act was in fact performed, and, therefore, if there was direct evidence of the service of summons, the Court might presume that it was regularly served, but that the Court cannot presume the fact of service. This argument is misleading. Service of summons is merely a ministerial act. The judicial act of the Court, the validity of which is challenged, is the step of bringing the legal representatives on the record, and it is to this that the presumption of regularity applies.

A minor point was taken in the Court below in connection with this issue on the ground that it was not proved that guardian

was appointed for Sada Prasad, who was a minor. The learned Subordinate Judge found against the plaintiffs, and in any case the matter is immaterial, as Sada Prasad Singh died without issue, and his nearest representatives were his uncles, Bhagirathi and Mahadeo, who, as we have found above, were duly represented.

On the second issue we hold without hesitation, that a son or grandson cannot escape the effect of a foreclosure decree passed against his father or grandfather on a mortgage executed for purposes binding on the family estate, merely because he was not impleaded by name in the suit. He is represented by his ancestor. If that ancestor has authority to execute the mortgage, he equally had authority to represent his son or grandson in the litigation. The ancestor must be presumed to be the head of that branch of the family which includes his own descendants. The rule applicable to such cases was laid down by Sir James Colville as long ago as 1879 in *Suraj Bansi Koer v. Sheo Persad Singh* (1).

It is—

“That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted.”

The case of *Sahu Ram Chandra v. Bhup Singh* (2) has thrown fresh light on the question of what is antecedent debt for the purpose of supporting an alienation of family property, but it has not in any way abrogated the principle laid down by the Privy Council in the earlier case.

(1) 6 I. A. 88; 5 C. 148; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705.

(2) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.)

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We concur entirely with the observations on this subject contained in the decision in *Basdeo Lal v. Mahabir* (3). It is open to a son who is not made a party to a suit to show that a debt in respect of which the mortgage was executed was not really antecedent in the sense accepted by the Privy Council, or that, if antecedent, it was for a purpose either illegal or immoral, but where the mortgage was within the scope of the father's authority, the sons are bound by the decree: *Lachhman Shukul v. Ram Kishore* (4). There is direct authority of the Privy Council itself in a case, relied on by the learned Subordinate Judge for the proposition that the father may represent the sons in foreclosure proceedings, *Sheo Shankar Ram v. Jaddo Kunwar* (5). In another recent Privy Council case, *Ganpat Lal v. Bindbasni Prashad* (6), their Lordships refused to allow a right of redemption to a plaintiff who was not made a party where the mortgage was made by the father for a purpose which bound the whole family property, and the son did not impeach the propriety of the decree or of the sale made under it. In this case also the plaintiffs do not allege any fact, such as fraud or misrepresentation, which would vitiate the decree. They base their claim solely on the omission to make them parties.

The appellants have relied strongly on section 85 of the Transfer of Property Act, which was in force at the time of the decree, and have urged that this provision is independent of Hindu Law, and requires every person having an interest in the property to be specifically joined. This contention was considered and overruled in the Full Bench decision of the Allahabad High Court in *Hori Lal v. Nimman Kunwar* (7). It was held by the Full Bench of five

Judges in that case, that the sons were sufficiently represented by their fathers for the purposes of that section, and that there was no necessity to implead them by name. We entirely concur with the reasoning of this judgment, and it is unnecessary, therefore, to discuss the matter in further detail. The appellants also rely on certain decisions of the Calcutta High Court and on two single Judge decisions of this Court: *Drigpal Singh v. Sukhnandan Lal* (8) and *Jadu Nath Singh v. Afzal Khanam* (9). It is sufficient to say that, in so far as these cases decide any thing contrary to the principles laid down above, we are unable to follow them.

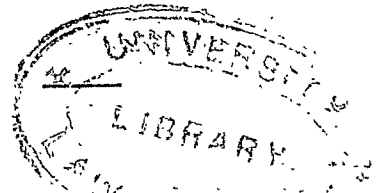
For the reasons already given, we dismiss the appeal with costs.

G. H.

Appeal dismissed.

(8) 56 Ind. Cas. 299; 7 O. L. J. 164; 2 U. P. L. R. (O.) 96.

(9) 57 Ind. Cas. 526; 8 O. L. J. 191; 2 U. P. L. R. (O.) 118; 7 O. L. J. 36.



MADRAS HIGH COURT, 1922

SECOND CIVIL APPEAL NO. 2092-OF-1920,
November 30, 1922.

Present:—Sir Walter Schwabe, Kt.,
Chief Justice, and Mr. Justice Wallace.

VAZHAYILPARKUM THATTAN

KUNHI KUTTY AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

VAZHAYILPARKAM THATTAN RAMAN

AND OTHERS—DEFENDANTS—

RESPONDENTS.

Hindu Law v. custom—Thattan caste in Malabar—Impartibility of estate—Burden of proof—Illegitimate son—Inheritance.

There is no presumption of law in favour of impartibility of property amongst the members of the Thattan caste in Malabar. They are Hindus and the Courts have to apply to them the principles of Hindu Law unless and until proof of custom to the contrary has been established. [p. 146, col. 2.]

The Makkathayam Law which the Thattans follow corresponds in the main to the ordinary Hindu Law and *prima facie* involves partibility. [p. 146, col. 2.]

(3) 59 Ind. Cas. 570; 23 O. C. 344; 8 O. L. J. 18; 3 U. P. L. R. (O.) 1.

(4) 64 Ind. Cas. 220; 24 O. C. 218.

(5) 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.).

(6) 56 Ind. Cas. 274; 47 I. A. 91; 47 C. 924; 18 A. L. J. 555; (1920) M. W. N. 382; 12 L. W. 59; 39 M. L. J. 108; 2 U. P. L. R. (P. C.) 103; 24 C. W. N. 954; 28 M. L. T. 330; (P. C.)

(7) 15 Ind. Cas. 126; 34 A. 519; 9 A. L. J. 619.

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Rarichan v. Perachi, 15 M. 281; 5 Ind. Dec. (N. S.) 547. *Raman Menon v. Chathunni*, 17 M. 184; 6 Ind. Dec. (N. S.) 126, distinguished.

Karuppaliyal P. K. Raman v. Ramulathaparukkal V. Muthu, 62 Ind. Cas. 534; 40 M. L. J. 301; 13 L. W. 218; (1921) M. W. N. 233. *Imbichi Kandan v. Imbichi Pennu*, 19 M. 1; 6 Ind. Dec. (N. S.) 705. *Kunhi Pennu v. Chiruda* 19 M. 440; 6 Ind. Dec. (N. S.) 1012. *Velu v. Chamu*, 22 M. 297; 8 Ind. Dec. (N. S.) 212, relied on.

To prove a custom of impartibility, there must be established a uniform, continuous, and definite practice submitted to for so long a period that it should be accepted as an established governing rule of the caste. [p. 147, col. 1.]

An illegitimate Thatttan son would be entitled to a share in the joint family property by showing either that he is a *Sudra* for the purposes of the Hindu Law, which *prima facie* applies to his caste or that his caste follows *Sudra* custom in the matter of the inheritance of an illegitimate child. [p. 147, col. 2.]

Second appeal against a decree of the Additional Temporary Subordinate Judge, North Malabar, in Appeal Suit No. 28 of 1919 (A. S. No. 154 of 1918, on the file of the District Court, North Malabar, preferred against the decree of the Additional District Munsif, Tellicherry, in O. S. No. 97 of 1915, (O. S. No. 294 of 1915, on the file of the Court of the Principal District Munsif of Tellicherry).

Mr. K. P. Rama Krishna Iyer, for the Appellants.

Mr. C. Kunhiraman, for the Respondents.

JUDGMENT.—The suit is one for partition by the plaintiff who is a member of the Thatttan caste in North Malabar, which caste follows Makhattayam Law. Various issues were framed, but the original Court dealt with two only, Issue No. II, whether the properties are impartible and Issue No. XIV, whether the plaintiff is not the legitimate son of the deceased Valia Nambi, the owner of the property sought to be partitioned. The original Court held that the property is impartible which finding was enough to dispose of the suit, and that the plaintiff was what is known as Veetukutti, or the son of a Sambandham wife who is not brought to her husband's house, and that such a Veetukutti is not entitled to share in his father's property. The Appellate Court agreed with the original Court on the last two points but did not consider the first. It is

urged before us by the plaintiff, who is the appellant before us, that the lower Courts have erred in law in coming to these conclusions.

To take the first issue as to partibility, we think the original Court has wrongly thrown the onus of proof on the plaintiff, though the frame of the issue threw it on the contesting defendant, and that it was wrong in holding that there is any presumption of law in favour of impartibility in the case of Thatttan caste. The Thatttans are Hindus; therefore, under section 16 of Act III of 1873, the Courts have to apply to them the principles of Hindu Law, unless and until it is proved that they follow any other Customary Law. The rule of Hindu Law is in favour of partibility, and impartibility is the exception. Makhattayam Law, which the Thatttan caste admittedly follows, corresponds in the main to the ordinary Hindu Law. Marumakhattayam, in which partibility is unknown, is an exception to the general rule. Hence, *prima facie*, Makhattayam involves partibility. The original Court has relied on various rulings of this Court to rebut that legal presumption, but, in our opinion, these do not justify any such inference. The case in *Rarichan v. Perachi* (1) merely says that those who follow Makhattayam must not be taken to be necessarily governed by Hindu Law, that is, that it is open to them to prove a custom at variance with Hindu Law; but it is no authority for the proposition that even if such a custom is not proved Hindu Law will not apply. The ruling in *Raman Menon v. Chathunni* (2) proceeded on a definite finding that among Thiyyans there is no custom of compulsory partition. It may be noted that this ruling relates to Thiyyans and not to Thatttans, and that its correctness has been gravely called in question in a later ruling of a Bench of this Court reported as *Karuppaliyal P. K. Raman v. Ramulathaparukkal V. Muthu* (3). In *Imbichi Kandan v. Imbichi Pennu* (4) the decision follows the general principle of Hindu Law either of impartible or of divided property. The

(1) 15 M. 281; 5 Ind. Dec. (N. S.) 547.

(2) 17 M. 184; 6 Ind. Dec. (N. S.) 126.

(3) 62 Ind. Cas. 534; 40 M. L. J. 301; 13 L. W. 218; (1921) M. W. N. 233.

(4) 19 M. 1; 6 Ind. Dec. (N. S.) 705.

KUNHI KUTTY v. RAMAN.

ruling in *Kunhi Pennu v. Chiruda* (5) also substantially follows the ordinary Hindu Law as opposed to that of Marumakkattayam. In *Velu v. Chamu* (6), which deals with the case of the Illuvans, the Court refused to extend to that caste the ruling of impartibility among Thiyyans as laid down in *Raman Menon v. Chathunni* (2) and held that the Illuvans had proved a custom of partibility. There is, therefore, no good ground why this Court in the case of the Thattans should not follow the principle laid down in the *Karuppalaiyal P. K. Raman v. Ramulathaparukkal V. Muthu* (3), or depart from the ordinary rule that the ordinary Hindu Law has in the first instance to be applied, unless and until proof of custom to the contrary has been established. This principle has also been adopted in the two unreported cases of this Court coming from Malabar, Second Appeal No. 518 of 1901 and Second Appeal No. 1056 of 1919.*

As to proof in this case of any custom to the contrary, we find none, no proof of the sort which is required to establish a uniform, continuous, and definite practice submitted to for so long a period that it should be accepted as an established governing rule of the caste. The original Court rejected Exhibit E, perhaps with reason, but if the law of Thiyyans is to be used to prove a custom of impartibility, amongst Thattans, then, Exhibit G, which lays down that the law among Kanichans is partibility, should be used in favour of the Thattans. But it is right that each caste should stand on the footing of its own rules and customs. Beyond the evidence noted there is only the vague evidence of three Thattans, D. Ws. Nos. 2, 3 and 4, that custom sanctions no compulsory partition, as against that of P. W. No. 2, another Thattan, who says it does. The evidence is very vague and seems to be based merely on the fact that the witnesses D. Ws. Nos. 2, 3 and 4 have never known a case of partition. We cannot hold that such evidence affords in law sufficient proof of a valid custom, which would suffice to rebut the presumption of law that the property is partible. We hold, therefore, that the

(5) 19 M. 440; 6 Ind. Dec. (N. S.) 1012.

(6) 22 M. 297; 8 Ind. Dec. (N. S.) 212.

* Since reported as *Thaikkandhi Pokkancheri v. Illuvathukkal Achuttan*, 60 Ind. Cas. 209; 39 M. L. J. 427; 13 L. W. 101.—[Ed.]

Trying Court on this issue has committed an error of law.

As to the next point, both the lower Courts have failed to address themselves to the proper legal points at issue. Assuming for the moment that there is a concurrent finding of fact that the plaintiff is illegitimate, it does not follow, as a matter of course, as the lower Courts suppose, that he is not entitled to a share in the joint family property. Among Sudras, under the ordinary Hindu Law, an illegitimate son is entitled to a share, and it was, therefore, open to the plaintiff to contend, as he does here, either that he is a Sudra for the purpose of Hindu Law, (which *prima facie* applies to his caste), since Hindu Law brings together as Sudras all castes below the Vaisyas; or to contend that his caste follows Sudra custom in the matter of the inheritance of an illegitimate child. On the merits of these contentions we say nothing at present, but would point out only that if the Hindu Law for Sudras is to be applied to the plaintiff's caste, he will *prima facie*, even if illegitimate, be entitled to a share without further proof or disproof of the custom; while if his case is to rest on proof of a custom by which Sudra custom is applied to his caste or on proof of independent custom altogether, then such custom will have to be proved. In the former case the onus of disproving the presumption of law will rest on the defendant; in the latter the onus of proving the custom will lie on the plaintiff.

Now, the only issue on this part of the case, and the only point, therefore, to which the parties had to direct their attention, was whether the plaintiff is not the legitimate son of the deceased Valia Nambi. Instead of trying that issue, both Courts have tried an issue not framed, whether the plaintiff is a Veetukutti, apparently assuming, first, that a Veetukutti is illegitimate as the word is used in Hindu Law, and, secondly, that to find that plaintiff is illegitimate puts him out of Court. It may be here pointed out that among the caste of Mukhavars in Malabar, also an inferior caste, it would appear that the children of a *Sambhandam* connection may inherit their father's property (*Vide* the Gazetteer of Malabar, page 182). We think there should be definite findings on these points in the case of the Thattan caste, since the customs of this caste appear

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not yet to have been the subject of judicial decisions, and a decision in this case will affect the whole caste.

In order that the matter may be re-opened and properly tried, the findings that the plaintiff is a Veetukutti and that a Veetukutti has no share in his father's property must be set aside and we do so on the ground that they were never in issue in the case. The finding of the Trying Court on Issue No. 2, as to partibility, is also set aside for reasons already given. The decisions of the lower Courts, based on these findings, are set aside.

The whole case is remanded to the original Court with a direction to re-hear the case after framing and trying the following issues in the light of the above remarks:—

I. Does the ordinary Hindu Law of partibility of joint family property not apply to the Thattan caste in North Malabar, or is there any caste custom to the contrary?

II. Is the plaintiff a Veetukutti, as that word is used by the Thattan caste?

III. Is a Veetukutti illegitimate in the legal sense of that word?

IV. Does a Veetukutti have no share in the joint family property?

V. Does an illegitimate Thattan have no share in the joint family property?

VI. If the property is partible and the plaintiff is illegitimate, to what share is he entitled?

VII. If the property is partible and the plaintiff is a Veetukutti, is he entitled to any share, and if so what?

VIII. If the property is partible and the plaintiff is illegitimate, is he entitled to any share and, if so, what?

Fresh evidence may be taken as offered by either party or by the Court.

If the findings are that the property is impartible or that the plaintiff is not entitled to any share, it is not, of course, necessary to decide the other issues as the plaintiff's suit will fail *in limine*.

Costs up to date in both lower Courts will abide the result. Appellant will get his costs in this Court.

V. N. V.

Appeal allowed.

PATNA HIGH COURT.

CIVIL REVISION NO. 293 OF 1922.

January 19, 1923.

Present.—Justice Sir B. K. Mullick, Kt., and Mr. Justice Ross.

SHEO PRASAD SINGH—PETITIONER

versus

SHUKHU MAHTO—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Government of India Act, 1915 (5 & 6 Geo. V, C. 61), s. 107—Interlocutory order—Refusal to exercise jurisdiction—Revision—Superintendence.

The general rule is that, except on proof of irreparable injury, the High Court will not interfere in revision when there is another remedy open to the applicant. The same rule applies to interlocutory orders. [p. 148, col. 2.]

There is no rule, however, that the High Court is not justified in interfering with an order even where there has been a refusal to exercise jurisdiction. [p. 149, col. 1.]

Chandi Roy v. Kirpal Roy 10 Ind. Cas. 308; 15 C. W. N. 682, distinguished.

Where a Court refused to strike an issue that clearly arose out of the pleadings of the parties:

Held, that the High Court had jurisdiction in the exercise of its powers under section 107 of the Government of India Act, if not under section 115 of the Civil Procedure Code, to direct the Trial Court to frame the issue. [p. 149, col. 1.]

Revision.

Mr. Janak Kishore, for the Petitioner.

Mr. B. C. Sinha, for the Opposite Party.

JUDGMENT.

Mullick, J.—The plaintiff brought a suit for enhancement of rent on two grounds, namely, that there had been a rise in the price of staple food crops, and that the rent paid by the defendant was lower than the prevailing rate paid for similar lands with similar advantages.

The Munsif framed an issue with regard to the first ground but declined to frame an issue as to the prevailing rate. An application was made to him to re-consider his decision, but that application was unsuccessful, and the plaintiff now seeks the assistance of this Court in revision.

It is quite clear that the general rule is that, except on proof of irreparable injury, this Court will not interfere in revision under section 115 of the Code of Civil Procedure, when there is another remedy open to the applicant. Interlocutory orders are not exempted. Upon the pleadings here, clearly an issue arises whether the rent payable by the defendant is below the prevailing rate and the learned Vakil for the defendant cannot assign any reason why that

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issue was not framed. He contents himself by suggesting that possibly the Court may have been under the impression that section 31 (A) of the Bengal Tenancy Act did not extend to the locality to which the suit relates, but that is not a sufficient answer. The plaintiff is entitled to have the issue raised and to give evidence as to the subject-matter of it. The learned Vakil for the opposite party next falls back upon the plea that, the Munsif having decided in exercise of a jurisdiction which he possesses, this Court cannot interfere either under section 115, Code of Civil Procedure, or under section 107 of the Government of India Act, and he cites *Chandi Roy v. Kirpal Roy* (1). In that case Mr. Justice Woodroffe and Mr. Justice Carn-duff declined to interfere where the Court had refused the plaintiff's prayer for the amendment of the plaint, but the learned Judges did not lay down any rule that, where there has been a refusal to exercise jurisdiction, the High Court will not be justified in interfering. The case before us is perhaps near the border line so far as section 115 of the Civil Procedure Code is concerned, but it is clear to us that under section 107 of the Government of India Act it is a fit case for our interference.

The application will, therefore, be allowed and the Munsif will frame the issue which arises as to the prevailing rate and proceed with the trial in accordance with law. The petitioner will get his costs. Hearing fee one gold *mohur*.

Ross, J.—I agree.

Z. K. Application allowed.
(1) 10 Ind. Cas. 308; 15 C. W. N. 682.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2046 OF 1920.

December 14, 1922.

Present:—Sir Walter Schwabe, Kt.,
Chief Justice, and Mr. Justice Wallace.

SANKARANARAYANA PILLAI—PLAIN-
TIF—APPELLANT
versus

RAMASWAMY PILLAI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Arbitration—Suit before Court having no juris-
diction—Agreement to abide by decision—Appeal,
right of, if terminated—Suit before Court having
jurisdiction—Agreement to have dispute settled by
special procedure, effect of.

When parties to a dispute agree to a Court pro-

ceeding without jurisdiction, *extra cursum curiae*, they cannot appeal from its decision. Parties to a suit may agree not to appeal from a decision of a Court and such an agreement will be inferred from the fact that they agreed to the Court taking a course which is altogether outside its ordinary powers. [p. 150, cols. 1 & 2.]

This does not, however, apply to mere deviations from procedure if the Court has jurisdiction over the subject, unless there is an attempt to give it a jurisdiction it does not possess, so that a Court of Appeal cannot properly review the decision. Such deviations do not deprive either of the parties of the right of appeal. The real question in such cases is whether the agreement results in the Court assuming jurisdiction which it otherwise could not have, or involves the Court going so outside its ordinary course of procedure that it is impossible for the Appellate Court to review its decision. [p. 150, col. 2.]

A right of appeal can only be given up by a clear agreement and a Court will not imply a term in an agreement giving up a right of appeal unless it is driven to do so. [p. 151 col. 1.]

In order to make a Court an arbitrator there must be a clear agreement to that effect. A Court acting *extra cursum curiae* does not involve an application of the provisions contained in the second Schedule to the Code of Civil Procedure. [p. 151, col. 1.]

Pisani v. Attorney-General (Gibraltar), (1874) 5 P. C. 516; 30 L. T. 729; 22 W. R. 900, *Burgess v. Morton*, (1896) A. C. 136; 65 L. J. Q. B. 321; 73 L. T. 713, relied on.

Sayad Zain v. Kalabhai Lallubhai 23 B. 752; 11 Bom. L. R. 366; 12 Ind. Dec. (N. S.) 3, *Rao Bahadur Raoji Trimbak v. Govind Vinayak*, Un. P. J. Bom. H. C. (1897), 413, *Jamnadas v. Gordhandas*, Un. P. J. Bom. H. C. (1896) 424, distinguished.

Chengalraya Chetti v. Raghava Ramanuja Doss, 52 Ind. Cas. 569; 37 M. L. J. 100, *Nidamarthi Mukkanu v. Thammana Ramayya*, 26 M. 76, dis-
sente from.

In a suit relating to a diversion of water, the parties agreed in writing that the Judge should go and inspect the spot and that they would abide by his decision on such local inspection and perusal of plans and other records:

He'd. that the parties had merely agreed to the evidence being taken in an irregular or unusual manner and that the Court had not acted either as arbitrator or *extra cursum curiae*, and that there was no intention to give up a right of appeal. [p. 151, cols. 1 & 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Appeal Suit No. 58 of 1919, preferred against the decree of the Court of the District Munsif, Srivaikuntam in Original Suit No. 181 of 1917.

Mr. K. S. Sankara Iyer, for the Appellant.

Mr. K. R. Rangasami Iyengar, for the Respondent.

JUDGMENT.

Schwabe, C. J.—This case is of considerable importance, because circumstances

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of a similar nature have been before the Courts on several occasions, and they have given rise to some considerable divergence of opinion.

The facts are that a suit came before the District Munsif as to whether the defendants had unlawfully diverted some water from the land of the plaintiff and so injured his land. When the case came before the District Munsif certain plans and documents were put before him, and then the plaintiff and some of the defendants agreed in writing, and the Pleader acting for the other defendants, I have no doubt, agreed to what appeared in writing, that the learned Munsif should himself go and inspect the land. The terms of the agreement signed by the plaintiff and two of the defendants are contained in an affidavit which ran as follows:—"We agree to the matter being decided according to the opinion which the Court might entertain on the aforesaid local inspection without going into any further evidence." The plaintiff endorsed on that affidavit an agreement to abide by any decision which the Court may arrive at after making a local inspection of the land and perusing certain plans and other records. The learned Munsif agreed to act on that agreement and went to the place, some seven miles off, two days later. The case was again before the Court when some documents were put in according to the plaintiff's statement and the judgment was given and a decree passed in the ordinary form of a decree.

The issues in the suit were issues of fact and issues of law. The learned Munsif found the facts in a certain way and in view of those facts gave a finding. In due course there was an appeal to the Subordinate Judge, and he expressed his view that the learned Munsif was wrong in law. He held that no appeal lay to him by reason of the agreement referred to above. He purported to follow a case in *Chengalraya Chetti v. Raghava Ramanuja Doss* (1), where a very similar agreement was held to result in the decree being not appealable on the grounds, as I understand it, that the decree was not a decree of a Judge as such but as an arbitrator. The law, as I understand it, is this. Where parties agree to a Court proceeding without

jurisdiction, *extra cursum curiæ*, as it has been put, the parties cannot appeal from the decision of the Court. The parties in fact may agree not to appeal from the decision of the Court and such an agreement will be inferred from the fact that they agreed to the Court taking a course which is altogether outside the ordinary powers of the Court. But this does not apply to mere deviations from procedure if the Court has jurisdiction over the subject unless there is an attempt to give the Court a jurisdiction it does not possess, so that a Court of appeal cannot properly review the decision. Such deviations do not deprive either of the parties of the right of appeal: *Pisani v. Attorney-General (Gibraltar)* (2). See also the decision of the House of Lords in *Burgess v. Morton* (3). So in these cases the question to be decided is, whether an agreement between the parties does result in the Court assuming jurisdiction which otherwise it would not have or involves the Court in going so outside its ordinary course of procedure that it is impossible for the Appellate Court properly to review its decision.

Further, the giving up of a right of appeal is giving up a very important right possessed by all litigants and, in my judgment, such right of appeal can only be given up by a clear agreement. It may be that an agreement is in such terms that the Court will be driven to imply a term that the right of appeal was given up, but a Court would not imply such a term unless it was driven to do so.

Turning to the agreement in this case I can find nothing in it to show an intention to give up a right of appeal. I think it merely means that the parties agree to the evidence being taken in an irregular way or in an unusual way, *viz.*, by the Munsif going to the place and seeing for himself what had happened and what was happening and not relying on what witnesses in Court told him had happened or was happening and the parties agreed to the case being decided in that way and to abide by the decision. If an appeal had been attempted

(2) (1874) 5 P. C. 516; 30 L. T. 729; 22 W. R. 900.

(3) (1896) A. C. 136; 65 L. J. Q. B. 321; 73 L. T. 713.

(1) 52 Ind. Cas. 569; 37 M. L. J. 100.

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on the ground that the learned Munsif took a wrong view of the facts, that his eyes have deceived him or that the procedure of dispensing with the evidence was irregular, I can well understand the argument that the parties had agreed not to take any such point, and indeed, I think, that would be right. But I can find nothing in the words used to indicate that the parties intended to give up all rights of appeal on questions of law which might arise, or did arise in the case. I do not think, it is right to say, that, even though there was an agreement of the kind indicated, the Court becomes an arbitrator, and, in my judgment, in order to make a Court arbitrator, there must be a clear agreement to that effect, as indeed there was in *Sayad Zain v. Kalabhai Lallubhai* (4). A Court acting *extra cursum curiæ* has been said to act as *quasi*-arbitrator which may be a convenient expression, but it does not involve an application of the 2nd Schedule to the Code of Civil Procedure which is applicable to arbitrators. Such agreement merely involves that the parties who agree expressly or impliedly not to appeal will not be allowed by the Court to appeal. I do not think it is necessary to go in detail into the cases that have been cited but would observe that it follows from what I have said that I do not agree in the reasoning in *Nidamarthi Mukkanli v. Thammana Ramayya* (5) and *Chengalraya Chetti v. Raghava Ramannuja Doss* (1). It may be that the result of those decisions is correct. *Rao Bahadur Raoji Trimbak v. Govind Vinayak* (6) is a case where the agreement stated that the decision was to be final and conclusive. I do not think it is necessary to consider whether the mere inclusion of those words is sufficient, for in this case there are no words to that effect. In *Jamnadas v. Gordhandas* (7), where the words were "we are not going to produce evidence, and agree to the decision which the Court shall pass after inspection" it was held, and I think rightly, that the Munsif did not thereby become an arbitrator and that an appeal lay from his decision. In

Chengalraya Chetti v. Raghava Ramannuja Doss (1), the terms of the agreement were "we shall abide by any kind of decree passed by the Court after a personal inspection of the place in dispute." It was held that the District Munsif acted thereafter as arbitrator and that he acted illegally and with material irregularity in accepting the position of an arbitrator, as all the parties had not consented. It follows from what I have said above that I do not agree with the finding that he acted as arbitrator nor do I agree that the agreement before the Court in that case amounted to an agreement that the Court should act *extra cursum curiæ*.

This appeal must be allowed with costs and the matter must go back to be disposed of on the merits.

Wallace, J.—I agree. The respondent rests his case not on the footing that the District Munsif's decree was really an arbitration award but on the principle of estoppel. In order that there may be an estoppel prohibiting an appeal by either party there must be an agreement, implicit or explicit, not to appeal. I think the words of the plaintiffs' and respondents' own undertakings read together as a contract, are enough to dispel any such idea, and to show that what the parties agreed to was nothing more than that the finality of the District Munsif's decision by which they agreed to abide was limited to the point which the District Munsif in the absence of other evidence, was required to settle by personal inspection, that is, the point of fact necessary for the decision of the first issue, and the agreement went no further. Now, it is open to the parties in an ordinary suit tried by the ordinary procedure, to dispense with evidence and it is open to the Judge on application by the parties to inspect the place, and what he sees on his inspection is evidence within the meaning of the Indian Evidence Act, on which he may decide issues in the suit, and this and no more is what, I conceive, the original Court has in this case done. Hence, I can see nothing in the agreement between the parties which puts the suit *extra cursum curiæ*.

I agree, therefore, that no estoppel exists except on the point of fact decided by the Munsif by his inspection of the ground. As to whether on the facts he found he

(4) 23 B. 752; 1 Bom. L. R. 366; 12 Ind. Dec. (N. S.) 3.

(5) 26 M. 76.

(6) Un. P. J. Bom. H. C. (1897) 413.

(7) Un. P. J. Bom. H. C. (1896) 424.

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came to a wrong decision on the law, I cannot see how there can be any estoppel of the right of appeal. If there was no agreement not to appeal, there cannot possibly be any question of the appellant intentionally permitting the respondents to believe that he had waived that right and to act according to that belief. I, therefore, agree in the order proposed by the learned Chief Justice.

V. N. V.

N. H.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 30
OF 1921.

January 18, 1923.

Present.—Mr. Justice Ross.

MAN MOHAN SAW AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

MUHAMMAD HUSAIN KHAN AND

OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadian Law—Legitimacy—Acknowledgment.

Acknowledgment has the effect of legitimation according to Muhammadian law, where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty. [p. 153, col. 2.]

Where, however, the finding is that there could not have been a valid marriage between the parents, the question of acknowledgment does not arise. [p. 153, col. 2.]

Bibee Fazilatunnessa v. Bibee Kamarunnessa, 9 C. W. N. 352, *Syed Habibur Rahman Chowdhury v. Syed Altaf Ali Chowdhury*, 60 Ind. Cas. 837; 33 C. L. J. 479; 40 M. L. J. 510; 19 A. L. J. 414; 23 Bom. L. R. 636; (1921) M. W. N. 366; 48 I. A. 114; 29 M. L. T. 354; 14 L. W. 175; 26 C. W. N. 81; 48 C. 856; (1922) A. I. R. (P. C.) 159, *Muhammad Allahdad Khan v. Muhammad Ismail Khan*, 10 A. 289 6 Ind. Dec. (N. S.) 193, *Liaqat Ali v. Karim-un-nissa*, 15 A. 396; A. W. N. (1893) 167; 7 Ind. Dec. (N. S.) 973, referred to.

Appeal from a decision of the Subordinate Judge, Patna, dated the 31st July 1920, confirming a decision of the Munsif of Patna, dated the 20th September 1919.

Mr. Chandra Sekhar Banerji, for the Appellants.

Mr. Hassan Jan, for Rai Tribhuban Nath Sahai, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit brought by the plaintiffs for recovery of possession of one *bigha*

of land forming part of the compound of their house in Muradpur. The plaintiffs allege that they and the *pro forma* defendants are the heirs of Nasir Nawab and that they are entitled to the land in suit. There was a case under section 145 of the Criminal Procedure Code which was decided in favour of the defendants, and the plaintiffs, therefore, brought this suit for recovery of possession of the land. In the written statement it is alleged that Bibi Munirunnissa, the second wife of Nasir Nawab, left a son and two daughters who were necessary parties. The shares of the plaintiffs in the property were also disputed. It is further alleged that the disputed land had been in cultivating possession of the defendants since 1871 and that their possession had been declared by the Criminal Court in a proceeding under section 145, Criminal Procedure Code, on the 3rd of July 1916; and that they had been granted a lease by a registered deed from Bibi Munirunnissa of the land in suit on the 14th of July 1916.

The Munsif disbelieved the alleged settlement in 1871 and the receipts produced by the defendants. With regard to the lease granted by Bibi Munirunnissa, he went into the question of the status of that lady but seems to have left the question open, observing that "one cannot be definite on the point in the absence of the particular evidence required by Muhammadian Law to prove the marriage." He also seems to have held that, whatever might have been the legal effect of a lease granted by her, this particular lease remained a lease on paper only and was never followed by possession and was a collusive act. He gave the plaintiffs a decree for confirmation of possession. The learned Subordinate Judge on appeal also disbelieved the settlement in 1871 and the receipts. In dealing with the settlement by Munirunnissa he considered the question of her status. His finding is to the effect that there was no evidence of actual marriage, and, even if there had been, the marriage it could not have been valid in law. His finding is thus much more definite than the Munsif's. He further held that the lease was executed in order to create evidence and did not confer any title, and that

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the defendants were not in possession of the land.

It is now contended, in the first place, that the decision in the case under section 145, Criminal Procedure Code, being in the appellant's favour on the question of possession and their possession being confirmed by the lease of 1916, the *onus* was on the plaintiffs to show that they had no possession and that the plaintiffs had both title and possession. Reference was made to the decisions in *Lillu v. Annaji Parashram* (1) and *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani* (2) as showing that the decision of the Criminal Court in a case under section 145 is conclusive of the fact of possession and that the fact thus established remains. The judgments of the Courts below are not altogether precise on this point. The Munsif's decree was for confirmation of possession. The Subordinate Judge, although he did not vary the decree, evidently thought that it should have been a decree for recovery of possession. On the facts found as to the defendant's want of title and possession except under the decision in the case under section 145, Criminal Procedure Code, in 1916, such a decree is correct.

In the second place, it is argued with regard to the title of the appellants, first, that no issue was framed as to the marriage of Munirunnissa and that the suit should be remanded for a decision on this point after framing an issue. I do not think that the fact that no issue was raised necessitates a remand of the case. If the defendants wanted an issue on the question of marriage, they should have taken it. The questions that they put in issue, in their written statements were questions of parties and the shares. These questions indirectly raised the question of the status of Munirunnissa and evidence was gone into on both sides. The fact that no issue was framed was not material; the defendants cannot say that they were taken by surprise. Secondly, it is argued that Munirunnissa was acknowledged as his wife by Nasir Nawab and that this is proof

of marriage. Reference was made to the case of *Bibee Fazilatunnessa v. Bibee Kamarunnessa* (3). I do not see how that decision helps the appellants. All that was decided there was that, "unless there is an absolute bar or impediment to a valid marriage, acknowledgment has the effect of the legitimation according to Muhammadan Law where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty." The law is stated more fully in *Syed Habibur Rahman Chowdhury v. Syed Altaf Ali Chowdhury* (4), and under the rule in that case the finding of fact by the Subordinate Judge that there could not have been a valid marriage disposes of the acknowledgment as proof of marriage—see also the judgment of Mahmood, J., in *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (5) and *Liaqat Ali v. Karimunnissa* (6). Although, in my opinion, for the purposes of the present litigation in which the question of the marriage of Munirunnissa arises only incidentally, the decision might equally well have been given as the Munsif gave it without definitely coming to any conclusion on the point, the findings of the Court below cannot be disturbed on the ground of the Muhammadan doctrine of acknowledgment.

Finally, it is argued that the appellants took settlement from Munirunnissa as a co-sharer landlord and, therefore, acquired a non-occupancy right. Reference was made to *Binad Lal v. Kalu Pramanik* (7), but that decision can have no application where it is found that there was no real settlement of the land by Munirunnissa.

All the grounds urged in this appeal, therefore, fail. The decree of the Court below is modified by making it a decree for recovery, and not for confirmation of possession and with this formal modification of the decree the appeal is dismissed with costs.

Appeal dismissed.

Z. K.

(3) 9 C. W. N. 352.

(4) 60 Ind. Cas. 837; 33 C. L. J. 479; 40 M. L. J. 310; 19 A. L. J. 414; 23 Bom. L. R. 636; (1921) M. W. N. 366; 48 I. A. 114; 29 M. L. T. 354; 14 L. W. 175; 26 C. W. N. 81; 48 C. 856; (1922) A. I. R. (P. C.) 159 (P. C.).

(5) 10 A. 289; 6 Ind. Dec. (N. S.) 193.

(6) 15 A. 396; A. W. N. (1893) 167; 7 Ind. Dec. (N. S.) 973.

(7) 20 C. 708; 10 Ind. Dec. (N. S.) 477.

(1) 5 B. 387; 3 Ind. Dec. (N. S.) 255.

(2) 29 C. 187; 29 I. A. 24; 6 C. W. N. 385; 12 M. L. J. 83; 4 Bom. L. R. 107; 8 Sar. P. C. J. 224 (P. C.).

KRISHNA AIYAR v. SUBRAMANIA AIYAR.

*** MADRAS HIGH COURT.**

CIVIL REVISION PETITION NO. 309 OF 1922.

November 23, 1922.

Present:—Sir. Walter Schwabe Kt.,
Chief Justice.A. S. KRISHNA AIYAR—
DEFENDANT NO. I—PETITIONER

versus

N. SUBRAMANIA AIYAR—PLAINTIFF
—RESPONDENT.*Presidency Small Cause Courts Act (XV of 1882), ss. 41, 43, 47, 49—Ejectment suit, stay of.*

When proceedings of a summary nature are taken under section 41 of the Presidency Small Cause Courts Act the occupant whom it is proposed to eject is entitled as of right to a stay of the suit, pending a suit in the High Court where he is prepared to bind himself with sureties to institute a suit for compensation for trespass.

The application under section 47 of the Presidency Small Cause Courts Act may be made at any time during the currency of the proceedings and need not necessarily be supported by an affidavit.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order, dated 27th March 1922, of the Court of Small Causes, Madras, in Ejectment Suit No. 739 of 1921.

Mr. W. V. Rangaswami Iyengar, for the Petitioner.

Mr. S. Venkataramana Iyer, for the Respondent.

JUDGMENT.—In this case the learned Judge of the Court of Small Causes has held that he has a discretion under section 47 of the Presidency Small Cause Courts Act as to whether or not to stay a suit in the Small Cause Court pending a suit in the High Court when the occupant is prepared to bind himself with sureties to institute a suit for compensation for trespass. He says that the application is not *bona fide*, and he bases his decision on the acts of the occupant that he has already delayed his proceedings in the Small Cause Court under section 41 and in a manner which quite properly did not commend itself to the Judge of the Small Cause Court, and he also puts his decision on another

ground, namely, that the application was not supported by an affidavit. The case here is also argued on a further ground, *viz.*, that in section 47, the words "Whenever on an application being made under section 41" mean at some early stage in the proceedings on that application, it is suggested, either at the first hearing or within a reasonable time thereafter. In my judgment the words of the section leave no discretion to the Judge of the Court of Small Causes at all. The rule is that, when the proceedings of a summary nature are taken under section 41, the occupant whom it is proposed to eject shall have a right to say to the Small Cause Court, "I want to have this case tried in the High Court, and am prepared to bind myself with two sureties for the probable costs of the suit." In my judgment, the Legislature in its wisdom, in section 47, gave no discretion to any one to refuse such an application when made. I can find no ground to say that such an application must be supported by an affidavit. My attention has not been called to any rule to that effect, and the Statute says nothing about affidavits, though I must not be understood to say that the learned Judge would not be justified, if he thinks that the application was not a genuine one at all, in adjourning the case for some short time for an affidavit.

Generally, I should think, he would be satisfied on the material before him, *viz.*, a statement in writing by the Vakil for the first defendant and the first defendant saying that they are ready to file a suit in the High Court and to give the necessary bond, though there may be cases where he would be justified in requiring more; and then it would be open to the Small Cause Court Judge to call upon them to put in an affidavit. In my judgment it was not open to him to dismiss the application as frivolous on the ground that it was not supported by an affidavit.

As to the point taken as to the proper interpretation of the words "on an application" in section 47, that these words mean "at some early time during the currency of such proceedings," I can find nothing in the Act to justify such an interpretation. It seems that the idea of the Act was that these proceedings are not to last long, and

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I think it was intended that at any time during the currency of the proceedings this application could be made, and I am confirmed in this view by the sub-clause to section 47, which obviously contemplates such an application being made after an order has been made under section 43 of the Act.

This revision petition must, therefore, be allowed with costs, and the case must go back to the Small Cause Court to proceed according to the provisions of section 47, as explained above.

V. N. V.

*Petition allowed.***ALLAHABAD HIGH COURT.**

LETTERS PATENT APPEAL NO. 128 OF 1921.

February 9, 1923

Present:—Sir Grimwood Mears, Kt.,
Chief Justice, and Justice Sir P. C. Banerji,
Kt.

BARU MAL—PLAINTIFF—APPELLANT
*versus*SUNDER LAL—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11
—*Question of title—Decision by Revenue Court—*
Res judicata.

In an ejectment suit against an alleged tenant in the Revenue Court, if the tenant sets up the plea of proprietary title and the Court elects to try the question, its decision must be deemed to be the decision of a Civil Court and operates as *res judicata* in a subsequent suit for the establishment of title in the Civil Court.

Appeal, under section 10 of the Letters Patent, from a judgment of Mr. Justice Smart, dated the 13th of July 1921.

Dr. S. N. Sen, for the Appellant.

Dr. M. L. Agarwala and Mr P. L. Banerji,
for the Respondent.

JUDGMENT.—The question in this case is whether a previous decision operates as *res judicata* under the provisions of section 11 of the Code of Civil Procedure. The plaintiff claims certain property by virtue of a sale-deed, dated 29th. of July 1917. Before the

institution of the present suit the defendant had brought a suit in the Revenue Court to eject the plaintiff from 5 plots out of the property comprised in the sale-deed, on the allegation that the plaintiff was the tenant of the defendant. In that suit the plaintiff claimed proprietary title in respect of that property by virtue of the sale-deed, which is the basis of the present claim in this suit. The Revenue Court, upon that plea being raised, could have adopted one of two courses. It might have referred the parties to the Civil Court, or it might have constituted itself a Civil Court and tried the question itself. It did not refer the parties to the Civil Court, and must be deemed to have elected to try the question of title. Its decision was adverse to the present plaintiff who was defendant in the previous suit, and the Court held that the plaintiff had failed to prove the proprietary right set up by him. In the present suit the plaintiff claims not only the plots which were in dispute in the suit in the Revenue Court but also other plots. It has been held that the present claim is barred by reason of the decision in the previous suit. The decision in that suit must be deemed to be the decision of a Civil Court. It is true that the property in dispute in the previous suit did not comprise the whole of the property now in dispute, but the question of the plaintiff's title to both descriptions of property is identical and must be deemed to have been decided in that suit. The decision negatived the title, and, therefore, the issue as to the title must be deemed to have been decided in the previous suit. As we have stated above, the Court in the previous suit was, by reason of the action taken by it, equivalent to a Civil Court which could have tried the subsequent suit. The title of the plaintiff was the matter in issue in the previous suit, and having been once decided against the plaintiff, it cannot be raised and decided in this subsequent suit. In this view, this appeal is not sustainable and is dismissed with costs.

N. H.

Appeal dismissed.

RAJARATNAM AIYAR v. KALASYASUNDARAM AIYAR.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 217 OF 1922.

December 7, 1922.

Present:—Mr. Justice Oldfield.

RAJARATNAM AIYAR *alias* BAPURA-

JAN—COUNTER-PETITIONER NO. 1—

PETITIONER

versus

VALASYASUNDARAM AIYAR AND

OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 10—Suit against Hindu widow to recover properties on footing of adoption—Reversioners, whether can be made parties.

In a suit by a plaintiff to recover certain properties against a Hindu widow on the footing of an adoption made by her, the reversioners of the latter's husband can be properly added as party defendants under O. I, r. 10 (2) of the Code of Civil Procedure. [p. 156, col. 2.]

Norris v. Beazley, (1877) 2 C. P. D. 80; 46 L. J. C. P. 169; 35 L. T. 846; 25 W. R. 320, *Sitaramaya v. Ramappaya* 39 Ind. Cas. 160; 5 L. W. 207, distinguished.

Risal Singh v. Balwant Singh, 48 Ind. Cas. 553; 40 A. 593; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511; 45 I. A. 168 (P. C.), *Ganga Narayan Dutta v. Indra Narayan Saha*, 35, Ind. Cas. 49; 25 C. L. J. 391; 22 C. W. N. 350, *Nugenderchunder Ghose v. Sreemulky Kaminee Dossee*, 11 M. I. A. 241; 8 W. R. (P. C.) 17; 2 Suth P. C. J. 77; 2 Sar. P. C. J. 275; 20 E. R. 92 and *Veerabhadra Aiyar v. Marudaga Nachiar*, 8 Ind. Cas. 1072; 34 M. I. A. 188; 21 M. L. J. 320; 9 M. L. T. 235; (1910) M. W. N. 799, referred to.

The mere fact that the reversioners had failed to sue within six years from the date of the alleged adoption would not debar them from the benefit of an adjudication in proceedings, such as the above otherwise legitimately instituted. [p. 157, col. 1.]

Petition, under section 115 of Act V of 1908, and section 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Tanjore, in I. A. No. 263 of 1921, in O. S. No. 19 of 1921.

Mr. S. Ramaswami Iyer, for the Petitioner.

Messrs. A. Krishnaswami Iyer, M. S. Venkatarama Iyer and S. Jagadisa Iyer, for the Respondents.

JUDGMENT.—The order I am asked to revise is one made in a suit by the plaintiff, here petitioner, for the recovery of possession of properties comprised in an estate, of which the last male owner was one Sundaram Ayyar. The plaintiff's father was, it is the plaintiff's case, adopted by the first defendant; the widow of Sundaram Aiyar. The

plaintiff sues on the ground that he has been unlawfully excluded from the plaintiff properties by that widow on account of an invalid agreement entered into between her and second defendant. The lower Court's order is one made on the petition of the present respondents alleging that they are the nearest reversioners to Sundaram Ayyar and asking that they may be made defendants in the suit. There was in this petition an allegation of collusion between the plaintiff and the first defendant. But in its order making the respondents parties the lower Court has not referred to any grounds for the allegation or recorded any finding in favour of it; and no stress has been laid upon it in this Court.

The question then is, whether the lower Court's order was one which it was competent to make under O. I, r. 10, clause (2), Civil Procedure Code; that is, whether the presence of the respondents before the Court was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

It is clear that the question, and probably the most important question, involved in the suit was whether the plaintiff's father's adoption to Sundaram Ayyar was true and valid. That question arises now as between the plaintiff and the first defendant. It will, in the natural course, if the plaintiff persists in his claim, arise again on the first defendant's death between him and the reversioners, whosoever at that time they may be. It is further the case that the adoption is alleged as having taken place over 35 years back and that a complete trial is advisable in the interests of the perpetuation of testimony, if on no other account. All convenience in the circumstances is in favour of the lower Court's order. Objection to it has accordingly been urged on strictly legal grounds, mainly, with reference to the interpretation which has been placed on the words of the rule. The rule is in fact identical with the English rule on the subject and reference has, therefore, been made to *Norris v. Beazley* (1) and *Sitaramaya v. Ramappaya* (2), in which that decision was applied in this country. It does not, how-

(1) (1877) 2 C. P. D. 80; 46 L. J. C. P. 169; 35 L. T. 846; 25 W. R. 320.

(2) 39 Ind. Cas. 160; 5 L. W. 207.

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ever, seem to me that these authorities are of much use in the present case, because in them the question, in which the persons alleged to have been wrongly joined were interested in having a decision, was distinctly outside the original scope of the proceedings. Here, as has been pointed out, the question which the present respondents are concerned with is a question which will have to be decided eventually even if no addition is made to the parties originally on the record.

It is then urged that the respondents, having failed to sue within six years from the date of the alleged adoption allowed by the Limitation Act, have lost their right to an adjudication on the adoption, until the succession opens in their favour or in favour of the reversioners at the time of the death of the widow. It is not, however, clear that inability to sue independently debars them from the benefit of an adjudication in proceedings, which have been otherwise legitimately instituted. On the other hand, it is pointed out that the widow in such proceedings as these represents the estate and that a decision against her will be binding on those eventually entitled, in the absence of collusion on the part of the respondents. See *Risal Singh v. Balwant Singh* (3) and the cases collected in the judgment of Mookerjee, J., in *Ganga Narayan Dutta v. Indra Narayan Saha* (4). The argument is, then, that it would be strange if a person, who, it cannot be disputed, would be represented by a party on the record, and bound by the decision against that party, is to be debarred from himself appearing to protect his interests. The question thus raised has not, so far as I have been shown, been the subject of any direct decision, but that a party so affected would be entitled to be impleaded is indicated by the language used in *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (5),

Veerabadr Aiyar v. Marudaga Nashar (6), and the decision of Mookerji, J., already referred to. Taking this view, I hold that the lower Court's order was not made without jurisdiction. The revision petition, therefore, fails and is dismissed with costs of respondents Nos. 1 and 2. Third respondent widow will pay her own costs.

V. N. V.

Petition dismissed.

Z. K.

(6) 8 Ind. Cas. 1072; 34 M. 188; 21 M. L. J. 320; 9 M. L. T. 235; (1910) M. W. N. 799.

PATNA HIGH COURT.

CIVIL REVISION NO. 325 OF 1922.

January 24, 1923.

Present:—Mr. Justice Ross.

RAMPARICHAN SINGH—DEFENDANT

PETITIONER

versus

BIRANJI PRASAD SINGH AND OTHERS

PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Burden of proof, wrong allocation of—Revision—Landlord and tenant—Right to timber—Record of Rights, entry in, value of.

The mere wrong allocation of the burden of proof is not ordinarily a ground for interference in revision with the order of an Appellate Court. [p. 158, col. 1.]

Where, however, an Appellate Court shifts, in appeal, the burden of proof, without giving the party on whom it lays the burden an opportunity of producing additional evidence it commits an error of procedure and its order is open to revision. [p. 158, col. 2.]

The general law is that a landlord is entitled to half the value of the trees cut down by the tenant. If the tenant denies this right he must prove an exception to the general law in the form of a local custom entitling him to the timber on the holding. If he produces an entry in the Record of Rights in support of his claim, the burden is shifted to the landlord to prove the contrary. [p. 158, col. 2.]

Janki Kuer v. Wali Muhammed 61 Ind. Cas. 420, relied upon.

Application from a decision of the Subordinate Judge, Muzaffarpore, dated the 5th June 1922, reversing that of the Munsif, Motihari, dated the 11th February 1922.

Mr. P. C. Rai, for the Petitioner.

Messrs. L. N. Singh and Harnarayan Prasad, for the Opposite Party.

JUDGMENT.—This is an application by the defendant for revision of the decree of the Subordinate Judge of Muzaffarpore

(3) 48 Ind. Cas. 553; 40 A. 593; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511; 45 I. A. 168 (P. C.).

(4) 35 Ind. Cas. 49; 25 C. L. J. 391; 22 C. W. N. 350.

(5) 11 M. L. A. 241; 8 W. R. (P. C.) 17; 2 Suth. P. C. J. 77; 2 Sar. P. C. J. 275; 29 B. R. 92.

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reversing the decision of the Munsif of Motihari in a suit brought by the plaintiffs opposite party, for damages. The plaintiffs claimed to recover half the price of the timber of certain trees cut by the defendants. The defendants pleaded that they were entitled to the timber. They relied on the entry in the Record of Rights, which showed that they had the entire rights in the timber, and also on the village note. The grounds of the present application are that the learned Subordinate Judge erred in disregarding the village note and in throwing the burden of proof of the custom alleged by the defence on the defendants in spite of their production of the Record of Rights. But the learned Vakil for the opposite party argues that, even if the learned Subordinate Judge was wrong, revision will not lie on such grounds as these; and that in fact he is right in the view he has taken of the law. With regard to the village note I see no reason why it should not have been considered as a piece of evidence and given such weight as the Court was prepared to attach to it, and the Subordinate Judge, in my opinion, was wrong in leaving it out of consideration altogether. But on this ground alone it would not be proper to interfere in revision. In this case, however, the view that the Subordinate Judge has taken has, in my opinion, involved him in an error in procedure. The Munsif held that as the Record of Rights was in favour of the defence in recording their rights in the trees, it was for the landlord to establish his claim. The Subordinate Judge was of opinion that, as the general law was in the landlord's favour, the entry in the Record of Rights was not enough to establish the custom alleged by the defence in view of the fact that it was for them to prove the custom. He, therefore, rightly observed that, "there can be no doubt that the procedure adopted was faulty" and that "the respondents, (that is, the defendants) should have been called upon to prove the custom of appropriating the entire timber. That was not done." Now, if the Subordinate Judge took that view, he ought clearly to have remanded the case in order to give the defendants an opportunity to adduce evidence sufficient to discharge the burden of proof which he thought lay upon them.

The Munsif had taken a different view of the burden of proof, and the proof tendered by the defence was according to that view. When the Subordinate Judge threw the burden otherwise, he ought certainly to have given the defence a further opportunity to discharge it. He, therefore, erred in procedure and this is a sufficient ground for revision of his judgment. But, in my opinion, he was clearly wrong in his view of the burden of proof. The general law is in the landlord's favour. The tenant has to prove an exception to the general law in the form of a local custom entitling him to the timber of the trees. He does this by producing the Record of Rights and this throws the burden on the landlord: [See *Janki Kuer v. Wali Muhammed* (1)]. In my opinion, the view taken in this case by the Munsif was correct and that of the Subordinate Judge was wrong. This application must, therefore, be allowed and the decree of the Subordinate Judge set aside and the appeal remanded for re-hearing. The hearing fee is assessed at one gold mohur. Costs will abide the result.

Z. K.

(1) 61 Ind. Cas. 420.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 83-B OF 1921.

November 23, 1922.

Present:—Mr. Prideaux, A. J. C.

ISHWARDAS—PLAINTIFF—APPELLANT

versus

BISMILLA KHAN—DEFENDANT—

RESPONDENT.

Limitation Act (IX of 1908), s. 5—Appeal filed in wrong Court—Negligence of Pleader—Extension of time.

Negligence of a Pleader in advising his client to file an appeal in a wrong Court is not a sufficient cause for the extension of time under section 5 of the Limitation Act. [p. 160, col. 2.]

Bholagiri v. Bhaddelai, F. A. No. 11 of 1905, decided on 18th August 1905, *Vilhi v. Sahhya*, 1 Ind. Cas. 904; 5 N. L. R. 25, referred to.

There are no hard and fast rules to control the discretion of a Court in the matter of extending time under section 5 of the Limitation Act, each case must be examined as to its own circumstances.

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to see whether they make it fall within or without the terms of the general rule. [p. 160, col. 2.]

When a litigation has been settled in favour of a particular litigant, that litigant has, upon the termination of the time allowed for appealing, a vested interest in his favour, of which he ought not to be deprived in the absence of special circumstances. [p. 160, col. 2.]

Appeal against the decision of the Sub-Judge No. 2, Akola, in Civil Suit No. 136 of 1918, dated the 4th February 1921.

Mr. V. K. Rajwade, for the Appellant.

Mr. M. R. Bobde, for the Respondent.

JUDGMENT.—The facts of this case are that, in execution of a decree obtained against the defendant by the plaintiff, field Survey No. 62, area 6 acres 23 *gunthas*, assessment Rs. 11, was sold and purchased by one Nainsukhdas Gokuldas on 22nd August 1917 and the purchaser subsequently sold the same to the plaintiff on 8th November 1917. Plaintiff got symbolical possession through the Court on 2nd February 1918. It is contended that defendant withholds actual possession from the plaintiff. Plaintiff, therefore, sues to recover possession and Rs. 1,100. as mesne profits for the year 1917-18. The sale in execution was admitted, but it was contended that the field only was attached and sold and not the bungalow thereon with its compound. It is stated that in January 1900, on an application made by him, the site on which the bungalow with the compound stood was converted into a building site under the orders of the Deputy Commissioner and ceased to be a portion of the field Survey No. 62 of Khamgaon. That site and building was neither attached nor sold. The sale certificate issued to the plaintiff's vendor and the subsequent deed of sale executed by him in favour of the plaintiff do not include the bungalow and the compound. It was further contended that the plaintiff himself was the real purchaser and aware of these facts. He denies that possession was obtained by auction-purchaser. As to mesne profits, it was stated that, as the sale to plaintiff was made on 8th November 1917, he is not entitled to any crops for that year and in fact there were no crops in 1917-18. Plaintiff denied that the site of the bungalow and compound was converted into building site.

The case went to trial on the following issues:—

"(1) What property was ordered to be

sold and what was sold in execution of the decree against the defendant?

"(2) Under the sale certificate and the deed of assignment of the same in favour of the plaintiff whether the plaintiff can claim possession of the bungalow also?

"(3) Whether the plaintiff is entitled to mesne profits for the year 1917-18; if so, what amount?"

The Trial Court finds that the contentions of the defendant should be upheld, holding that the defendant had proved that the site of the bungalow and compound ceased to be a portion of the field Survey No. 62 and this portion was never attached and sold. As to mesne profits, parties agreed that the questions about the right to recover the mesne profits and the amount of such profits should be left for execution proceedings. A decree was passed directing the defendant to deliver possession of the field portion of Survey No. 62 to the plaintiff and to pay costs calculated at five times the revenue assessment of that portion, and Pleader's fee at 10 times that amount. Defendant has been allowed costs on the amount of the claim dismissed. Subsequently, the above order was modified and the Court-fee on the plaint and Pleader's fee were assessed on Rs. 7,000, the value of the land proved to be a garden.

This appeal has been filed by the plaintiff and I admitted it subject to objection on the point of limitation at the hearing. That objection has been taken. The decision of the lower Court is dated 9th February 1921. Copies were applied for on 23rd February 1921 and obtained on 15th March 1921 and the appeal was presented to the District Judge on 29th March 1921. It was returned for presentation to the proper Court, namely, this Court, on 13th December 1921, and was filed here on 14th December 1921. It is admitted for the appellant that the appeal lay to this Court and not to the Court of the District Judge, Akola, and, further, it is admitted that the appeal here is barred by some months; but I am asked to show leniency because it was through a mistake of the Pleader that the appeal was filed in the District Judge's Court. In support of this plea for leniency and for extension of time under section 5 of the Limitation Act, I am referred to the following

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cases; *Seth Nerbada Prasad v. Nathuram* (1); *Sunderbai v. Collector of Belgaum* (2); *Brij Indar Singh v. Kanshi Ram* (3) and *Basvanappa Shivrudrappa v. Krishnadas Govardhandas* (4). The case of *Shib Dayal v. Jagannath Prasad* (5) is also relied upon.

It is explained here by the Pleader who appears in this Court, Mr. V. K. Raiwade, that he thought he could urge that the value for jurisdiction would be five times the assessment of the field and not the market-value and, therefore, he filed the appeal in the Court of the District Judge. I have great difficulty in believing this explanation, because, when the lower Court assessed the value of the land as garden land making the whole value of the land, bungalow and *kotha* Rs. 8,600, an application for revision, Civil Revision No. 58-B of 1919, was presented to this Court and my brother, Kotval, A. J. C., dismissed that application upholding the decision of the lower Court. The revision case was disposed of in this Court on the 15th April 1920 and, as the case in the lower Court was not disposed of until the 9th February 1921, it is obvious that the Pleader must have known that this Court had decided what the value of the suit was and that it was not in the province of the District Court to change that valuation.

Another reason given by the same Pleader for his action in filing the appeal in the Court of the District Judge is, I regret to say, untrue. He tells me that he intended in the District Court to rely on the case of *Harba v. Raghunath* (6). He states that when the revision was argued before Kotval, A. J. C., this authority was not in existence and, therefore, could not be brought to the Judge's notice and he hoped by mentioning it to get the District Court to accede to his wishes as regards the value of the

land in suit. Now, I have taken the trouble to ascertain that *Harba v. Raghunath* (6) was published in the Nagpur Law Reports in April 1919 and, as the revision application was not argued until the 7th April 1920 the case could have been brought to the notice of this Court in those revision proceedings. The truth is, that the Pleader was grossly negligent in advising his client to file the appeal in the District Court.

In *Bholagir v. Bhaddelal* (F. A. No. 11 of 1905, decided on 18th August 1905) it was held in a similar case that time should not be extended and in *Vithia v. Sakhya* (7) where the appellant's Counsel presented a memorandum of appeal which was of the jurisdictional value of over Rs. 5,000 to the Court of the Divisional Judge, having failed to notice that the value had been wrongly entered by his clerk who wrote the memorandum as below Rs. 5,000, it was held that, given due care and attention, the mistake might have been avoided and that the delay thus caused was, therefore, not a "sufficient cause," within the meaning of section 5 of the Indian Limitation Act. Following this ruling, I decline to condone the delay, because the former revision case must have brought it home to the appellant and to his Pleader what the real value of the suit was, and no mistake should have been possible. It cannot be said, in the words of section 5 of the Limitation Act, that the appellant had sufficient cause for not preferring this appeal within due time, and, though there may be no hard and fast rule to control the discretion of a Court in this matter, each case must be examined as to its own circumstances to see whether they make it fall within or without the terms of the general rule. In the present case those circumstances make it fall without the section. Where a litigation has been settled in favour of a particular litigant, that litigant has, upon the termination of the time allowed for appealing, a vested interest in his favour of which he ought not to be deprived in the absence of special circumstances. These circumstances have not been established in the present case. I dismiss this appeal as time-barred. The appellant will pay his own and respondent's costs.

G. R. D.

Appeal dismissed.

(7) 1 Ind. Cas. 904; 5 N. L. R. 25.

(1) 8 C. P. L. R. 121.

(2) 52 Ind. Cas. 897; 43 B. 376; (1919) M. W. N. 254; 23 C. W. N. 753; 21 Bom. L. R. 1148; 46 I. A. 15 (P. C.).

(3) 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 41 I. A. 218 (P. C.).

(4) 59 Ind. Cas. 743; 45 B. 443; 22 Bom. L. R. 1387.

(5) 68 Ind. Cas. 812; 20 A. L. J. 674; 44 A. 636; (1922) A. I. R. (A) 490.

(6) 50 Ind. Cas. 967; 15 N. L. R. 60.

LALMONI NONIA *v.* EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 643 OF 1922.

November 23, 1922.

Present:—Mr. Justice Bucknill.

LALMONI NONIA AND ANOTHER—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XL V of 1860), s. 193—Perjury—*Proof.*

In order to sustain a successful charge of perjury it is not enough to show that the statement in question is probably not true, it must be shown that it is certainly false. It is necessary for the prosecution to prove either that on its face the statement must be necessarily regarded as deliberately perjured or that it is so from extrinsic circumstances. It must be proved beyond any reasonable doubt that the statement is deliberately false. [p. 164, col. 2; p. 165, col. 1.]

Application from a decision of the Sessions Judge, Chapra.

Sir Ali Imam, Messrs. E. N. Mittler and S. N. Bannerji, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This was an application made in Criminal Revisional Jurisdiction by two men, one known as Lalmoni Nonia and the other known as Gangabishun. These men were convicted by a Magistrate of the 1st class of Chapra of an offence against the provisions of section 193, Indian Penal Code. They were tried separately, each was sentenced to two years' rigorous imprisonment; the circumstances in each of their cases were identical and when both of them appealed to the Sessions Judge of Saran the appeals were dealt with simultaneously. The learned Sessions Judge on the 11th of October 1922 upheld the decision which had been come to by the Magistrate of Chapra on the 19th of September.

Now, the circumstances which gave rise to this affair are extremely simple, although there has been a good deal of discrepancy of view held in connection with the matters out of which have come these trials and other litigation connected with them. The position may very shortly be put as follows:—

In April of 1916 a man called Ram Lagan Nonia of Lakhnoura was killed; and investigation was held and a certain Durga Prasad was implicated in the matter by

the deceased's brothers named Tapsi and Bujhawan. Now, apparently, Durga Prasad was placed upon his trial in connection with this homicide together with other persons, but he was discharged in the course of the preliminary enquiry by virtue of the provisions of section 209 of the Criminal Procedure Code. Durga Prasad then brought a suit claiming damages for malicious prosecution against the deceased's brothers Tapsi and Bujhawan. He succeeded in obtaining judgment in his favour for nearly Rs. 5,000 on the 30th April 1919. In that suit he seems to have proved to the satisfaction of the Tribunal before which his case came, that he was not present when the homicide took place and that he was in fact lying on a bed of sickness at Benares, a considerable distance from the place where this crime is alleged to have been committed. Now, in the course of this suit the two applicants who are now before me and who, it is said, are relatives of the deceased, adduced some evidence on behalf of the defendants and in their testimony they made certain statements as a consequence of which Durga Prasad applied for sanction to prosecute them both for an offence with which they were eventually convicted, namely, of perjury in contravention of the provisions of section 193, Indian Penal Code. This sanction was granted on July 3rd, 1919; but the trial of these two men was stayed until after an appeal, which had been filed in the suit for damages for malicious prosecution, had been by this Court decided. The result of that appeal was that the decision of the Subordinate Judge was affirmed, and then the prosecution, trial and conviction of these two applicants now before me proceeded in the manner which I have already indicated.

Now, the Magistrate, by whom these two persons were convicted, and the Sessions Judge, who confirmed his sentence, have, I must point out at the outset, taken an entirely different view as to the *alibi* put forward by Durga Prasad to that which had been taken by the Subordinate Judge before whom the suit for damages for malicious prosecution had been preferred and tried. The Magistrate says that, "in spite of the oral as well as documentary evidence I do not see my way to accept this version of the prosecution." When

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the Magistrate makes use of the words "this version of the prosecution" he refers to the endeavour made by the prosecution to show that the evidence which was given by the two applicants before me in the suit brought by Durga Prasad for damages for malicious prosecution was false, because Durga Prasad was at the date of the murder lying ill of dysentery at Benares. The learned Sessions Judge elaborates the same theme and appears also to be clearly of the opinion that Durga Prasad's *alibi* was virtually incapable of credence. It is remarkable that he states that in his view the *alibi* is a very suspicious one. I mention this feature before I discuss the facts upon which the prosecution has here founded its case other than in connection with the *alibi*, because I think that it indicates in a very marked degree the considerable uncertainty which the circumstances in this case have introduced into the minds of different Tribunals who had to deal with it; whilst the Subordinate Judge in the Civil Court was satisfied of the truth of Durga Prasad's *alibi*, and whilst apparently on the appeal from that decision in this Court the question of *alibi* was not seriously contested (it may have been because it really appeared to be one purely of fact), yet both the Magistrate, who tried this case of perjury, and the learned Sessions Judge, who heard the appeal from his decision, came to precisely a contrary opinion.

Having said that much and having pointed out that the evidence which was given in the murder trial, was in the year 1916, whilst that in the damage suit was in 1919, and that in the present prosecution for perjury in 1922, I will pass now to the exact details as to the nature of the charge which has been brought against these two applicants and in connection with which they have been convicted. I think that, as the two cases are substantially identical, it is only necessary that I should deal fully with one.

Now, when giving evidence in 1919 on behalf of the defendants in the suit brought against them for malicious prosecution. The first applicant here, Lalmoni Mahton, or as he is called here Nonia, is stated to have deposed as follows: "I have seen Ram Lagan's Baharghara. My house is in

west of it, at a distance of 20 *laggis*. It was on Saturday night, the day of murder, that I was sleeping at my *Darwaza* when a *pahar* night was remaining, Sheoprasad shouted aloud that Gurtali was cutting Ram Lagan. Then I went there running. I met in the way Durga Prasad, Gurtali Sain, Aliman, and Sohawan. They were running away. I went to where from Sheoprasad was shouting. I found there Sheoprasad, Tapsi and Gangabishun. Sheoprasad was telling Tapsi (and I had also enquired) that Aliman and Sohawan were pressing Ram Lagan with *lathi* and that Gurtali had killed him with *Garasi* and that they were running away and that Durga Prasad was standing. After hearing it, I came back to my house. I was examined before the Police after 2 or 3 days of occurrence;" and in cross-examination Lalmoni says: "I had met Durga Prasad and others at a distance of 10 *laggis* from the place of murder. I had asked them why were they running away. Upon this Gurtali Sain scolded me and said, 'keep quiet' (*Chup raho*). They were a *laggi* from me, when I met them. They had not their faces concealed . . . I had not made this statement before the Magistrate on (query of) the Police, *viz.*, that I had met Durga, Gurtali, Aliman and Sohawan in way. As no one had questioned me, I did not make that statement." Gangabishun says substantially the same thing. He deposed on the same day as Lalmoni's deposition was taken, that is to say, on April the 22nd, 1919:—"I know about Ram Lagan's murder. It was on Saturday (night) when a *pahar* night was remaining that. Sheoprasad shouted that Gurtali Sain was cutting Ram Lagan. I heard this shout at my *darwaza*, which was a *rassi* from the place of occurrence. I ran from my place and came to the place of murder. I saw Durga Prasad, Gurtali, Aliman and Sohawan running away. I recognised them. Sheoprasad on enquiry by Tapsi said that Aliman and Sohawan were pressing down Ram Lagan with *lathi* and Gurtali had murdered with *Garasi* and Durga Prasad was standing. Lalmoni had also come; after that many came but I don't recollect their names . . . I had not made any statement before the Police on Sunday, as Asharfi Sahu was threatening to have murdered who would

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depose before the Police. I had stated before the Police that on the first day for fear of Asharfi I did not depose before the Police;" and in cross-examination he adds—"I saw Durga Prasad and others running when I was at a distance of 5 or 6 *laggis* from them. They were running away in southerly direction. I saw their full faces. I had not asked them any question . . . Out of fear, I had not named Durga Prasad before the Police."

Now, what is alleged is false and concocted in these statements and what is alleged is the perjured statement by these men is that they had actually seen, on the night of the murder, at the scene of the crime and running away, Durga Prasad himself. Now, the way in which it is sought to show that this statement made by these two applicants is one which must be regarded as constituting a perjury, is perhaps somewhat a round-about one. It is freely admitted that had not the Magistrate and the Sessions Judge come to the conclusion that Durga Prasad's *alibi* was not true, and had they, on the contrary, decided that Durga Prasad's presence at Benares ill at the time when this homicide took place had been indubitably proved, the position of these two applicants would have been, to say the least of it, highly precarious. The learned Sessions Judge in a syllogism, the logic of which I do not altogether follow, says that "though the *alibi* might be false it does not necessarily follow that the statements in question must be true." This is such an obvious truism that it seems to me to be hardly worth stating; but in order to be entirely fair to the accused it should start with much wider premises and it might almost be taken to read properly that, as the *alibi* was false, the statements of the applicants must be dealt with at best on their own merits and on the assumption that it was not impossible for the purposes of this Criminal trial that Durga Prasad had in fact been present at the time of the occurrence.

Now, the only gravamina of the charge against the two accused lie in two factors; the first of these is that an Inspector of Police gave evidence in the criminal prosecution of these two men that, when he had examined them very shortly after the

occurrence six years previously to the time when he was giving his testimony, neither of them had told him that they had seen Durga Prasad. "Lalmoni had," so this Inspector states, "told me, however, that on hearing the *golmal* he (Lalmoni) had gone to the spot and had seen Sheo Prasad who had told him that Gurtali was running away after cutting Ram Lagan and that Durga Prasad had come and got him murdered." I take it that the last part of this sentence refers to the narrative of Sheo Prasad. The Inspector, according to the learned Sessions Judge, never questioned Lalmoni as to whether he had seen Durga Prasad himself, and it should be noticed that in Lalmoni's testimony before the Subordinate Judge in the case of malicious prosecution, he himself bears out exactly what the Police Inspector had there stated. The Inspector of Police says, that Gangabishun did not tell anything about Durga Prasad having been seen by him running away, but that on the two occasions when he (the Inspector) had endeavoured to elicit some information from Gangabishun, he had given somewhat different statements in which, in the second, he added materially to what he had stated in the first. In the former he had stated that he had only heard of the murder in the following morning; whilst in the second, given nearly a month later, he is said to have told the Inspector that he heard the noise and went to the place where he found Ram Lagan dead from a cut, Sheo Prasad Nonia, Tapsi Nonia, Lalmoni Nonia and Deonandan Koeri. Sheo Prasad and Tapsi were saying that Gurtali and Sohawan and Aliman had run away after killing Ram Lagan. According to the Inspector's evidence, this Gangabishun never even said as much as Lalmoni had said and had not stated that Tapsi or Sheo Prasad had even mentioned the name of Durga Prasad, a possibility which, in view of the gradual manner in which he was adding to the amount which was being elicited from him by successive investigation, is not at all unlikely.

Now, I have no doubt that, so far as it goes, the evidence which was given by the Inspector of Police may be regarded as of some importance and also as being, so far as he can remember, correct. I think, however, it is desirable to mention casually

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that a long period had elapsed between what took place in 1916 and the giving of his testimony in 1922, that it is not altogether unreasonable to suppose that the enquiries directed to these two men were not, as indeed can be seen by the evidence which was subsequently given before the Sub-Divisional Officer, pursued with great minuteness (as there were, it is clear, other witnesses who ostensibly purported to know more about the matter and who were ready to give far more important evidence than was apparent from the statements which were elicited from Lalmoni and Gangabishun), and, lastly, that, even assuming that the Inspector's memory is complete as to minutiae and that what he states is perfectly correct, it does not seem to me to amount to more than that before him these two men may not have told everything which they alleged they knew. They themselves now give explanations, such as they are, indicating why they did not tell the Inspector everything which they told the Subordinate Judge.

One must now pass from that first portion of the case which has weighed with the learned Magistrate and with the learned Sessions Judge to the second part which, no doubt, is perhaps of greater gravity; and that is the depositions which were in fact made by these two men before the Sub-Divisional Officer in 1916. Lalmoni deposes very much to the same effect as that which he is said to have stated before the Police Inspector. The material part of the evidence reads thus:—

"On Saturday night over 3 months ago 3 *gharis* night remaining I was sleeping at my door. Sheo Prasad called out loudly that Gurtali Sain had cut. I was awoke then. I ran up and saw Sheo Prasad, and questioned him. He said Gurtali had cut. Durga was standing by, Sohawan and Aliman were pressing. I went, Ram Lagan was lying on a *charpai*, with a cut on the right side of his face . . . I went home. The Sub-Inspector examined me."

Nothing is elicited from him in cross-examination, and in re-examination he says: "I bolted from fear." Gangabishun also says very much the same thing as he is said to have said in his second statement to the Inspector of Police. He deposes:—

"On Saturday night over 3 months ago

I was at my door. Sheo Prasad called out that Gurtali is cutting. I ran up to the place, at Ram Lagan's out-house. I saw Sheo Prasad. He told me Gurtali cut Aliman and Sohawan Prasad and Durga Prasad was standing there. I understood he had seen it. Ram Lagan was on a *charpai*, with a cut across his face—" and in cross-examination, he said:—

"I do not know why, when the Sub-Inspector came, I denied all knowledge on that day from fear. I did not tell the Sub-Inspector that I heard of the murder at sunrise or that I heard of the murder, but no names of any accused, or that I suspected none. On Monday the Inspector and Sub-Inspector came. Sub-Inspector took my statement. I told the Sub-Inspector the name of Gurtali only from fear of Asharfi 3 days after I gave all 4 names to the Sub-Inspector and made a full statement."

Then in re-examination he adds—"Asharfi said that all the witnesses for Ram Lagan would meet with him first."

Now, I do not know after a careful consideration that this evidence given before the Sub-Divisional Officer carries the matter very much further. I, of course, do not for one moment suggest in any way that Durga Prasad was present at the time of the occurrence, or that the statements which were made by these two applicants before the Subordinate Judge were necessarily true. I should only like to point out that it must be shown, in order to sustain against them a successful charge of perjury, that they were certainly false.

Now, I do not think that the evidence which they gave before the Sub-Divisional Officer is in any way more than the statements which they are said to have made to the Inspector of Police and is inconsistent with the possibility of the truth of the statements which they made before the Subordinate Judge; and the criterion and the test of that is indicated when I state that it is conceivable that they for some reason or another omitted to state to the Inspector and before the Sub-Divisional Officer what they afterwards stated, under totally different circumstances, to the Subordinate Judge in the suit for damages for malicious prosecution. It is not merely sufficient for the prosecution to point to the fact that in a trial or, rather, at a preliminary

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stage of an investigation, Durga Prasad was dismissed, no doubt rightly, under the circumstances, from the serious accusation which had been made against him. It is not, I think, even sufficient to show that there has been discrepancy between what was stated by these men before the Sub-Divisional Officer or before the Inspector of Police and what was stated before the Subordinate Judge. Putting aside altogether that the latter evidence appears, when examined, to be an addition to previous statements, it is necessary for the prosecution to prove either that on their face the latter statements must be necessarily regarded as deliberately perjured or that they are so from extrinsic circumstances, such as the fact that in these prosecutions Durga Prasad had satisfied the Trying Officer and the Sessions Judge that he was not in fact present at the place. I must admit that when one looks at the circumstances of this case one's mind is filled with serious suspicions. It may very well be, as is suggested by the learned Assistant Government Advocate, the case that these two men recklessly went into the witness-box in order to help their relatives when they saw their relatives being sued for damages in connection with this claim brought against them by Durga Prasad for malicious prosecution; and it may be that these statements which they made were not in fact true. But, when one has said that, I think that one has said practically all. But that is not enough. It must be proved beyond any reasonable doubt that those statements are deliberately false. I doubt, whether in this case that can really properly be said. It has been suggested to me quite rightly that in revisional jurisdiction of this kind it is necessary to be exceptionally careful before interfering with findings of fact of Subordinate Courts, and with that I entirely agree, and, if I could find here any decisions based upon fact alone upon which these applicants had been convicted, I should hesitate more than once before coming to a conclusion that these convictions should be set aside. But in this case I do not find any such findings of fact; what I do ascertain from the papers which have been placed before me, is that there have been inferences drawn as to probabilities which may be deduced from facts and from circumstances which

formed the environments of this somewhat peculiar affair; and, where one has to make up one's mind as to inferences and the correctness of those inferences and as to what is probable and what is reasonable and what is possible, there is often introduced, in my view into a case such an element of doubt as should properly cause a Court to give accused persons under such circumstances such as these the benefit of whatever doubt there is. Here, I think, there is a loophole in this case; although a suspicious and sinister affair, I cannot think that the charge has been fully maintained against these two men by the prosecution.

I, therefore, now have no hesitation in setting these convictions aside.

Z. K.

*Convictions set aside.***MADRAS HIGH COURT.**

CRIMINAL REVISION CASE NO. 212 OF 1922.
(CRIMINAL REVISION PETITION NO. 187 OF 1922).

December 5, 1922.

Present :—Mr. Justice Oldfield and
Mr. Justice Ramesam.

HIS HOLINESS SRI SUKRALENDRA
THIRTHA SWAMI OF KASI MUTT—
ACCUSED—PETITIONER

versus

M. N. PRABHU—COMPLAINANT

—RESPONDENT.

*Penal Code (Act XLV of 1860), s. 499, Except.
V I I—Interdict issued by head of mutt—Defama-
tion—Caste—Swamis, powers of—Principles of
natural justice.*

Accused, the head of a mutt, on receipt of a formal accusation signed by several members of the caste stating that complainant had taken part in a dinner which disqualified him from taking part in caste functions, issued a temporary interdict against the complainant which was *prima facie* defamatory pending the issue of a final order after enquiry. It was found that, although the complainant was aware that the accusation had been preferred against him, no formal notice of the matter was given to him before the issue of the provisional interdict;

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Held, that the interdict having been issued *bona fide* to meet the urgency of the case was covered by Exception VII to section 499 of the Penal Code. [p. 169, col. 1.]

Per *Oldfield, J.*—A caste is an autonomous association, the powers vested in its constituted heads being, subject to any special custom, those necessary for the protection of the interests committed to their charge. When a dispute arises as to the proper exercise of those powers the only duty of the Court is to see whether those powers are exercised in accordance with the principles of natural justice; that is, in the majority of cases, after the person to be affected by their exercise has been heard and his defence has received fair consideration. [p. 167, col. 2.]

Per *Ramesam, J.*—It is not for the Courts to dictate the details of procedure to persons in the position of heads of a caste. [p. 170, col. 1.]

Though an interdict issued by the head of a caste against a member of the caste who is not guilty of any moral offence savours of tyranny and oppression from the point of view of an advancing community and becomes almost intolerable as the community becomes more catholic, so long as submission to the headship of a *Swami* remains the usage of the caste and the members of the community do not shake themselves off from such headship, the *Swami* is perfectly within his rights to resort to the orthodox methods of conventional discipline and of vindicating caste usage, provided principles of natural justice are not violated. The advancing community is not justified in expecting its own progressive opinions to be reflected in the immutable minds of the *Swamis* or their faithful followers, nor can they be coerced to change with the times by fear of criminal prosecution. [p. 170, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the South Kanara Division, in Criminal Appeal No. 35 of 1921, preferred against the Judgment of the Court of the Sub-Divisional First Class Magistrate, Mangalore Division, in Calender Case No. 66 of 1920.

Mr. *Nugent Grant* for the Accused:—The Accused, the head of a *mutt*, has been convicted of defamation in issuing an interdict prohibiting the community of which he was the head from social intercourse and association with certain persons for having attended a cosmopolitan dinner.

On the findings of the learned Sessions Judge, the conviction is altogether unsustainable; on his own reasoning the conclusion is wrong. The Judge found there was no excessive publication, there was no malice, that the accused had jurisdiction to issue interdicts and the procedure

adopted was not opposed to rules of natural justice, but thought the case was taken out of the Exception VII to section 499 on the view that a temporary interdict was unnecessary and improper having regard to the undertakings in the case and that a final order should have been passed without delay.

The question of the necessity or otherwise of the interdict is entirely immaterial on the *bona fides* of the *Swami*. He could not be hustled to take any precipitate course of action.

The caste dinner was coming off and the passing of a provisional order was in accordance with practice. The undertakings might or might not have been effectual or adequate. A disturbance was possible, if they were broken. The *Swami* was the sole Judge as to whether or no a provisional order was necessary. The Court has no right or jurisdiction to put itself in his place and consider the situation. A provisional order was considered urgently necessary by the religious head of the community to effectually discharge his duty to it and on the facts it was not unreasonable, and it cannot be subject of review by a Court.

There was no unnecessary delay either. The matter was one of great importance arising before him in the present form for the first time and had evoked much feeling and controversy on all sides. Difficult questions of religious and ceremonial law were raised and it is impossible to say there was any intentional delay.

The observation of the Judge as to *Queen v. Sri Vidya Sankara Narasimha Bharathi Guruswamulu* (1) not applying to the present day conditions, is manifestly wrong. The rule governing membership of caste as laid down in that case continued still to be good law.

[*RAMESAM, J.*—Your position is that continuance of membership in the community and the consequent acceptance of the headship involve submission to jurisdiction to the exercise of religious authority and discipline in all caste and social matters.]

Exactly; the conviction is clearly wrong and unsustainable.

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The Advocate-General (with him Mr. S. T. Sreenivasagopala Chariar), for the Respondent:—The *ad interim* punitive interdict without any inquiry is opposed to all rules of natural justice and is, therefore, bad. In the present case there has been no inquiry even now. His subsequent conduct *pendente lite* could be excellent evidence of his *mala fides* in issuing the prior *interim* interdict.

In the face of the undertaking, it was uncalled for and improper. Further the conduct of the accused in refusing to give a definite answer as to the date of the final inquiry is also indicative of want of good faith.

The language of the interdict is very much in excess of the purpose intended: "*Yavavidha samparkam mada kudutha, (i. e.)* association of any sort or kind is prohibited," an order much in excess of the *bona fide* necessities of the situation. The decisions establish the position that where a member of a caste or community is subjected to disciplinary order of ex-communication or the like, they can be justified only if all the rules of natural justice had been observed and the person affected had been given an opportunity to state and explain his case before an adverse order is passed.

See *Queen v. Sri Vidya Sankara Narasimha Bharathi Guruswamulu* (1); *Gompertz v. Goldingham* (2); *Krishnasami Chetti v. Virasami Chetti* (3); *Vallabha v. Madusudanani* (4); *Ganapati Bhatta v. Bharati Sami* (5); *Cuppusawmi Chetty v. Doraisawmy Chetty* (6); *Jagannath Churn v. Akari Dassia* (7).

An *interim* order of suspension without notice is also bad: see *Jagannatha Chariar v. Seenu Bhattachariar* (1); *Venkata Narayana Pillai v. Ponnusawmy Nadar* (9).

On the whole, it is submitted the language of the order is much in excess of the necessities of the purpose; it was *ad interim* and punitive in character without notice or opportunity to explain and in the face of the undertakings was unnecessary without any good faith. The conviction is, therefore, justified.

ORDER.

Oldfield, J.—I adopt the statement of facts in my learned brother's judgment, which I have had the advantage of reading, but give my own reasons for concurring in his conclusions, because the questions raised are important and may arise with increasing frequency in the future. They relate to the conditions of membership in associations, castes and sects, which as regards their adult members at least are consensual, but which probably have no counterpart in the West, because the obligations of membership in them are on the one hand so loose, that they have never been formulated by Statute or any written constitution and, on the other, so strict that their breach is visited, as in the case before us, with the severest penalties. With the advantage or stability of such social conditions I am not concerned. It is sufficient that the law which regulates the internal rights of those subject to them has been laid down clearly in *Queen v. Sri Vidya Sankara Narasimha Bharathi Guruswamulu* (1) and *Krishnasami Chetti v. Virasami Chetti* (3); and it is not disputed that these associations are autonomous, the powers vested in their constituted heads being, subject to any special custom (none being relied on in the present case), those necessary for the protection or the interest committed to their charge. The Court's only duty is to see whether those powers are exercised in accordance with the principles of natural justice; that is, in the majority of cases, after the person to be affected by their exercise has been heard and his defence has received fair consideration.

There is no dispute before us that the accused petitioner, is the head of the religious community to which complainant belongs; or that he has authority to exclude from it permanently or in appropriate cases until the offence against its customary law has been atoned for by penance; or that Exhibit F, the notice by which com-

(2) 9 M. 319; 3 Ind. Dec. (N. S.) 618.

(3) 10 M. 133; 3 Ind. Dec. (N. S.) 843.

(4) 12 M. 495; 4 Ind. Dec. (N. S.) 694.

(5) 17 M. 222; 4 M. L. J. 101; 6 Ind. Dec. (N. S.)

153.

(6) 3 Ind. Cas. 955; 33 M. 67; 19 M. L. J. 714; 6 M. L. T. 290.

(7) 21 C. 463; 10 Ind. Dec. (N. S.) 938.

(8) 51 Ind. Cas. 869; 42 M. 618; 36 M. L. J. 351; (1919) M. W. N. 240.

(9) 43 Ind. Cas. 205; 41 M. 357; 33 M. L. J. 660; (1917) M. W. N. 839; 22 M. L. T. 454; 7 L. W. 85.

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plainant's exclusion pending the passing of a further order was published, was *prima facie* defamatory. The only question before us is, whether Exhibit F was covered by Exception VII to section 499, Indian Penal Code, because, notwithstanding that complainant had not been heard, it was published in good faith, provisionally to meet the urgency of the case. It is alleged that it was not so published, because circumstances did not require a provisional order and because its provisional character was a pretence, the real intention being to exclude complainant permanently or for an indefinite period, without hearing him or passing a final order at all.

The passing of a provisional order, such as Exhibit F, without enquiry or hearing the person to be affected was, as the evidence shows, in accordance with precedent and can be justified so far as it was essential to the effectual execution of accused's power and duty to protect the interest of the community in his charge by saving its members from the risk of contamination from intercourse with one whose orthodoxy was in doubt. Even if immediate action had not been necessary on account of the communal feasts which were to take place on the day of, and two days after, the publication and which were distinct reason against delay, precautions had in any case to be taken against the wider consequences of ordinary association between the complainant and the community at large. Before the publication of Exhibit F, on the 23rd November 1920, there had been no reasonable opportunity for enquiry, because the formal representation, Exhibit III, on which accused wisely insisted before he would act, reached him only on 20th November 1920. No doubt, since complainant's alleged breach of caste law was committed on 24th October 1920 and since the matter was first brought to accused's notice shortly after 4th November 1920, there was before accused sent his reply, Exhibit XI, on 20th November 1920, an interview with 11th and 12th prosecution witnesses, who said that complainant would undertake not to attend the feasts and that a provisional interdict might be prepared for publication in case he attempted to do so. But the Court has no right to review the accused's

exercise of his discretion in rejecting this undertaking and the alternative, the issue of an interdict in case complainant broke his word would probably have been ineffectual to prevent the consequences, including very likely a disturbance, of his doing so. It is clear from the evidence that complainant's conduct raised difficult questions of fact and religious law. For in his lawyer's letter, Exhibit A, he had referred to the newspaper report of the original occurrence, a dinner at which he and Pariahs had eaten together, as false without qualification and it appears from the evidence that there was much to be said as to the exact conditions in which such intercourse would be sinful; and that some of the accused's advisers were raising the question whether any penance could be effectual. In these circumstances, there is, regard being had to the limitation on the Court's right to scrutinize the accused's proceedings, more than enough to show that they were up to this stage taken in good faith.

In fact this account of what happened has really been necessary for the appreciation of complainant's further contention that the provisional form of Exhibit F was and was intended to be a device by which the permanent or indefinite postponement of the passing of a final order after enquiry and hearing of his defence could be secured. But, in view of the circumstances already stated, the further short delay until 9th December 1920, when the complaint was filed, needs no separate justification.

No doubt the later periods until 4th October 1921, the date of the Magistrate's decision, and until 6th February 1922, that of the hearing of the appeal, both (it may be observed) unduly prolonged by those responsible for the conduct of the proceedings, passed without a final disposal by accused of the case; and they may be relied on, not as supporting directly the charge, which had been made before they began, but as evidence of accused's original intention. But they go very little, if any, way towards establishing what complainant requires and what, the form of Exhibit F being provisional, it is for him to prove. In that sense there is nothing

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direct to support him, his evidence going no further than that, when 11th, 12th and 18th prosecution witnesses apparently on 30th November 1920 and 1st December 1920, remonstrated with accused and asked whether he would hold an enquiry, say within a year, he gave them no answer, a natural course when it is remembered that this prosecution had already been threatened and that such enquiries were inconsistent with respect for his spiritual supremacy. After the complaint, which was made mainly without reference to the failure to hear complainant and on the ground that the interdict was unjustifiable on its merits, accused may well have hesitated before proceeding to a final sentence, which might be regarded as an aggravation of what he had done. It may be true that, as 18th prosecution witness says, he represented, there have in the past under accused's predecessors, been cases, in which the interval between the provisional and final orders was long enough to raise suspicion as to the intention of the former. But that is not sufficient to justify the affirmative conclusion, for which complainant contends and which he can support only on the negative ground, of a delay which is intelligible in the circumstances of the case. It is not, in those circumstances, possible to hold that the accused intended the order, Exhibit F, to be other than provisional, or that he acted in bad faith. The result is that Exception VII to section 499 is applicable and that the conviction and sentence must be set aside, the fine, if levied, being refunded.

Ramesam, J.—This is a revision petition filed against the order of the Sessions Judge of South Kanara, confirming the conviction and sentence by the first Class Magistrate of Mangalore under section 500 of the Indian Penal Code (Defamation). The accused is the petitioner. He is the head of the Kasi Mutt in South Kanara District, and a section of Gowd Saraswat Brahmins are the disciples of the Mutt.

On 24th October 1920, in celebration of the 56th Anniversary of the Brahmo Samaj, there was a dinner at which about 150 people of all castes, including Pariahs, Muhammadans and Christians, were present. There were also three Gowd Saraswat Brahmins, two of whom were Messrs.

M. N. Prabhu (the complainant) and M. Mahadeva Rao, Vakils, practising at Mangalore. The dinner was by invitation and it appears that no Pariahs were invited nor were any Pariahs named on the list of invited guests. Mr. Prabhu was in the row opposite to the one in which Pariahs sat. An account of the dinner appeared in the local vernacular paper—*Kantirava* (Exhibit I dated 26th October 1920). This was followed by a memorial (Exhibit II dated 29th October 1920) signed by more than a hundred people of the Gowd Saraswat community to the Mukteessars of Sri Venkataramana Temple in Mangalore, calling attention to the report in the paper and to the fact that three members of their community had been present at the dinner and requesting the Mukteessars to take action lest those persons should attend the temple dinners, which were to come off on November 23rd and 25th and there should be a disturbance. The Mukteessars then called a meeting (Exhibit VIII) for November 2nd and at the meeting a resolution was passed that the Memorial should be forwarded to the *Swamis* of the Kasi and Gokarna Mutts for disposal. The resolution was confirmed at another meeting and the memorial was forwarded by Exhibit XIII dated 4th November 1920 to the accused who happened there to be at Mangalore. On the 14th November Messrs. Prabhu and Mahadeva Rao addressed Exhibit S to one Mr. Vencoba Rao (P. W. No. 12) in which, after referring to the caste trouble now pending before the *Swami* of Kasi Mutt, they gave an undertaking not to attend the temple dinners or even enter the temple premises during the *Kartika Pournami* celebration (November)—without prejudice to any action they may be advised to take in the matter in future. The 11th and 12th witnesses for the prosecution had about this time two interviews with the accused. The first one was on the invitation of the accused. The second one was three or four days afterwards. Between the two, Mr. Prabhu met Mr. Srinivasa (P. W. No. 11) and told him of his willingness to do Prayachittam, if necessary, and to request the *Swami* not to issue an interdict. P. W. Nos. 11 and 12 at their interviews did their best to induce the *Swami* not to take any

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strong course of action against Mr. Prabhu. Mr. K. Sadasiva Rao, an Advocate of Mangalore also sent Exhibit A (dated 16th November 1920) to the *Swami* on behalf of Messrs. Prabhu and Mahadeva Rao, complaining that the report in *Kantirava* was false and malicious (but without giving any particulars as to the matters in respect of which the report was inaccurate) and warning that the *Swami* will be held wholly and solely responsible in law if he should issue, arbitrarily and without full enquiry and before hearing what his clients have to say in the matter, any interdict against them. On the 20th November the accused replied to Exhibit XIII by calling for the original Memorial and a *mucchilakka* (a statement) solemnly affirming the facts stated in the paper. Exhibit III dated 20th November 1920, a statement signed by a number of persons confirming the report in the paper, was accordingly sent to the accused. The interdicts, Exhibits F and H, were thereupon issued on the 23rd November. They purport to be *interim* orders and are to remain in force until a second order is issued.

The present complaint was launched on 8th December. The Sessions Judge finds (1) that there was no excessive publication, (2) that there was no violation of the principles of natural justice in the procedure adopted by the accused, and (3) that a temporary interdict was unnecessary and that a final order without unnecessary delay ought to have been issued once for all. On this last ground, he held that the accused did not act in good faith and affirmed the conviction.

Taking up this last ground I am unable to concur with the learned Sessions Judge. It is not for the Courts to dictate the details of the procedure to persons in the position of the accused. Considering that there was conflict of opinion as to how far the action of Messrs. Prabhu and Mahadeva Rao was reprehensible and that the matter was urgent, as the temple dinner was to come off on the 23rd, it cannot be said that temporary interdicts (like Exhibits F and H) were not called for. On the other hand, the very fact that the accused was not in great haste to make up his own final opinion one way or the other argues in favour of the view that he was acting

with great caution. Though society has marched far (one would think it is not very far) since 1883, the law as laid down in *Queen v. Sri Vidya Sankara Narasimha Bharathi Guruswamulu* (1) has not changed and it cannot be said that greater promptitude is required from caste authorities in 1920 than in 1883. It must be remembered that, though action like that of the accused savours of tyranny and oppression from the point of view of an advancing community and becomes almost intolerable as the general community becomes more catholic, so long as submission to the headship of a *Swami* remains the usage of the caste and the members of the community do not shake themselves off from such headship, the *Swami* is perfectly within his rights to resort to the orthodox methods of conventional discipline and of vindicating caste usage, provided principles of natural justice are not violated. The advancing community is not justified in expecting its own progressive opinions to be reflected in the immutable minds of the *Swamis* or their faithful followers nor can they be coerced to change with the times by fear of criminal prosecution.

The learned Advocate-General, who appeared for the complainant attempted to support the conviction on two grounds:— (1) that the interdicts were issued without due notice to Mr. Prabhu and in effect, without giving him an opportunity of being heard, and (2) that the temporary interdict was really intended to be permanent, as no final order has yet been issued. As to the first ground, the interview of P. W. Nos. 11 and 12 with the accused and the notice (Exhibit H) sent by Mr. Sadasiva Rao show that Mr. Prabhu anticipated the action of the *Swami* and had an opportunity of making such representation to him as he thought fit and it must be held that, for the purpose of a temporary order at least, the absence of a more formal notice could not be taken as indicating want of good faith.

As to the second it is enough to observe that it cannot be said that a reasonable time for a complete enquiry had elapsed by the time the prosecution was launched. It is true that no final order has been issued up to date. The Counsel for the accused

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explains that this is due to the present Proceedings. Though the explanation is not such as a man of business should advance I still think it is true. The Advocate-General says that when the accused was asked to state when he would hold his final enquiry, he did not give any answer. It is difficult to hold that he was bound to give an answer to such a question especially having regard to the manner in which it was put to him. Any how, the materials on the record are totally inadequate to enable me to come to the conclusion that it was clear by the 8th December that the accused had no intention to hold the final enquiry within a reasonable time.

In my opinion no offence has been made out and the conviction and the sentence must be set aside. I only wish to add, I have no doubt that Mr. Prabhu had been the victim of an oppression nothing short of cruel and he has all my sympathy. I do not in the least sympathise with the accused or his followers. The fault lies in the social system of which Mr. Prabhu is a member and the sooner one sets about to improve it the better, and it is futile to attempt to make persons like the accused responsible for the persecution.

Z. K. *Conviction & Sentences set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION NO. 374 OF 1921.

October 19, 1921.

Present:—Mr. Justice Das.

Mahant SATURHAN DAS AND ANOTHER
—PETITIONERS

versus

MAKHAN DAS AND OTHERS—OPPOSITE
PARTY.

*Criminal Procedure Code (Act V of 1898),
s. 144 (4)—Jurisdiction to rescind or alter order,
nature cf.*

The jurisdiction conferred by clause (4) of section 144 of the Criminal Procedure Code upon a Magistrate to rescind or alter an order made

under the section by himself or by any Magistrate subordinate to him or by his predecessor-in-office is neither Appellate nor Revisional jurisdiction. It is a special jurisdiction conferred by a special provision in a Statute.

Application against the order of the Deputy Commissioner, Hazaribagh.

Messrs. H. L. Nandkeolyar and G. C. Pal,
for the Petitioner.

Messrs. S. P. Varma and S. Saran,
for the Opposite party.

JUDGMENT.—This application is directed against an order passed by the learned Deputy Commissioner of Hazaribagh on the 22nd July last. It appears that there are considerable disputes between the parties in regard to Chauni Akhra, and Maulvi Riyassik Karim, one of the Magistrates in Hazaribagh, drew up proceedings under section 144 of the Criminal Procedure Code against both the parties. The matter came up before the learned Deputy Commissioner under section 144, clause (4), and he rescinded the order passed by the learned Deputy Magistrate under section 144 and directed the learned Deputy Magistrate to draw up proceedings under section 145. Mr. Nandkeolyar appearing on behalf of the petitioners urges before me first that the learned Deputy Commissioner had neither revisional nor appellate jurisdiction in the matter and that, consequently, his order ought to be set aside and, secondly, that he had no jurisdiction to direct the learned Deputy Magistrate to draw up proceedings under section 145 of the Code. Now, it may be conceded at once that there is neither revisional nor appellate jurisdiction in the Magistrate under clause (4) of section 144 of the Code, but there is still a jurisdiction to rescind or alter any order made under section 144 either by himself or by a Magistrate subordinate to him or by his predecessor-in-office. It seems to me that it is useless to enter into a controversy as to the exact jurisdiction exercisable by the Magistrate under clause (4). It is sufficient to say that it is a special jurisdiction under special Statute and the Statute gives him ample power to rescind or alter any order made under section 144 either by himself or any Magistrate subordinate to him or by his predecessor-in-office. The learned Deputy Commissioner was satisfied that there was a question of possession to be tried between the parties and, in my opinion, he was entirely

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right in rescinding the order passed by the learned Deputy Magistrate.

The next point is, had he any jurisdiction to direct the learned Deputy Magistrate to draw up proceedings under section 145 of the Code? It seems to have been held in various cases that he has no such power, but in my opinion the point is without any substance. It is merely a question of words; nothing more than that. The proper order to pass in such a case would be to say that if the learned Deputy Magistrate thinks that any action is still necessary he will proceed under section 145 of the Code and not under section 144. If no action has in the meantime been taken either by the learned Deputy Commissioner or by the learned Deputy Magistrate, then the learned Deputy Magistrate will proceed under section 145 of the Code if he considers that it is still necessary to proceed in the matter.

Z. K.

Order accordingly.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 330 OF 1922
CRIMINAL REVISION PETITION NO. 287
(OF 1922).

November 15, 1922.

Present.—Mr. Justice Krishnan.

In re P. S. VELAYUTHAM CHETTY—

ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), ss. 403, 406—Goods delivered in pursuance of contract—Denial of receipt—Offence—Judgment of Civil Court, admissibility of.

Where goods are delivered to a person in pursuance of a contract for their purchase, there is no entrustment which would give rise to a trust and the mere fact that the person denies receipt of goods delivered does not render him guilty of an offence either of criminal misappropriation or criminal breach of trust. [p 173, col. 1.]

Obiter.—A decision of a Civil Court is admissible in evidence to disprove an allegation on the truth of which the guilt of a person in a criminal case depends. [p. 173, col. 1.]

Markur, In re 33 Ind. Cas. 633; 41 B. 1; 18 Bom. L. R. 185; 17 Cr. L. J. 153, relied on.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898,

praying the High Court to revise the judgment of the Court of the Second Presidency Magistrate, George Town, Madras, in Calendar Case No. 7381 of 1921.

Mr. Nugent Grant, for the Petitioner.

Mr. K. V. Madhavan Nair, for the Crown Prosecutor, on behalf of the Crown.

ORDER.—This is an application to revise the conviction and sentence passed upon the accused by the Second Presidency Magistrate, George Town, in Calendar Case No. 7381 of 1921 on his file. The accused has been convicted of criminal breach of trust under section 406, Indian Penal Code, and sentenced to four months' rigorous imprisonment by the Magistrate.

It is contended by the learned Counsel for the accused that his client is not guilty of any offence on the facts found by the Magistrate.

The facts of the case as found by the Magistrate are as follows:—The accused entered into two contracts with the firm, of which complainant is a clerk, for the delivery to him of 400 bags of castor seeds of a particular kind at Rs. 16 per bag; each bag weighing 165 lbs. and again for the delivery of 300 bags of another kind of castor seeds at the rate of Rs. 15 per bag, here also each bag was to weigh 165 lbs. The delivery in each case was to be at Royapuram. With reference to these two contracts, all but 200 bags under the first contract was delivered. The only dispute in this case is about these 200 bags. The complainant asserted that those bags had been delivered at the accused's godown. The accused denied receipt of those bags. The Magistrate held on the evidence in the case that the 200 bags were actually delivered as the complainant asserted; and as the accused denied delivery of those bags, he came to the conclusion that the accused has committed the offence of criminal breach of trust, and has convicted him of that offence.

In the first place, it may be mentioned that about the same time when the criminal case was going on, there was a civil suit filed in the High Court by the complainant firm for the value of these 200 bags alleged to have been delivered, or, for the return of the bags. That case was decreed by the learned Judge on the Original Side, and the decree has been filed in this case as Exhibit

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XVI. That decree is for the payment of the price of the bags. On appeal, it is stated before me, and it is not contradicted by the other side, that a Bench of this Court came to the conclusion that the alleged delivery of the 200 bags to the accused was not true. If I were to accept this as the basis of my judgment now, there can be no doubt that the conviction is clearly, wrong, as the very foundation of it, namely, the alleged delivery of the 200 bags, is gone; and there is authority in favour of admitting such judgment in evidence in *Markur, In re* (1). But I do not propose to rest my judgment on that authority. Taking for the purposes of this case that the finding of the Magistrate that the 200 bags were delivered is correct, even then it is clear that no kind of criminal offence has been committed, the matter being one purely in the nature of a civil dispute. The 200 bags were delivered in pursuance of a contract for their purchase. No doubt, there was an undertaking between the parties that the bags were to be weighed to ascertain whether they contained 165 lbs., but this was entirely for the purpose of ascertaining the actual price to be paid for the quantity of goods delivered. It did not in any way affect the delivery that was made in pursuance of the contract, and, on delivery of the goods, it was entirely open to the accused to insist upon weighing, or, to waive it, if he thought fit to do so, and to accept the bags as containing 165 lbs., as the complainant firm sent them. I do not think the Magistrate was right in thinking that the weighing had anything to do with the passing of the property. When the goods were delivered, they were appropriated for the contract, and all that remained to be done was to ascertain the actual amount of money to be paid, the rate being already fixed by contract. The Magistrate says that the mere delivery of possession was an entrustment which would give rise to a trust. That cannot be so in a case where the delivery is made in pursuance of a contract to deliver at a fixed price, and his view that there was a breach of trust is entirely unsupportable. It is not possible even to hold that any criminal misappropriation, which is a lesser

offence than breach of trust, was committed in this case, for, if the goods become the goods of the accused, when they were delivered to him, there can be no misappropriation at all of those goods. In this view, the conviction even on the finding of the Magistrate is untenable. It follows, therefore, that the accused should have been acquitted. It seems to me that this case was merely an attempt on the part of the complainant to convert a civil dispute into a criminal case and to try to bring pressure on the accused to pay up the value of the 200 bags.

The conviction of the accused is set aside, and his bail-bond is cancelled.

V: N. V.

Conviction set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 548 OF 1922.

August 2, 1922.

Present:—Justice Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Chotzner.
CHANDI CHARAN MITRA—PETITIONER
versus

MANINDRA CHANDRA ROY CHOWDHURY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 202, 203—Postponement of issue of process—Notice to show cause to accused—Improper and irregular procedure.

The petitioner made a complaint to a Magistrate against the opposite party with regard to the cutting and removal of certain paddy. The Magistrate directed notice to be served upon the opposite party to show cause why process should not issue against him. Thereupon the opposite party put in a petition and a Pleader appeared for him and showed cause why process should not issue. The result was, that no process was issued and the complaint was dismissed.

Held, that the Magistrate did not act in accordance with the provisions of the Criminal Procedure Code as laid down in sections 202 and 203 and the procedure adopted by him was improper and irregular.

Criminal revision against the order of the Sessions Judge, Rungpur, dated the 9th May, 1922, affirming that of the Sub-Deputy Magistrate, Rungpur, dated the 15th March 1922.

(1) 33 Ind. Cas. 633; 41 B. L. 18 Bom. L. R. 125; 17 Cr. L. J. 153.

GHANDI CHARAN MITRA v. MANINDRA CHANDRA ROY.

Babus Rishindra Nath Sarkar and Sudhansu Sekhar Mukherjee, for the Petitioner.

Babus Manmatha Nath Mukerjee and Debendra Narain Bhattacharjee, for the Opposite Party.

JUDGMENT.

Sanderson, C. J.—This was a Rule issued by two of my learned brothers, Mr. Justice Walmsley and Mr. Justice C. C. Ghose, and obtained by the complainant calling upon the District Magistrate and on the opposite party to show cause why the orders complained of should not be set aside.

The facts of this case, so far as they are necessary for me to state for the purpose of my judgment, are these :

The complainant made a complaint against certain persons with regard to the cutting and removal of certain paddy and the allegation was that the paddy was removed by certain Barkandazes with the connivance or at the instigation of Manindra Chandra Roy Chowdhury who was called accused No. 1. It was alleged by the complainant that one of the persons who actually cut and removed the paddy was one Mokimuddin. The Magistrate who took cognizance of this case asked for a report and on receipt of the report issued a summons against Mokimuddin only. The Sub-Deputy Magistrate, to whom the case was made over for disposal, after hearing the evidence which the complainant produced dismissed the case against Mokimuddin on the ground, as I understand, that there was not sufficient evidence to identify Mokimuddin with regard to this alleged offence. Then the complainant desired to proceed against the accused No. 1, Manindra Chandra Roy Chowdhury, who was the *zemindar* of the complainant. The Sub-Deputy Magistrate then directed notice to be served upon Manindra Chandra Roy Chowdhury to show cause why process should not issue against him. Cause was shown by Manindra Chandra Roy Chowdhury. We were informed by the learned Vakil who showed cause in this Rule, that a petition was put in by Manindra Chandra Roy Chowdhury and that a learned Pleader appeared for him and showed cause why process should not issue. The result was that the Sub-Deputy Magistrate came to the following conclusion, to use his own words: "I do not find any reason to issue

any process against Manindra Babu." I assume that that amounted to an order dismissing the complainant's complaint as against Manindra Chandra Roy Chowdhury.

Thereupon the complainant applied to the learned Sessions Judge for the purpose of setting aside the order of the Sub-Deputy Magistrate and that application was dismissed, although the learned Sessions Judge came to the conclusion that the procedure adopted by the Sub-Deputy Magistrate in calling upon Manindra Chandra Roy Chowdhury to show cause why he should not be proceeded against, was improper and irregular. The learned Sessions Judge came to the conclusion on the facts that there was no case against the first accused and consequently he dismissed the application.

I agree with the learned Sessions Judge that the procedure adopted in this case as between the complainant and Manindra Chandra Roy Chowdhury was improper and was not in accordance with the provisions of the Code of Criminal Procedure. My learned brother Mr. Justice Walmsley and I had to consider a case, in which a similar point arose, see *Balai Lal v. Pashupati Chatterjee* (1). I desire to draw the attention of the Magistrate to that case. I refer to two passages in the judgment in that case which are to be found at page 608* or 129† in the (other) report. they are as follows :

"The second irregularity which is relied upon was that the learned Magistrate did not confine himself to the evidence of the complainant and the report which was made by the Police Officer but that he allowed the accused to be represented by a learned Pleader and to address him to argue the points which arose in the case and to put in a detailed statement of the points and the facts upon which the defence relied.

"To my mind this procedure is quite inconsistent with the scheme of this Legislation: I do not understand how the accused person ever goes before the Magistrate until the Magistrate has made up his mind to issue process. The Magistrate is directed by the Statute to enquire into the case in certain specified ways, and then having investigated the matter in one or other

(1) 35 Ind. Cas. 828; 25 C. L. J. 606; 21 C. W. N. 127; 17 Cr. L. J. 396.

*Page of 25 C. L. J. [Ed.]

†Page of 21 C. W. N.—[Ed.]

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of the specified ways, he is to decide whether process ought to issue, and then if he thinks that process ought to issue he should direct process to issue. Then the accused person appears, and if he has got a defence, his defence is investigated as well as the case for the prosecution. That being so, it appears to me that the learned Magistrate has not acted in this case in accordance with the procedure which is laid down by the Criminal Procedure Code."

In this case I am of opinion that the Magistrate did not act in accordance with the provisions of the Criminal Procedure Code as laid down in sections 202 and 203 of the Criminal Procedure Code, and the learned Sessions Judge was quite right in saying that the procedure was improper and irregular. I hope that the judgment, which we are delivering in this case and the judgment which this Court delivered in the case of *Balailal v. Pasupati* (1), will be brought to the notice of Magistrates and that they will observe in this respect the plain provisions of the Code of Criminal Procedure. If Magistrates do not comply with the provisions in the Code, the inevitable result is that Rules are applied for in this Court and they have to be granted because the Magistrates do not follow the provisions of the Code of Criminal Procedure, and much time is unnecessarily wasted.

In this case we do not intend to send the case back for further investigation, and we propose to discharge the Rule on the ground that the two lower Courts, that is, the learned Sessions Judge and the Sub-Deputy Magistrate, both came to the conclusion on the facts of the case that there was no ground for the complaint against the first accused; and having regard to additional matters which have been brought to our notice at the hearing of this Rule, I am of opinion that it will be mere waste of time to direct this case to be reheard. As far as it is possible to foresee, the result would be the same if we were to send this case to the Magistrate for rehearing. Although we are not sending the case back to the lower Court, it must not be understood that we approve of the procedure which was adopted in this case.

The Rule is discharged.

Chotzner, J.—I agree.

B. N.

Rule discharged.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 728 OF 1922.

December 20, 1922.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

In re KUPPUSWAMY NAIDU—

PETITIONERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 5 (2), Ch. XIV—Madras Abkari Act (I of 1886), ss. 40 to 47, 55—Offence under Abkari Act—Investigation—Procedure.

Section 5 (2) of the Criminal Procedure Code governs and controls Chapter XIV of the Code.

Lakshmi Narasayya v. Narasimhachari 21 Ind. Cas. 685; (1913) M. W. N. 1000; 25 M. L. J. 577; 14 Cr. L. J. 637, relied on.

Under the Madras Abkari Act, the accused person has the right to a special procedure regulating the course of investigation and from the moment the suspected person is arrested and produced before the Abkari Officer, the Abkari Department alone has the conduct of the proceedings.

The Police have, therefore, no right to file a charge-sheet or otherwise to proceed under Chapter XIV of the Criminal Procedure Code in respect of an offence under the Abkari Act, and proceedings so instituted by a charge-sheet by the Police, are without jurisdiction and liable to be set aside by the High Court in revision.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the 3rd Class Magistrate of Cheyyar Taluk, in Calendar Case No. 240 of 1922.

Mr. V. N. Kuppu Rao, for the Petitioners.

Mr. J. C. Adam, (Public Prosecutor), for the Crown.

ORDER.—In this case we are asked to exercise our powers of revision and to set aside what is referred to as an order by the 3rd class Magistrate of Cheyyar Taluk, holding that he has jurisdiction to go on with a case and rejecting the petition from the accused, petitioners here, for discontinuance of the proceedings on a complaint pending against them. We are not clear what section of the Criminal Procedure Code authorised the passing of a formal order at the stage in question or that it was necessary or advisable that such an order should be passed. If the Magistrate proceeded without jurisdiction, that would be a ground for appeal, which could be dealt with by the Appellate Court in case the proceedings ended in a conviction. As, however, the matter is before us, we deal with it on the merits.

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The case against the accused was instituted on a charge-sheet alleging that they had committed offences punishable under section 55 of the Abkari Act I of 1886. It is sufficient for our purpose that all the accused before the Court were arrested by the Police after investigation by the Police into the case. The charge-sheet had been filed with reference to Chapter XIV of the Criminal Procedure Code. The ground, on which the Magistrate was asked to discontinue the proceedings was, that the Police had no right to file a charge-sheet or otherwise to proceed under Chapter XIV of the Criminal Procedure Code in respect of an offence under the Abkari Act, because Chapter XIV of the Criminal Procedure Code is controlled by section 5 (2) of the Code and this is an offence under a special law, which can be investigated and tried only according to the provisions of that law. We assume for the purpose of the present case that the offence defined in section 55, Abkari Act, is a cognisable offence. We have been shown no authority directly in point. But we think that on general grounds, if section 5 (2) is to be given effect to, the decision must in the present proceedings be in favour of the petitioners. If the question were merely of a charge of an offence under a special Act, made after an investigation carried on in the ordinary way and not differing in material particulars from the investigation, after which offences under the Penal Code are charged, our conclusion might be different. But in fact under the Abkari Act the accused person has the right to a special procedure regulating the course of the investigation; and in the absence of any statement that this right has been respected by the Police, we must hold that he has been obliged to forego it owing to the Police holding the investigation instead of the Abkari Officers, who would, it is to be presumed, proceed in accordance with the Abkari Act.

The proceedings, preliminary to the filing of a charge under the Abkari Act, begin with the steps provided in section 40 for securing the production of the suspected person before the Abkari Officer, who has jurisdiction to enquire into the case, by whomsoever the arrest has been made, whether by the Abkari Officer or Police Officer or any of the persons specified in

section 31. From that point, the Act contemplates that only the Abkari Department shall have the conduct of the proceedings and in the succeeding sections 41 to 47, there is provision for a much more formal enquiry than any contemplated in Chapter XIV, Criminal Procedure Code. There is, no doubt, no explicit statement, so far as we can see, in those sections that the accused is to be present at that enquiry or is entitled to cross-examine the witnesses or submit his contentions. But we are told that in fact the practice is to allow him to do so; and in any case these sections direct a much more elaborate enquiry than is provided for in the Criminal Procedure Code, giving much more definite powers to the Abkari Officer who holds that enquiry, and in some sections for instance sections 42 and 43, making the intervention of an officer of a certain status in the department obligatory. In these circumstances the submission of the charge-sheet by the Police Officers instead of the Abkari Officers, presumably in accordance with the Police instead of the Abkari Procedure, has, in our opinion, placed a considerable disability on the accused, depriving them of the procedure, to which they would ordinarily be entitled.

That being so, we cannot hold that the offence here has been investigated according to the provisions of the special law, the Abkari Act. The case, it seems to us, is similar to *Lakshmi Narasayya v. Narasimhachari* (1), although there is no distinct reference in the judgment to section 5 (2), Criminal Procedure Code. Taking this view we decide that the lower Court's order and the submission to it by the Police of the charge-sheet offend against section 5 (2), which for the present purpose must be regarded as controlling Chapter XIV. We must, therefore, set aside the lower Court's order on the ground that there are no proceedings properly instituted by means of any legal complaint or charge-sheet before it. It will be for the Magistrate in communication with the Abkari Department to consider whether the proceedings can be revived on the latter presenting a proper charge-sheet.

V. N. V.

Order set aside.

(1) 21 Ind. Cas. 685; (1913) M. W. N. 1000; 25 M. L. J. 577; 14 Cr. L. J. 637.

MOTI SAGAR v. DHANNA MAL.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 924 OF 1918.

March 17, 1922.

Present:—Mr. Justice Broadway and

Mr. Justice Abdul Qadir.

Rai Sahib Lala MOTI SAGAR—

PLAINTIFF—APPELLANT

versus

DHANNA MAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Unregistered document—Admissibility in evidence—Collateral purpose—Oval evidence, whether admissible—Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Erroneous decision on question of law—Landlord and tenant—Tenancy, permanent—Burden of proof—Origin of tenancy, meaning of—Improvements—Compensation—Appeal, second—Questions of fact and law.

A Court must decide whether the purpose for which it is sought to use an unregistered document is really a collateral one or is to establish directly title to the property sought to be conveyed by the document. [p. 180, col. 1.]

An unregistered deed of lease is not admissible in evidence to prove that the property to which it relates was let for a term of years, nor can the terms of the lease be proved in such a case by oral evidence. [p. 181, col. 1.]

Niatar Mal v. J. Rank, 63 Ind. Cas. 90, followed. (Case-law discussed.)

In deciding whether a decision in a former suit does or does not operate as *res judicata* in a subsequent one the facts of each case must be considered. [p. 181, col. 2.]

An erroneous decision on a question of law cannot be allowed to operate as *res judicata* so as to prevent a Court from deciding the same question on its arising between the same parties in a subsequent suit in accordance with law. [p. 183, col. 2.] (Case-law discussed.)

The question whether a tenancy is a permanent one or a tenancy-at-will, if not a question of law, is certainly a mixed question of law and fact and as such is open to examination in second appeal. [p. 183, col. 2.]

Surendra Nath v. Dwarika Nath, 35 Ind. Cas. 605; 44 C. 119; 24 C. L. J. 350; 21 C. W. N. 530, *Mohoram Sheikh Chaprasi v. Telamuddin Khan*, 13 Ind. Cas. 605; 15 C. L. J. 220; 16 C. W. N. 567, *Krishna Kishore Neogi v. Mir Mahomed Ali*, 3 C. W. N. 255 and *Sulatu Dass v. Jadu Nath, Das* 8 C. W. N. 774 at p. 775, relied upon.

The onus of proving the permanent nature of a tenancy lies upon the person asserting it. [p. 183, col. 2.]

The expression "origin of the tenancy" means something more than commencement, though it may also include that term. It means the circumstances in which the tenancy was created. [p. 184, col. 1.]

Long possession of a tenure by a tenant and his ancestors, and the landlord having permitted them to erect substantial structures, which have been added to by successive tenants, and the transfer of the tenure from time to time by succession and purchase, with the permission of the landlord,

express or implied, may warrant the presumption that the tenure is of a permanent character. [p. 185, col. 1.]

A similar presumption may also arise when it can be definitely found that land had been leased for building purposes. [p. 185, col. 2.]

But in coming to a decision as to whether a tenancy is of a permanent nature in any particular case it is on the facts of that case alone that the decision must be arrived at. [p. 185, col. 2.]

(Case-law discussed.)

As a general rule if a tenant-at-will chooses to erect buildings on land leased to him he does so at his own risk. [p. 186, col. 1.]

Second appeal from a decree of the District Judge, Delhi, dated the 18th December 1917, reversing that of the Senior Subordinate Judge, Delhi, dated the 5th January 1917.

Bakhshi Tek Chand and Lala Durga Das, for the Appellant.

Mr. C. Bevan Petman and Lala Sardha Ram, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen relates to a plot of land 2,200 square yards in area situated in one of the by-lanes in the Sadar Bazar at Delhi. This land originally belonged to one Hafiz Banna alias Khuda Bakhsh, and in 1871 was owned by Karim Bakhsh, son of Khuda Bakhsh, and others. In 1875 a partition took place between the proprietors and this plot of land was allotted to Mohammad Mirza, Musammats Anwar Jahan and Mehr Jahan. At the time of this partition certain buildings existed on the plot in question which belonged to Desraj-Khemraj, who, it is alleged, had taken the land on lease and had built thereon. In 1899 Rai Bahadur Sagar Chand secured a mortgage of an annas thirteen pies eight share of this land. Subsequently, he brought a suit on the strength of this mortgage, had the mortgaged property put up for sale, and, with the sanction of the Court bought it himself on the 19th July 1901. The necessary sale certificate was issued to him on the 16th December 1903. On the 15th August 1903 the said Rai Bahadur Sagar Chand purchased the remaining annas two pies four share from the owner Abdul Gafur. Abdul Gafur was a minor and the sale by him was sanctioned by the Court.

As has been stated above, certain buildings existed on this land in 1875 which buildings belonged to Desraj-Khemraj. On the 23rd August 1885 Lachman Das, suc-

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cessor of Desraj-Khemraj, sold the *amla* (buildings) to Mool Chand, Thaker Chand, Lahouri Mal, Parmeshari Das and Raghubar Dyal, for Rs. 4,000, *vide* Exhibit P-31, a registered deed of sale. In this deed of sale, while the vendors covenanted for title so far as the structures and Cotton Presses were concerned, they specifically refused to covenant for title so far as the land was concerned.

On the 26th of January 1904, *Rai Bahadur* Sagar Chand issued a notice to Mul Chand, Ghamandi Lal and Thana Mal, who were the representatives of the purchasers of the *amla*, demanding an increase of rent from Rs. 12-8-0 to Rs. 25 and calling upon them to vacate the site if they did not wish to pay the enhanced rent. On the 19th January 1905, *Rai Bahadur* Sagar Chand instituted a suit against Mul Chand, etc., for rent at the enhanced rate from 1st March 1904, to date of suit.

The defendants pleaded that they were permanent tenants and that the rent was not liable to enhancement. The Trial Court decreed the suit holding that the tenancy was not a permanent one and the rent could be enhanced. The defendants appealed, and the learned Divisional Judge, while remarking that he was disposed to differ from the view taken by the Trial Court on the question of the permanency of the tenancy, held that whether the tenancy was a permanent one or not the rent was liable to enhancement. The decree passed was, therefore, maintained.

Rai Bahadur Sagar Chand attempted to get a review of this judgment by the Divisional Judge on the question of the nature of the tenancy. The learned Divisional Judge, however, rejected the application for review on the ground that it did not lie.

Since the decree the tenants have continued to pay rent at the enhanced rate of Rs. 25 per month. In 1911 a portion of the *amla* was destroyed by fire. On the 25th May 1911, the owner of the site issued a notice to the tenants warning them against re-erecting the buildings without permission.

In spite of this, however, the tenants re-built them. On the 10th November 1913, *Rai Sahib* Moti Sagar, son of *Rai Bahadur* Sagar Chand, sent a notice to the tenants calling upon them to remove their

buildings by the 31st December 1913, and warning them that, in the event of their not doing so, they would be ejected and would have to pay rent in the interval at the rate of Rs. 200 per mensem.

On the 9th July 1915, *Rai Sahib* Moti Sagar instituted the present suit in which he prayed for the ejectment of the tenants-defendants and for recovery of Rs. 1,700 being rent for seventeen months at the rate of Rs. 100 per mensem.

The defendants pleaded that the tenancy was a permanent one and that the rent was not liable to enhancement. It was also pleaded that the decision in the former suit operated as *res judicata* on the question of the permanency of the tenancy.

The Trial Court held that the former suit did not operate as *res judicata* and that the tenancy was not a permanent one. The plaintiff was, therefore, granted a decree for ejectment, the defendants being given one year within which to remove their buildings. The rent was decreed at the rate of Rs. 50 per mensem.

The defendants appealed to the District Judge and the plaintiff filed cross-objections as to the rent decreed.

The learned District Judge found that the tenancy was a permanent one and the defendants were not liable to ejectment and also that the rent was not liable to be enhanced. The plaintiff's suit being thus dismissed, he has come up to this Court in second appeal through Messrs. Tek Chand and Durga Das while Mr. Bevan Petman has addressed us on behalf of defendants-respondents.

The first point argued at the Bar was as to the admissibility of the document Exhibit P-12, dated the 10th January 1871. This document purports to be a lease executed by one Ghasi Ram on behalf of Desraj-Khemraj in favour of Karim Bakhsh, etc., the owners of the site, and contains a recital that the land had been leased for a period of five years for the purpose of having a Cotton Press built thereon. The rent settled was Rs. 12 per mensem. This document was not registered. Mr. Tek Chand contended that, as it did not amount to a lease, registration was not compulsory. He drew our attention to *Beni v. Purn Das* (1) where it was held that a unilateral docu-

(1) 27 A. 1901 A. W. N. (1904) 212.

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ment of this nature was not a lease and, therefore, not compulsorily registrable. At the same time, the learned Vakil drew our attention to a Full Bench decision of the Madras High Court reported as *Syed Ajam Sahib v. Ananthanarayana Aiyar* (2) which took an opposite view. To the same effect is a decision reported as *Kantipudi Somayya v. Khataya Begam* (3). We have considered the authorities cited and Mr. Tek Chand's arguments, and have no hesitation in holding that the document in this case is a lease and, as such, is compulsorily registrable.

It was next contended that, even if this document required registration, it was admissible for the purpose of proving the nature and character of the possession held by the defendants since the year 1871, i.e., whether the tenancy was a permanent one or a tenancy-at-will. In support of this contention reliance was placed on *Varada Pillai v. Jeevarathnammal* (4); *Jhamphu v. Kutramani* (5); *Venkatachari v. Rangaswami Iyengar* (6); *Ram Sarup v. Suraj Din* (7); *Raghoba v. Palhoba* (8); *Thakore Fatesingji v. Bamanji* (9); *Basdeo v. Behari Lal* (10); *Jagannath Marwari v. Chandni Bibi* (11) and *Rajah of Venkatagiri v. Narayan Reddi* (12).

In *Varada Pillai v. Jeevarathnammal* (4) the plaintiffs sought to establish their title in certain lands and the defence set up was a gift followed by possession which possession had ripened into full ownership by the lapse of time. The gift had been effected by means of certain petitions

filed by the donors and donee in accordance with which the Collector had registered the land in the name of the donee. These petitions being unregistered could not be admitted in evidence to prove the gift, but it was held that they could be "referred to as explaining the nature and character of the possession thenceforth held by" the donee, (p. 251*).

In *Jhamphu v. Kutramani* (5) one of two joint owners of certain immoveable property executed a deed of relinquishment in favour of the other. The deed was not registered, but the owner, in whose favour it was, remained in possession of the entire property. It was held that the deed was admissible in evidence for the purpose of showing the nature of occupant's possession since its execution.

In *Venkatachari v. Rangaswami Iyengar* (6) the facts are not fully stated and the judgment is brief. It appears that the plaintiff sued the defendant to enforce the acceptance of a "pattah." The defendant pleaded that the plaintiff's father had executed a document, whereby in consideration of services rendered by the defendant, he had agreed to give the defendant a rent-free pattah. It was held that the document, though unregistered, was admissible to prove the nature of the defendant's possession for a number of years.

In *Ram Sarup v. Suraj Din* (7) it was held that the lease in that case could be "admitted in evidence to explain the circumstances under which the defendants got into possession. The defendants got into possession of the land leased by the license or permission of Gokal Das and it is not open to them to deny the title of the person who gave them possession."

In *Raghoba v. Palhoba* (8) an unregistered lease was held to be admissible to prove that the relation between the parties was one of landlord and tenant.

In *Thakore Fatesingji v. Bomanji* (9) it was laid down that an unregistered document may be looked to, "not in any way as creating a title, or as showing a transaction that affected the property, but merely as containing a clear and exhaustive statement of the adverse possession which was set up by a person whose claims were

(2) 8 Ind. Cas. 668; 35 M. 95; (1910) M. W. N. 766; 8 M. L. T. 437; 21 M. L. J. 202;

(3) 24 Ind. Cas. 784; 1 L. W. 236.

(4) 53 Ind. Cas. 901; 43 M. 244 at pp. 249, 251; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. J. L. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.).

(5) 42 Ind. Cas. 713; 39 A. 696; 15 A. L. J. 761.

(6) 3 Ind. Cas. 223; 6 M. L. T. 192.

(7) 30 Ind. Cas. 258; 2 O. L. J. 276.

(8) 45 Ind. Cas. 217.

(9) 27 B. 515; 5 Bom. L. R. 274.

(10) 54 Ind. Cas. 117.

(11) 67 Ind. Cas. 31; 26 C. W. N. 65; 34 C. L. J. 432.

(12) 17 M. 456; 4 M. L. J. 198; 6 Ind. Dec. (N. S.) 315.

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admittedly limited to the rights enunciated in such document."

In *Basdeo v. Behari Lal* (10) an unregistered receipt was held inadmissible to prove the redemption of a mortgage but admissible as evidence of the fact that a particular sum was paid on a particular day by the mortgagor to the mortgagee.

In *Jagannath Marwari v. Chandni Bibi* (11) an unregistered deed of gift was held admissible to explain the reason why the donee received the income of the property gifted as if she was a joint owner in possession of the same.

In *Rajah of Venkatagiri v. Narayan Reddi* (12) the point was quite different. There the action was one for damages for breach of the contract to execute the lease and the *kabuliyat* was admitted in evidence, though unregistered, to prove the contract alleged to have been broken. Mr. Petman contended that practically all these authorities dealt with the question of adverse possession and that they were not authorities for the proposition enunciated by Mr. Tek Chand, namely, that the document could be looked at for the purpose of ascertaining the nature of the tenancy.

It seems to us that no hard and fast rule can be laid down having regard to the provisions of section 49 of the Registration Act and each case must be decided on its own facts, the Courts having to decide whether the purpose for which it is sought to use an unregistered document is really a collateral one, for, as pointed out in *C. Bevan Petman v. Ganesh Das* (13), there is a clear difference between the use of a document for a collateral purpose and its use to establish directly title in a part of the property conveyed. The decisions of this Court in the past have not adopted the view laid down in the cases cited by Mr. Tek Chand. In *Dyal Singh v. Gian Singh* (14) it was held that an unregistered document cannot be received in evidence of any transaction affecting

that property. In *Jat Mal v. Bell Ram* (15) it was held that the documents sought to be there used in evidence, being unregistered, were inadmissible for any purpose "tending to indicate" that the plaintiff had lost by partition his original share in the shop. Their Lordships say at page 102*: "We are clear that these documents cannot be looked at in this case for possession of the immoveable property they purport to dispose of, for the adoption of a different course, would permit them to affect that property and to be received as evidence of a transaction affecting that property." Again, in *Jaman v. Chandiya Ram* (16) the question involved related to adverse possession. A gift had been set up and, as the deed of gift was unregistered, it was sought to use the said deed in order to show the nature of the donee's possession.

Thakore Fatesingji v. Bamanji (9) was considered but its correctness doubted on the grounds that to allow the defendants to prove their title, in any capacity, to the land by means of the document would be to infringe the provisions of section 49 of the Registration Act. In *Kanai Mandal v. Shyama Charan* (17) it was held that an unregistered lease for a period exceeding one year cannot be received in evidence to prove a present demise of the property constituting the relation of landlord and tenant between the parties, inasmuch as it could not be received in evidence of any transaction affecting the property. The decision in *Maung Po O. v. Muniandy Servai* (18) is against the admissibility of the lease in this case. It was there held that a tenant could not prove the permanent nature of his possession by means of an unregistered lease which is inadmissible in evidence. That case is a converse one to the present one but the principle there enunciated is clearly applicable.

In *Muthukaruppan Samban v. Mulhu*

(15) 33 Ind. Cas. 948; 35 P. R. 1916; 52 P. W. R. 1916.

(16) 18 Ind. Cas. 918; 83 P. R. 1913; 69 P. W. R. 1913; 196 P. L. R. 1913.

(17) 10 Ind. Cas. 892.

(18) 42 Ind. Cas. 375.

*Page of P. R. 1916.—[Ed.]

(15) 34 Ind. Cas. 542; 49 P. R. 1916; 144 P. W. R. 1916; 149 P. L. R. 1916.

(14) 27 Ind. Cas. 769; 142 P. L. R. 1915; 55 P. W. R. 1915.

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Samban (19) it was held that a document which affects immovable property, and which is required by law to be registered is, if it is not registered, inadmissible in evidence to prove the nature of possession of the person claiming under it, such as the adverse character of the possession. The force of this decision, however, is somewhat negated by the decision of their Lordships in *Varada Pillai v. Jeevarathnammal* (4) on this particular point.

The case which appears to us to be practically on all fours with the present one is that reported as *Niadar Mal v. J. Rank* (20) where it was held that an unregistered deed of lease is not admissible in evidence to prove that the property to which it relates was let for a term of three years. This was a decision of a Division Bench of this Court, and we consider is clearly applicable, for in the present case the plaintiff seeks to use the document to prove that the land was originally leased for a term of five years. We, therefore, hold that the document in this case cannot be used for the purpose it is sought to be utilized for want of registration.

Mr. Tek Chand, then, attempted to argue that the terms of this lease could be proved *allunde*. This point was not taken in any of the grounds of the appeal and we refused to hear any arguments regarding it. We would note that *Niadar Mal v. J. Rank* (20) would exclude any attempt to prove the terms of the lease by oral evidence.

It was next contented by Mr. Tek Chand that, the liability to enhancement having been decided against the present defendants-respondents in the former suit, that decision operated as *res judicata* and that, as the liability to enhancement was incompatible with a permanent tenancy it should be held that the tenancy in this case was a tenancy-at-will. Our attention was drawn on the question of *res judicata* to *Kiran Chandra v. Bono Behari Datta* (21); *Amzad Ali v. Naimuddin* (22); *Saiyiduddin*

v. Avadh Behari Singh (23); *Gopinath v. Bhugwat Pershad* (24), *Bhagwati Prasad Singh v. Parmeshwar Dutt* (25); *Mune Muhammad Nasya v. Dhanu Muhammad* (26), *Kasimaddi Muhammad v. Shib Prasad Das Chowdhury* (27) and *Kali Kumar Ghosh v. Bidhu Bhushan Banerji* (28).

Before examining these cases and the authorities cited by Mr. Petman it will be as well to set down clearly the matters that were decided in the former suit between the parties. As already stated, in the former suit the plaintiff sued to recover rent at the enhanced rate of Rs. 25 per mensem. The defendants denied their liability to pay rent at that rate on the ground that they were permanent tenants. The Trial Court found that the tenancy was not a permanent one and that the rate of rent payable was Rs. 25 per mensem. The Divisional Judge on appeal came to no clear finding on the question of the nature of the tenancy but held that, whether it was permanent or not, the rent was liable to enhancement and that the rent payable was at the rate of Rs. 25 per mensem. It has been conceded that this finding as to the liability to enhancement was based on a mistaken view of the law.

Mr. Petman contended that a decision on a question of law could not operate as *res judicata* in subsequent suits; still less so when that decision was manifestly erroneous. Mr. Tek Chand, on the other hand, urged that the rule of *res judicata* applied to decisions on questions of law as well as to decisions on questions of fact. The point is not free from difficulty, but it has to be borne in mind that in deciding whether a decision in a former suit does or does not operate as *res judicata* in a subsequent one, the facts of each case must be considered. Taking the cases cited by Mr. Tek Chand in chronological order, the first is *Gopinath v. Bhugwat Pershad* (24), where it was held that, when in a suit for *malkana* the issue between the parties substantially raised the question of the proprietary

(19) 25 Ind. Cas. 772; 38 M. 1158; 1 L. W. 754; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497.

(20) 63 Ind. Cas. 90.

(21) 59 Ind. Cas. 752.

(22) 42 Ind. Cas. 583.

(23) 40 Ind. Cas. 864; 2 P. L. W. 64.

(24) 10 C. 697; 5 Ind. Dec. (N. S.) 468.

(25) 45 Ind. Cas. 252; 5 O. L. J. 16.

(26) 16 Ind. Cas. 22; 17 C. L. J. 71; 17 C. W. N. 76.

(27) 16 Ind. Cas. 590.

(28) 10 Ind. Cas. 382; 16 C. L. J. 89.

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right to the estate in respect of which the *malikana* was claimed and when the question of the proprietary right had been decided in a previous suit between the same parties, a subsequent suit for *malikana* would be barred by *res judicata*.

It is clear that the liability to pay *malikana* depended on the question of the proprietary right to the estate and a decision on this question having been clearly arrived at, the doctrine of *res judicata* was manifestly applicable.

In the present case the liability to pay an enhanced rent depended on whether the tenancy was a permanent one or not and on this point no clear finding was arrived at by the Divisional Judge. In *Kali Kumar Ghosh v. Bidhu Bhushan Banerji* (28) the facts were different but it was held that when an issue has been raised on a disputed point in a suit for rent and has been heard and finally decided the decision operates as *res judicata* in a subsequent suit.

Here, again, it will be seen that it was the decision on the first point that ended the controversy and precluded the re-opening of the other point in issue.

Mane Muhammad Nasya v. Dhani Muhammad (26) is to the same effect and merely lays down that a decision on a matter in a previous rent suit operates as *res judicata* in a subsequent suit if the matter in question is directly and substantially in issue in both suits.

Kasimaddi Muhammad v. Shib Prosad Das Chowdhury (27) does not afford any assistance. It was there held that the rate at which rent was decided to have been payable in a previous rent suit was *res judicata* in a subsequent rent suit for the same land for another period.

Satyiduddin v. Avadh Behari Singh (23) relates to the question of the liability to pay *malikana*, and, following *Gopinath v. Bhugwat Pershad* (24), it was held that a decision on this point arrived at in a former suit operated as *res judicata* in a subsequent suit.

In *Amzad Ali v. Naimuddin* (22) the question before the Court was what was the amount of rent annually payable, and it was held that a decision of that question having been arrived at in a former suit, the question was *res judicata*.

In *Ehagraty Prosad Singh v. Parmeshwar Dutt* (25) it was held that a decision on a question of law may operate as *res judicata*.

In *Kiran Chandra v. Bono Behari Datta* (21) it was laid down that in a suit for enhancement of rent the question of the rate of rent is an issue which must necessarily be decided by the Court, and the Court's decision on that point would operate as *res judicata* in a subsequent suit for rent in which the same question is in issue. We are unable to see that this authority affords any assistance in deciding the matter before us.

The present suit is one for the ejectment of the defendants, their liability to ejectment depends on the nature of the tenancy, and this question has not been previously adjudicated upon. What has been decided in the former suit is:—

Firstly, that the rent payable is liable to enhancement whatever the nature of the tenancy may be, and

Secondly, that the rent payable is Rs. 25 per mensem.

On the above authorities in a suit for arrears of rent claimed at the rate of Rs. 25 per mensem the defendants would be barred by the doctrine of *res judicata* from raising the defence that any lesser rate of rent was payable. Can it, however, be said that the same doctrine applies to the finding that the rent is liable to enhancement?

Admittedly, this finding is based on an erroneous view of the law, and Mr. Petman referred us to *Chamanlal v. Bapubhai* (29); *Baij Nath Goenka v. Pudmanand Singh* (30); *Alimunnissa Chowdhurani v. Shama Charan Roy* (31); *Mangalathammal v. Narayanswami Aiyar* (32); *Vishnu v. Ramling* (33) and *Jotindra Mohun Tagore v. Shumbku Chunder* (34).

Taking these also in chronological order, the first in point of time is

- (29) 22 B. 669; 11 Ind. Dec. (N. S.) 1028.
- (30) 14 Ind. Cas. 124; 39 C. 848; 16 C. L. J. 154; 16 C. W. N. 621.
- (31) 32 C. 749; 1 C. L. J. 176; 9 C. W. N. 466.
- (32) 30 M. 461; 17 M. L. J. 250.
- (33) 26 B. 25; 3 Bom. L. R. 450.
- (34) 4 C. W. N. 43.

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Chamanlal v. Bapubhai (29), where it was laid down that a point of law, though decided between the same parties, can never be *res judicata*.

In *Jotindra Mohun Tagore v. Shumbhu Chunder* (34) the point for decision was entirely different and this case affords no assistance.

In *Vishnu v. Ramling* (33) the decision in *Chamanlal v. Bapubhai* (29) was followed, and it was held that "the mere fact that in the former suit *thal* or the produce of betel-nuts may have been wrongly awarded could not alter the provisions of the law and, therefore, under the circumstances, no question of *res judicata* arose."

Mr. Petman's contention was that in the present case, too, the decision that the rent was liable to enhancement did not operate as *res judicata*, as the said decision proceeded on an erroneous view of law.

Mangalathammal v. Narayanswami Aiyar (32) is to the same effect. It was there held that "the erroneous decision by a competent Tribunal of a question of law directly and substantially in issue between the parties to a suit does not prevent a Court from deciding the same question arising between the same parties in a subsequent suit according to law," although the correctness of the former decree could not be impugned in the later suit nor its effect set at naught in whole or in part.

In the present suit the liability to pay the rent decreed in the former suit is not disputed in any way.

In *Alimunnissa Chowdhurani v. Shama Charan Roy* (31) an erroneous decision on a question of law was not allowed to operate as *res judicata*, although it was not held that a point of law could never constitute *res judicata*.

Baij Nath Goenka v. Pudmanand Singh (30) deals with execution proceedings; but at page 853* their Lordships of the Calcutta High Court say that when a decision lays down what the law is and is found to be erroneous it cannot have the force of *res judicata* in a subsequent proceeding for a different relief.

Now, we are not prepared to lay down that a decision on a point of law can never

constitute *res judicata* but we are of opinion that an erroneous decision on a question of law cannot be allowed to operate as *res judicata* so as to prevent a Court from deciding the same question on its arising between the same parties in a subsequent suit in accordance with law.

In this view we are supported by the authorities referred to above, as well as by *Muazam Shah v. Alam Khan* (35), and we hold that the decision in the former suit does not operate as *res judicata* in the present one and that the defendants are not precluded from proving that they are permanent tenants and, as such, not liable to ejectment.

It also follows from what has been said above that the question of the permanent nature of the tenancy is not *res judicata*, inasmuch as the Divisional Judge did not come to any definite decision on the point. Even if he had, however, we do not think it could operate as *res judicata*, inasmuch as the finding could not have been attacked on appeal by the plaintiff in whose favour a decree had been passed, *vide* Mulla's Civil Procedure Code, pages 59 and 60, and Aggarwala's Indian Practice, page 85 and the authorities cited thereunder.

It is, however, clear that the *onus* of proving the permanent nature of the tenancy lies on the defendants-respondents. Mr. Petman contended that, as this point had been decided by the learned District Judge in his favour, the finding being one of fact could not be assailed in second appeal. After giving every consideration to the arguments advanced by him, we are of opinion that the question whether the tenancy is a permanent one or a tenancy-at-will, if not a question of law, is certainly a mixed question of law and fact, and as such open to examination, *vide, inter alia*, *Surendra Nath v. Dwarka Nath* (36); *Mohorram Sheikh Chaprasi v. Telamuddin Khan* (37); *Krishna Kishore Neogi v. Mir Mahomed Ali* (38) and *Sulatu Dass v. Jadu Nath Das* (39).

(35) 44 P. R. 1908.

(36) 35 Ind. Cas. 605; 44 C. 119; 24 C. L. J. 350; 21 C. W. N. 530.

(37) 13 Ind. Cas. 626; 15 C. L. J. 226; 16 C. W. N. 567.

(38) 3 C. W. N. 255.

(39) 8 C. W. N. 774 at p. 775.

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Now, the learned District Judge has found that the origin of the tenancy is unknown and that the land was leased for building purposes. Also that it had been built upon by successive tenants to the knowledge of the ground landlords who by receiving the rent must be held to have permitted the building operations. Further, he has held that the defendants had been in possession for a long period and that the buildings had been transferred by succession and purchase. From these findings he has drawn an inference that there was an implied contract by which the tenancy was to be permanent.

As to the origin of the tenancy being unknown, Mr. Tek Chand contended that there was ample material on the record to show that the tenancy was created in 1871, and he argued that, therefore, it was wrong to say that the origin of the tenancy was not known. He maintained that the expression "origin" was synonymous with "commencement" and drew our attention to 9 Bombay Printed Judgments, page 372 (?) and Civil Appeal No. 1125 of 1905 (unpublished). We have studied these authorities and are unable to find that they support the contention put forward. We consider that the expression "origin" means something more than commencement, though it may also include that term. There is, no doubt, some evidence to show that the tenancy was in existence in 1871. Indeed it may be said that it commenced in that year. But from this fact alone we do not think that it can be said that the origin, *i. e.*, the circumstances in which the tenancy was created, is known. We must, therefore, accept this finding as one by which we are bound.

Then, Mr. Tek Chand attacked the finding that the land had been leased for building purposes and contended that there was no evidence on the record to warrant such a conclusion. The learned District Judge deals with this question on page 12, lines 31 to 49 of the printed book. It appears to us that his finding on this point is really based on inferences drawn from certain circumstances. These are:—

(a) That the land is situated in the Sadar Bazar;

(b) That there was a Cotton Press build-

ing on it in 1871 which belonged to the defendants' predecessors-in-title;

(c) That there is evidence to show that in the Sadar Bazar while one man owns a piece of land another owns a building on it;

(d) That it is in evidence that after the Mutiny the land in the Sadar Bazar was given for settlement purposes;

(e) That Hardeo, D. W. No. 1, deposes that the land in suit was leased for the erection of a Cotton Press; and

(f) That the plaintiff had stated that this Cotton Press belonged to the defendants' predecessors-in-title.

Now, the mere fact that the land in suit is situated in the Sadar Bazar is not, by itself, sufficient to show the object for which the tenancy was created, nor does the mere fact that the defendants' predecessors-in-title owned the Cotton Press on it show that the land was leased for building purposes.

Again, it has not been shown that the whole of the land in the Sadar Bazar is owned as alleged, and the mere fact that various plots of lands situated in the said Bazar are so owned would scarcely warrant the conclusion arrived at.

Again, seeing that the buildings in suit only came into existence in 1871, the reference to what occurred after the Mutiny is scarcely in point. The facts of the present case are materially different from those in the case reported as *Afzal-un-nisa v. Abdul Karim* (40). We have not been able to find that Hardeo, D. W. No. 1, made the statement attributed to him, and it seems scarcely equitable to use the statement of the plaintiff in the manner it has been used. The plaintiff was not deposing from personal knowledge, but from knowledge derived from documents, one of which, the most important one, is inadmissible in evidence. It seems clear that none of the above circumstances taken singly can properly give rise to the inference that has been raised, nor, in our opinion, can they do so collectively.

(40) 50 Ind. Cas. 749; 81 P. R. 1919; 17 A. L. J. 608; 36 M. L. J. 580; 26 P. W. R. 1919; 1 U. P. L. (P. C.) 47; 26 M. L. T. 55; 23 C. W. N. 966; (1919) M. W. N. 494; 30 C. L. J. 152; 21 Bom. L. R. 893; 65 P. L. R. 1919; 46 I. A. 131 (P. C.).

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In this view of the case it is not necessary to discuss the authorities cited by the learned Counsel. We would note that our attention has been drawn to *Prosunno Coomaree Debea v. Sheikh Rutton Bepary* (41); *Secretary of State for India v. Luchmeswar Singh* (42); *Beni Ram v. Kundan Lal* (43); *Mohim Chandra v. Rup Manjari Das* (44) and *Ismail Khan v. Jagun Bibi* (45) by Mr. Tek Chand, while Mr. Petman referred to *I. L. R. 4 Calcutta 648* (?); *Naba Kumari Debi v. Behari Lal Sen* (46); *Rungo Lall v. Wilson* (47); *Mohoram Sheikh Chaprasi v. Telamuddin Khan* (37); *Grey v. Ram Shashi Roy* (48); *Prosunno Coomar v. Jagun Nath* (49); *Navabram Shankar Das v. Javerilal Govandram* (50); *Raja Promoda Nath v. Sri Govindo* (51) and *Madho Rao v. Govindbhat* (52).

Mr. Petman also referred to Gour's Transfer of Property Act, pages 1673, 1674 and 1678. All these authorities we have examined, but it seems to us that in deciding a question of this kind the facts of each case must be considered and that no hard and fast rule can be, or has been, laid down. No doubt, long possession of a tenure by a tenant and his ancestors, and the landlord having permitted them to erect substantial structures, which have been added to by successive tenants, and the transfer of the said tenure from time to time by succession and the purchase with the permission of the landlord, express or implied, would warrant the presumption that the tenancy was of a permanent character.

Further, a similar presumption may also arise when it can be definitely found that land had been leased for building purposes. But in coming to a decision as to whether a tenancy is of a permanent nature in any particular case it is on the facts of that case alone that the decision must be arrived at.

In the present case the origin of the tenancy is doubtless unknown, but we are unable to agree with the Courts below in the inference that has been drawn as to the purpose for which the land was leased. A Cotton Press, no doubt, existed on this land in 1871, and it may be taken that Desraj-Khemraj, the owners of the Cotton Press, were tenants. These buildings were transferred in 1885 by Exhibit P-31, and the fact that the purchasers paid Rs. 4,000 is an indication that the buildings then in existence were of a substantial nature. It is to be remembered, however, that in the deed conveying these buildings the vendors definitely refused to covenant for title so far as the land was concerned, a circumstance which we consider is an indication that the vendors were uncertain of the nature of their tenancy. Mr. Petman alleged that in 1895 the buildings, including the tenancy of the land, again changed hands. It, however, appears that this change of ownership took place in accordance with a partition, and it seems to us that such a transfer is not what is contemplated by the authorities cited.

In the present case, moreover, there has not been the transfer of the tenancy by succession and purchase that existed in the authorities cited by the learned Counsel on both sides. Again, it seems to us that it cannot be said that there has been a fixity of rent. It is true, as pointed out by Mr. Petman, that a small enhancement in rent in the course of long possession as tenant would not be of much importance. In the present case, however, it will be seen that the rent was increased very substantially, *i.e.*, by 100 per cent. in 1905.

Again, the possession of the defendants has not been for so long a period as was the case in *Caspersz v. Kedar Nath* (53), on which the learned District Judge has relied. Assuming that the buildings came into

* (41) 3 C. 696; 1 C. L. R. 577; 1 Ind. Dec. (N. S.) 1026.

(42) 16 C. 223; 16 I. A. 6; 13 Ind. Jur. 10; 5 Sar. P. C. J. 275; 8 Ind. Dec. (N. S.) 147.

(43) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. L. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

(44) 16 Ind. Cas. 213.

(45) 27 C. 570; 4 C. W. N. 210; 14 Ind. Dec. (N. S.) 374.

(46) 34 C. 902; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397; 2 M. L. T. 433; 34 I. A. 160 (P. C.).

(47) 26 C. 204; 2 C. W. N. 718; 13 Ind. Dec. (N. S.) 735.

(48) 15 Ind. Cas. 110.

(49) 10 C. L. R. 25.

(50) 7 Bom. L. R. 401.

(51) 19 C. W. N. 453; 32 C. 648.

(52) 46 Ind. Cas. 794.

(53) 28 C. 738; 3 C. W. N. 858.

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existence in 1871, the rent was doubled in 1905 after a possession of 34 years, and not 46 as the learned District Judge has stated.

Again, our attention has not been drawn to any evidence to support the finding that buildings had been erected on this land from time to time by successive tenants. So far as we know, the only occasion when any additional buildings were erected was after the fire in 1911, and it must be noted that the then ground landlord promptly issued a notice to the defendants warning them against re-erecting the premises without permission. The defendants thus were fully aware that their ground landlord was objecting to the erection of any structures. It appears to us, therefore, that in the present case there is an absence of long possession coupled with fixity of rent.

We are, therefore, unable to agree with the lower Appellate Court's conclusion that the circumstances of the present case raise a presumption that the tenancy was a permanent one or that there was an implied contract that it should be permanent. The *onus*, as has been said above, was on the defendants and, in our opinion, has not been discharged. We must, therefore, hold that the tenancy is either a tenancy-at-will or a yearly one.

It was then contended that, having regard to all the circumstances of the case, the defendants were not liable to ejectment. We cannot, however, agree with this contention. The tenancy not being permanent, the tenants must be held to have been aware of their liability to ejectment. In 1911 when the buildings or a portion of them were demolished they were warned against re-building and, in spite of that, proceeded to re-build. We are, therefore, unable to hold that the plaintiff is in any way estopped from claiming the eviction of the defendants.

Next, it was contended that in any event the plaintiff should be made to pay the price of the buildings. As a general rule, if a tenant-at-will chooses to erect buildings on land leased to him he does so at his own risk. The plaintiff, however, expressed his willingness to pay the sum of Rs. 23,479-5 which was the amount fixed as the value of the premises when the proceedings were

in the Courts below. It has not been urged that this sum did not represent the value of the premises at that time, although it is possible that the present value is more. We think that it would be equitable to allow the defendants to elect to remove their buildings or accept the sum offered, and our reason for this course is that in the former suit the finding on the question of the nature of the tenancy was not clear and might have led the defendants to consider that their position was stronger than it really was.

We, accordingly, accept this appeal, and, setting aside the order of the lower Appellate Court, restore that of the Trial Court with this modification that the defendants are to elect within a period of three months from this date whether they will accept the sum of Rs. 23,480 as the price of the buildings. If they fail to accept this sum within the period fixed, they will be compelled to remove the buildings as directed by the Trial Court's decree.

There remains the question as to the amount of rent payable. In our opinion the amount fixed by the Trial Court is a reasonable one, and we grant the plaintiff a decree for Rs. 850 on account of arrears of rent and at the rate of Rs. 50 per mensem from the date of suit till the date when the buildings are removed or the compensation referred to above is accepted.

In all the circumstances of the case, we think it equitable to allow the parties to bear their own costs throughout.

Z. K.

Appeal allowed.

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PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

November 28, 1922.

Present:—Lord Buckmaster, Lord Phillimore, Sir John Edge and Lord Salvesen.

KISHEN NARAIN—APPELLANT

versus

PAL, MAL, AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Mortgage—Principal and interest payable separately—Suit for interest alone, whether bars subsequent claim for realisation.

If a mortgage provides for an independent obligation to pay the principal and the interest, in a suit brought to obtain a personal judgment in respect of the interest alone, O. II, r. 2 of the Civil Procedure Code would not prevent a subsequent claim for payment of the principal, as in such a case the cause of action is distinct. The matter is, however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action—the non-payment of interest—gives rise to two forms of relief which the Code of Civil Procedure provides, shall not be split. [p. 188, col. 1.]

Appeal from the decree of the Chief Court, Punjab, affirming that of the District Judge, Delhi.

Messrs. DeGruyther, K. C. and Dube, for the Appellant.

Mr. Wallach, for the Respondents.

JUDGMENT.

Lord Buckmaster.—The difficulty in this case is due to the provisions of r. 2 of O. II of the Code of Civil Procedure, 1908. This rule provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. But the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. The illustration given shows that a personal claim for the mortgage-money under a mortgage and the enforcement of the security for the debt are to be regarded as one and the same cause of action. This provision is in marked distinction to the law of this country, where a mortgagee is at liberty to appoint a Receiver under his deed to sue for the debt and to take proceedings for sale or foreclosure independently and at the same time. It is important, therefore, in considering the effect of the Code, to bear in mind that its obvious intention is to establish a rule of law different from that accepted here.

The appellant was a mortgagee under a mortgage executed on the 19th January

1904, by the three respondents. It was a mortgage to secure Rs. 11,748 with interest at Rs. 8 per month, and provided that the money was to be paid in two years. The conditions of the mortgage enabled the mortgagors to redeem within the two years if they thought fit. It also contained an express promise on the part of the mortgagee to pay interest for the first year, and provided that if the interest were not paid for the first year it should be competent to the mortgagee to cancel the fixed term and to realise. Clause 5 dealt with the conditions that would arise if the interest were paid for the first year and there was difficulty thereafter. It is one of the critical clauses in the present dispute, and it is in the following terms:—

“5. If we do not pay the interest on the expiry of the first year, we shall pay the interest on the mortgage-money after every three months after the expiry of the first year. If by chance we are unable to pay the interest after every three months, we shall pay it after six months without any objection. If we do not pay the remaining interest after six months, the mortgagee will be at liberty to cancel the term of two years and to realise with costs all the principal mortgage-money with interest by means of a suit from the mortgaged property and our other moveable and immoveable property and our person. If the mortgagee of his own accord wishes to maintain the term of mortgage, he will have a right to realise only the remaining interest by means of a suit from the said property and our person. We and our representatives shall have no objection and refusal.”

The interest was paid up to the 4th July 1905, but no further payment being made in respect of interest, on the 17th November 1908 the mortgagee sued the mortgagors, and the first question that arises is what was the effect of that suit.

The plaint set out the mortgage, set out payment of the interest up to the 4th July 1905 and certain further payments on account of principal. It then stated that the plaintiff only sued for the remaining interest, and that a suit for the recovery of the principal and of the future interest would be brought later on, and it asked for a decree in the following terms:—

“A decree for Rs. 2,390-8-0 interest at

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the above rate from *Asarh Sudhi 2, Sambat 1962*, to *Mansgar Badi 8, Sambat 1965*, corresponding to the 16th November 1908 with costs in favour of the plaintiff against the defendants, recoverable from the mortgaged property and the other property and the persons of the defendants."

The only question that appears to have been tried was what was the correct amount of interest; and a decree passed by the Subordinate Judge on the 27th January 1909, was a decree for Rs. 2,226-13-0, which it was stated should be charged on the mortgaged property. The mortgagee then attempted to get the equity of redemption sold, and in this he succeeded before the Subordinate Judge, but failed on appeal. He thereupon on the 19th of November 1914 instituted the proceedings out of which this appeal has arisen, asking the full mortgagee's relief in respect of the mortgaged property. The District Judge held that r. 2 of O. II barred the case and dismissed the suit; this decree was supported in the Chief Court of the Punjab; and from this judgment the present appeal has been brought.

That r. 2 of O. II of the Code of Civil Procedure is the relative section of the Code applicable to the dispute is not in contest. The whole question is, what does it mean? It does not appear to their Lordships that if the mortgage had provided, as mortgages always do in this country, for an independent obligation to pay the principal and the interest, that in a suit brought to obtain a personal judgment in respect of the interest alone the rule would have prevented a subsequent claim for payment of the principal. In such a case the cause of action would have been distinct. The matter is, however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action—the non-payment of the interest—gives rise to two forms of relief which the Code provides shall not be split. This is illustrated by the present suit. The interest was paid during the first year, and the interest in arrears was that under clause 5. If, therefore, the plaintiff originally brought came to be properly interpreted as claiming only a personal relief in respect of the unpaid interest, the appellant's case would be on surer ground,

but, although their Lordships are anxious that claims for a just debt should not be defeated by the intricacies of legal procedure, yet they are unable to hold that the plaintiff that was originally issued by the appellant can properly bear that interpretation. The claim is for a decree for the interest "recoverable from the mortgaged property," and the other property and persons of the defendants. The words are not dissimilar from the words of clause 5 of the mortgage-deed, which clearly points to the interest being payable (that is, by sale) out of the mortgaged property. Their Lordships are unable to give any other interpretation of the phrase "recoverable from the mortgaged property" in the appellant's plaintiff than a claim for realisation, and the fact that the decree he obtained was not a decree for sale but in the nature of a personal judgment, does not alter its effect, for r. 2 of O. II provides that every suit shall include the whole of the claim. The suit so brought by the plaintiff did not include it, and this consequently barred the institution of a further suit in respect thereof. Indeed, when once it be accepted that the original plaintiff did seek, by its prayer, for realisation, this case becomes indistinguishable from the case of *Muhammad Hafiz v. Muhammad Zakariya* (1) where a similar question arose and was determined by this Board.

There were, no doubt, good grounds of policy that caused the introduction into the Code of Civil Procedure of the provisions which, in the result of this case, will involve the appellant in some pecuniary loss, and it is the duty of the Courts to interpret and carry into effect those rules uninfluenced by the consideration of the individual loss that may be occasioned by disobedience of the provisions.

Their Lordships think that this case was rightly decided; that the appeal should be dismissed with costs, and they

(1) 65 Ind. Cas. 79; 49 I. A. 9; 44 A. 121; 42 M. L. J. 248; 20 A. L. J. 17; 26 C. W. N. 297; 35 C. L. J. 126; 15 L. W. 377; (1922) M. W. N. 89; 24 Bom. L. R. 341; 3 P. L. T. 279; 30 M. L. T. 224; 1 P. W. R. 1922; (1922) A. f. R. (P. C.) 23 (P. C.).

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will humbly advise His Majesty accordingly.

N. K. *Appeal dismissed.*

Solicitors for the Appellants :—Messrs. Barrows Rogers and Nevill.

Solicitors for the Respondents :—Messrs. T. L. Wilson & Co.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 180 AND 181 OF 1922.

November 21, 1922.

Present:—Mr. Justice Phillips and Mr. Justice Devadoss.

D. SUBRAMANIA IYER, RECEIVER IN O. S. NO. 169 OF 1917 ON THE FILE OF THE COURT OF THE DISTRICT MUNSIF, SHIVALI
—APPELLANT IN BOTH

versus

CHOKALINGA MUDALIAR AND OTHERS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64, O. XXI, rr. 46, 51—Negotiable Instruments Act (XXVI of 1881), ss. 9, 78—Attachment of pro-note—Prohibitory order, effect of—Endorsement in favour of one of several decree-holders—Holder in due course—Pro-note, whether extinguishes debt.

The proper method of attaching a promissory-note under O. XXI, r. 51 of the Civil Procedure Code is by actual seizure and by bringing it into Court and a mere prohibitory order issued to the judgment-debtor and the maker of the note forbidding the latter to pay and the former to receive the amount due does not create a valid attachment of the pro-note. [p. 190, col. 2; p. 191, col. 1.]

A number of decree-holders in execution of their respective decrees attached a promissory-note executed in favour of the judgment-debtor, but the attachment in every case was effected not by actual seizure but by mere prohibitory orders issued to the judgment-debtor and the maker of the note under O. XXI, r. 46 of the Civil Procedure Code. One of the decree-holders with knowledge of the prohibitory orders obtained an endorsement of the pro-note in his own favour from the judgment-debtor :

Held, (1) that though the attachments were invalid as not having been made in the manner prescribed by law, and section 64 of the Civil Procedure Code was not, therefore, applicable, the title of the judgment-debtor to the pro-note was defective on account of the prohibitory orders which imposed a disability on him with respect to the pro-note and the endorsee-decree-holder who took the note with notice of the defect was neither a holder in due course under section 9 of the Negotiable Instruments Act nor even a holder within the meaning of section 78 of the Act; [p. 191, col. 2; p. 192, col. 1.]

(2) that the conduct of the decree-holder was fraudulent, being designed to secure himself and to defeat the other creditors who had obtained prohibitory orders and amounted to an abuse of the process of the Court. [p. 192, col. 1.]

The execution of a promissory-note in satisfaction of a debt does not necessarily mean that the original debt is extinguished, the note may operate as a substitute for the debt and the original debt kept in abeyance pending the discharge of the pro-note, but it is also open to the parties to treat the original debt as discharged and substitute therefor the obligation under the pro-note. The question is one of fact and depends on the intention of the parties in each case. [p. 191, col. 1.]

Second appeals against the decrees of the District Court of East Tanjore at Negapatam in Appeal Suits Nos. 18 and 17 respectively, preferred against the decrees of the Court of the Third Temporary Subordinate Judge of Tanjore in Mayavaram in Original Suits Nos. 50 and 49 of 1919.

Mr. T. M. Krishnaswami Aiyar (with him Mr. N. S. Sivaramakrishna Iyer), for the Appellants.—The debt to be attached is only the original book debt. There cannot be any merger of the account debt in the pro-note debt. The finding that the account debt has merged in the pro-note debt is not sustainable.

Secondly, the respondent has himself attached the very same debt and having known of the attachment by the other creditors including the plaintiff, his conduct in getting an assignment in his own favour is clearly fraudulent, and under section 9 of the Negotiable Instruments Act he cannot be a holder in due course, as he cannot be said to be a person who had no sufficient cause to believe that any defect existed in the title of the person from whom he got the assignment. Again, the second defendant cannot be said to be a holder under section 78, Negotiable Instruments Act, as he cannot maintain a suit on the note in his name.

Thirdly, the attachment of the note by a prohibitory order under O. XXI r. 46, instead of under O. XXI, r. 51, amounts only to an irregularity. The attachment can be only under O. XXI r. 46. Again, as the amount due to the appellant was borrowed by the father of the judgment-debtor, the deceased father's debt becomes a charge on the properties in the hands of the judgment-

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debtor: See *Bazayet Hossein v. Dooli Chund* (1).

Mr. K. Bhashyam Aiyenger (with him Mr. A. Sri Rangachariar, for the Respondents.—Taking the last point first, the debt cannot become a charge on the properties: *Bazayet Hossein v. Dooli Chund* (1) is a case under Muhammadan Law and the properties can be distributed only after the discharge of the debt on the properties. *Bazayet Hossein v. Dooli Chund* (1) does not apply to the case of Hindus.

Secondly, the question of merger by the account-debt in the pro-note is a question of fact.

Subramanian Chetty v. Muthia Chetty (2); *Kodali Mallayya v. Tarigopala Ramayya* (3); *Jambu Chetty v. Palaniappa Chettier* (4).

In second appeal the High Court cannot go behind the finding of the lower Court. So the only debt to be attached is the pro-note debt and the only provision for the attachment of a pro-note is that prescribed in O. XXI r. 51, and that is by actual seizure. When the pro-note is not seized, section 64 cannot operate and an assignment in the absence of a proper attachment will be good.

Nur Ahmad v. Altaf Ali (5); *Satya Charan v. Mahdub Chunder* (6); *Ramasami Moopan v. Srinivasa Iyengar* (7); *Sinnappan v. Arunachalam Pillai* (8); *Attar Singh v. Ghulam Muhammad* (9).

The judgment-debtor has not disobeyed any order of the Court. Exhibit II only prohibits him from receiving any amount from the garnishee and it prohibits the garnishee from paying the amount to the judgment-debtor. Here the judgment-debtor has already assigned the note for debt due by him. There is no disobedience in fact or in law. There is no ques-

tion of any fraud and there is no evidence in support of the same and, the point was not urged in the lower Courts or even in the grounds of appeals to this Court.

The respondent is a holder in due course. The judgment-debtor's title to the note cannot in any sense be said to be defective as he can maintain a suit on the note.

JUDGMENT.

Phillips, J.—The facts of this case are as follows:—One Chokalinga Mudali (called the first defendant) received a sum of Rs. 3,000 from one Kumaraswamy Pillai. The latter died and on 29th June 1917 the first defendant executed a promissory-note for the Rs. 3,000 to Kumaraswami Pillai's son, Sadasiva Pillai. There were many creditors of Sadasiva Pillai and suits were brought against him and several orders were passed in respect of this promissory-note. Subramania Iyer (called the plaintiff) is the receiver in one of those suits in which a decree was obtained against Sadasiva. In that suit an order was passed on the 31st July 1917 attaching this promissory note. On the 20th August 1917 a similar attachment was taken out by Kupuswami Iyengar (called the second defendant). There were various other attachments also, and, on the 18th March 1918, the promissory-note was endorsed by Sadasiva to Kupuswami Aiyengar. The plaintiff now brings the suit to recover Rs. 3,000 from the maker of the note, and Kupuswami Iyengar, the second defendant in that suit, has also filed a suit to recover the amount due under the promissory-note. The lower Courts have found that there was no valid attachment of the promissory-note and that the second defendant is a holder in due course and have consequently decreed the second defendant's suit and dismissed the plaintiff's suit. The plaintiff, therefore, appeals in both cases.

Under O. XXI, r. 51, the method of attaching a promissory-note is by actual seizure and by bringing it into Court. Admittedly, this has not been done with reference to the promissory-note executed by the first defendant. The orders that were passed are said to be orders of attachment but are really prohibitory orders that were addressed to Sadasiva Pillai

(1) 4 C. 402; 5 I. A. 211; 3 Sar. P. C. J. 853; 3 Ind. Jur. 121; 2 Shome L. R. 169; 2 Ind. Dec. (N. S.) 255 (P. C.).

(2) 17 Ind. Cas. 721; 35 M. 639.

(3) 10 Ind. Cas. 177; 21 M. L. J. 462, 10 M. L. T. 55.

(4) 26 M. 526 at F. 528; 13 M. L. J. 252.

(5) 2 A. 58; 1 Ind. Dec. (N. S.) 583.

(6) 9 C. W. N. 693.

(7) 28 Ind. Cas. 284; 39 M. 389; 28 M. L. J. 338.

(8) 53 Ind. Cas. 207; 42 M. 844; 37 M. L. J. 375; (1919) M. W. N. 678; 10 L. W. 391; 26 M. L. T. 281.

(9) 60 Ind. Cas. 527.

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and the first defendant forbidding them to receive or pay, respectively, the amount due under the note. It does appear from one execution petition of the 7th October 1917 that an attempt was made to seize the note but it could not be found and an attachment was not effected.

It is now contended in the appeal, firstly, that the attachment was a valid attachment and that, therefore, the endorsement in favour of the second defendant was invalid and, under section 64 of the Civil Procedure Code, is void as against the plaintiff's claim and, secondly, that, even if the attachment is not a valid attachment, the second defendant has abused the process of the Court by getting an endorsement of the note after he had obtained the orders of the Court prohibiting the parties to the note from taking action thereon. As regards the first ground, it is said that, although there was no attachment in the form prescribed for attachment of negotiable instruments, the prohibitory orders must be deemed to be attachment of the original book-debt which has not been discharged by the promissory-note. The execution of a promissory-note in satisfaction of a debt does not necessarily mean that the original debt is extinguished, but the note may operate as a substitute for that debt and the original debt is kept in abeyance pending the discharge or otherwise of the promissory-note. It is, however, certainly open to parties to treat the original debt as discharged and substitute therefor the obligation under the promissory-note, and in this case we have the finding of both the lower Courts that the book-debt of Rs. 3,000 was discharged by the execution of the promissory-note. This finding is based on the intention of the parties and, consequently, I do not think it is open to this Court in second appeal to interfere with that finding. We must take it, therefore, that the book-debt had been discharged on the date of the prohibitory order, and consequently, the procedure prescribed for the attachment of debts not secured by negotiable instruments is inapplicable to the present case. It is, therefore, quite clear that the attachment of the promissory-note was not a valid attachment. One of the most important questions to be con-

sidered in deciding whether an attachment is valid or not is, whether the order has been communicated to all parties concerned so as to make it effective. If a promissory-note is left in the hands of a party and there is merely a prohibitory order telling him not to receive the money due thereunder it is always possible that he may negotiate the instrument or, in the case of a note payable to bearer, he may hand it on to a third party who would be quite unaware that there was any order of Court restricting dealings with the note; unless, therefore, the actual note is seized there is always a danger that third parties may *bona fide* become possessed of it, and, if the prohibitory order was held to be a valid attachment, they would be prejudiced by such an order of which they were unaware. I, therefore, agree with the lower Courts that the attachment was invalid, and consequently section 64, Civil Procedure Code, is not applicable.

I next have to consider the question whether the second defendant has abused the process of the Court. The order obtained by him, Exhibit II, was an order prohibiting Sadasiva from receiving any amount on account of the promissory-note from the first defendant and an order prohibiting the first defendant from paying any amount under the note. Most of the prohibitory orders were in similar terms but it does appear that one of them, Exhibit II (c), prohibited the first defendant from receiving any amount on account of any promissory-note or from adjusting that promissory-note in any other way. The second defendant died during the pendency of the proceedings, but Sadasiva was examined and he admits that the second defendant was a friend of his and that he was probably aware of the many orders. I think we may take it that the second defendant was undoubtedly aware of the many orders which had been passed against Sadasiva and realized the risk he was taking in dealing with this promissory-note. He himself obtained an order of Court prohibiting the first defendant from paying the amount and Sadasiva from receiving the amount, and having obtained this order and knowing that many similar orders had also been obtained, he went to Sadasiva and obtained an endorse-

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ment from him in contravention of the letter of Exhibit II and of the spirit of the other prohibitory orders. It seems to me that this action on his part was fraudulent, being designed to secure himself and to defeat the claims of the other creditors who had obtained prohibitory orders.

It is suggested that he did not actually disobey the orders of Court or induce Sadaseva to disobey it, but, assuming that he was aware of Exhibit II (c), that argument is certainly incorrect; and, even as regards the other orders it is clear that he intended to obtain the money from the first defendant notwithstanding the order prohibiting the payment. I am, therefore, inclined to hold that the whole of this transaction of endorsement is vitiated by fraud, and that second defendant's claim being based on his own fraud should not be allowed, but in the view I take of the next ground of appeal, it is unnecessary to finally decide the case on this point.

There is yet another point which has been taken in appeal and that is that the second defendant was not a holder in due course as found by the lower Courts, and this I think is a valid objection. Under section 9 of the Negotiable Instruments Act a holder in due course means "the payee or the endorsee thereof (namely, the promissory-note) if payable to order before the amount mentioned in it becomes payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title." In this case the title to the note still remained in Sadasiva after the prohibitory order, but he was unable to deal with the note, or to receive money under it and to that extent his title was defective, for I do not think it can be said that, when a person is under a disability with respect to his property, his title thereto is without defect, as is argued for the respondents. The second defendant was aware of this disability and, therefore, he had sufficient cause to believe that a defect existed. He is not, therefore, a holder in due course.

It is then argued that, although he is not a holder in due course he is yet the holder of the note and that, under section 78 of the Negotiable Instruments Act, payment of the amount due on a promissory-note

must, in order to discharge the maker or the acceptor, be made to the holder of the instrument. A holder of the promissory-note means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. At the time the second defendant became the actual possessor of the note, Sadasiva was restrained from receiving the amount from the maker and also from adjusting the note in any way. He cannot transfer any better title to the second defendant. The endorsement is invalid for the purpose of making the second defendant a holder in due course and I do not think it can then be treated as being sufficient to make the second defendant a holder, for it is an invalid endorsement.

Apart from that endorsement, the second defendant is not entitled in his own name to the possession of the note nor to receive or to recover the amount due thereon. If he is neither the holder nor the holder in due course within the meaning of the Act, it follows that he has no right to recover the amount of the note from the first defendant; on the other hand, the plaintiff is entitled to recover the amount from the first defendant as garnishee and, therefore, these appeals must be allowed and the plaintiff's suit decreed with costs throughout and the second defendant's suit similarly dismissed. The first defendant is in no way liable for these proceedings, and his costs in each case must be paid by the unsuccessful party.

Devadoss, J.—I agree.

V. N. V.

Appeals allowed.

MAUNG TIN v. MAUNG PO YA.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 178 OF 1922.

August 15, 1922.

Present:—Mr. Brown, A. J. C.

MAUNG TIN AND OTHERS—APPLICANTS
*versus***MAUNG PO YA—RESPONDENT.***Civil Procedure Code (Act V of 1908), Sch. I I, Paras. 14, 20, 21—Arbitration without Court's intervention—Court's power to file award in part—Refusal to file award—Effect.*

The provisions of paragraphs 20 and 21 of Schedule II to the Civil Procedure Code give a Court power to file the award and pass a decree in accordance with it or to refuse to file it. No other course is open to the Court. The Court has no power to file the award in part or to decide which part, if any, of the award is invalid. Unless the award is valid in its entirety, the only course open to the Court is to refuse to file it. [p. 194, col. 1.]

Where arbitrators have determined a matter not referred to arbitration, the Court to which an application is made to file the award, must refuse to do so, even though the portion of the award which is in excess of the reference is separable. The Court has no power to separate or amend the award in any way. [p. 193, col. 2.]

Ma Chaung v. Ma Aing, 2 U. B. R. (1897-01), 297, *Thiruvengadathiengar v. Vaidinatha Ayyar*, 29 M. 303, *Dinabandhu Jana v. Chiniamoni Jana*, 26 Ind. Cas. 697; 19 C. W. N. 476, relied on.

Where the Court to which an application is made to file an award refuses to do so because it is in excess of the reference, that does not necessarily mean that the award is entirely invalid but merely that the procedure provided by paragraphs 20 and 21 of Schedule II to the Civil Procedure Code for enforcing the award is not open to the applicants. [p. 194, col. 1.]

Mr. P. Bose, for the Applicants.

JUDGMENT.—The applicants filed an application in the Township Court of Kanbalu to file an award of arbitrators under the provisions of paragraph 20 of the Second Schedule of the Code of Civil Procedure. The Trial Court neither filed the award nor refused to file the award, but passed orders confirming the award partially. The respondent appealed to the District Court and that Court set aside the decree of the Trial Court and passed orders dismissing the suit. The applicants at first came to this Court in second appeal, but as no second appeal lies, they have since been given permission to amend the memorandum of appeal and to treat it as an application in revision.

The applicants were engaged by the respondent to do certain work for him, and

claimed wages for their work. The respondent claimed that he had paid the applicants in full. And this dispute between the parties was referred to the arbitrators to decide. The arbitrators passed an award in which they directed the respondent to pay not only the balance of wages found due, but also certain other expenses, the total payment ordered being Rs. 66-6-0. The Trial Court "confirmed" the award as regards Rs. 47-2-0, but held that the sum of Rs. 19-4-0 incurred as costs in the Trial Court was outside the reference. The District Court agreed with the Trial Court that the arbitrators in awarding the costs in question had exceeded the terms of reference, and held that the award was invalid on the face of it.

The first ground stated in the application before this Court is, that the reference did include the whole matter. But it has not been seriously argued that it is competent for this Court to interfere with the concurrent finding of the two lower Courts on this point in revision. The contention is, that none of the grounds for avoiding the award set out in paragraphs 14 and 15 of the Second Schedule of the Code of Civil Procedure have been made out, and that the part of the award which is in excess of the reference is severable from the rest of the award. Assuming that the excess is so severable, I am unable to see how the award can be filed in this case. It was held by this Court in the case of *Ma Chaung v. Ma Aing* (1) that, in dealing with an application to file an award the Court had no power to modify or correct the award, to remit it for consideration or to set it aside. Its power is limited to filing the award and decreeing in accordance with it, or to refusing to file it. In the case of *Thiruvengadathiengar v. Vaidinatha Ayyar* (2), it was held that, when arbitrators had decided a matter not referred to arbitration the only course open to a Court before which an application to file an award had been made was to refuse to file the award. And in the case of *Dinabandhu Jana v. Chiniamoni Jana* (3) a similar view of the law

(1) 2 U. B. R. (1897-01), 297.

(2) 29 M. 303.

(3) 26 Ind. Cas. 697; 19 C. W. N. 476.

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was taken. In that case the question was considered whether, having regard to the provisions of rule 14 (a), the portion of the award which was in excess of the reference could not be struck out. It was held that, even if the invalid portion of the award was separable, it would still not be enforceable by the summary procedure of r. 20. The provisions of paragraphs 20 and 21 of the Second Schedule only give the Court power to file the award and pass a decree in accordance with it, or to refuse to file it. No other course is open to the Court. Paragraph 21 gives the Court no power to file the award in part, or to decide which part, if any, of the award is valid. Unless the award is valid in its entirety then the only course open to the Court is to refuse to file it. The award in this case has been held to determine a matter not referred to arbitration, and that is one of the grounds mentioned in paragraph 14 (a). It is true that the ground is not a good ground for the purposes of paragraph 14, if the matter not referred is capable of separation from the rest of the award. But paragraphs 20 and 21 give the Court no power to separate or amend the award in any way. It appears clear that an award cannot be filed which contains an order that the arbitrators had no power to pass. It must, therefore, be held that the fact that the award is in excess of the reference is a ground such as is mentioned in rule 14, and that the only course open to a Court in such a case is to refuse to file the award. That does not necessarily mean that the award is entirely invalid, but merely that the procedure provided by paragraphs 20 and 21 of the Second Schedule for enforcing the award is not open to the applicants.

It does not, therefore, appear to me that any good ground has been made out for interfering with the orders passed by the District Court.

I dismiss this application.

N. K. *Application dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER.

No. 7 OF 1922.

October 24, 1922.

Present.—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

JEKKANNU SAMI AIYAR—RESPONDENT

No. 6, SURETY—APPELLANT

versus

MUTHUKUMARA RAMASWAMI CHETTIAR, MAJOR, AND OTHERS—

PLAINTIFFS-PETITIONERS AND RESPONDENT

No. 2—DEFENDANT No. 2—RESPONDENTS.

Contract Act (IX of 1872), ss. 128, 134—Principal and surety—Merger of estates of creditor and debtor—Liability of surety—Civil Procedure Code (Act V of 1908), s. 145.

Pending an appeal against a decree for mesne profits, stay of execution was ordered on security being furnished. A security bond was executed by a surety. The appeal was dismissed. The judgment-debtor died and the decree-holder succeeded to his estate. On an application by the decree-holder to enforce the security bond against the surety:

Held, that the debt due by the judgment-debtor was extinguished in consequence of the merger of his estate with that of the decree-holder and, that under sections 128 and 134 of the Contract Act, the decree-holder could not proceed against the surety. [p. 196, col. 1.]

Ordinarily, the liability of a surety is co-extensive with that of the principal debtor, unless it is otherwise provided for; and the liability ceases when the principal's debt has been extinguished by an act which causes the merger of the estate of the creditor and the debtor. [p. 195, col. 1.]

Subroya Chetty v. Rangammall, 28 M. 161; 14 M. L. J. 482, *Brojendra Kissore v. Hindusthan Co-Operative Insurance Society*, 39 Ind. Cas. 705; 44 C. 978; 25 C. L. J. 238; 21 C. W. N. 482, *Jambu Ramaswamy Bhagavathar v. Sundaraja Chetty*, 26 M. 239; 12 M. L. J. 267, distinguished.

The principle of merger applies whenever rights devolve either by inheritance or are acquired under a valid transfer if the result of such devolution or acquisition is that the estates of the creditor and debtor or of the mortgagee and mortgagor become united wholly or in part in the person of a single individual; and the question whether merger takes place depends on the intention actual or presumed of the person in whom the interests become united. [p. 196, col. 1.]

Banarsi Das v. Maharani Kuar, 5 A. 27; A. W. N. (1882) 140; 3 Ind. Dec. (N. S.) 5; *Kudhal v. Sheo Dayal*, 10 A. 570; A. W. N. (1883) 231; 13 Ind. Jur 275; 6 Ind. Dec. (N. S.) 383 relied on.

Though a surety bond may be executed in favour of the Court, the Court holds it for the benefit of the decree-holder; and in proceedings instituted under section 145 of the Civil Procedure Code the

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surety can put forward all defences that are open to him as against the decree-holder. [p. 196, col. 2.]

Ramanathan Pillai v. Doraiswami Ayyangar, 55 Ind. Cas. 363; 43 M. 325; 38 M. L. J. 65; 11 L. W. 45; (1920) M. W. N. 114. 27 M. L. T. 207, referred to.

Appeal against an order of the Court of the Subordinate Judge, Tanjore, in A. S. No. 57 of 1921, preferred against the decree of the Court of the District Munsif, Tiruvadi, in E. P. No. 270 of 1920, in O. S. No. 365 of 1914.

Mr. M. S. Venkatrama Iyer, for the Appellant.

Mr. A. C. Sampatha Iyyengar, for the Respondent.

JUDGMENT.

Spencer, J.—This appeal raises a question as to the liability of a surety when his principal's debt has been extinguished by an act which causes the merger of the estates of the debtor and the creditor. As the facts have been set out in my learned brother's judgment, I will not recapitulate them. Ordinarily, the liability of a surety is co-extensive with that of the principal debtor, unless it is otherwise provided for. There is no provision to the contrary in the security bond executed on January 16th, 1917, by the appellant and his mother. Therein they declared that they would stand as sureties and make themselves responsible for the amount of Rs. 225 that might be found due to the plaintiffs (from the defendants). An illustration of the effect of section 128 of the Contract Act occurs in *Shek Suleman v. Shivram Bhikaji* (1) where it was observed that if an amount recoverable by a plaintiff from a defendant debtor is diminished in appeal, the surety's engagement, being one of indemnity, would diminish in like proportion. So, if the sum recoverable became zero owing to the decree being reversed, the surety's liability would also be reduced to nothing. The present is not a case of a continuing guarantee, or of time being given to the principal debtor, or of the terms of any contract between the creditor and the debtor being varied. Therefore, the references by the respondent's Vakil to sections 129, 130, 133 and 135

of the Contract Act and to *Subroja Chetty v. Ragammall* (2) are not to the point. Nor is there any question of the remedy against the principal debtor becoming barred by limitation, or being kept alive by payment, as to which it was held in *Brojendra Kissore v. Hindusthan Co-Operative Insurance Society* (3) that section 128, Contract Act, would not prevent the liabilities of the principal and the debtor being distinct in matters of limitation, and in *Jambu Ramaswamy Bhagavathar v. Sundararaja Chetti* (4) that section 134, Contract Act, would not help the surety.

The main question to be decided in this case is, whether the first defendant's debt became extinguished in consequence of the merger of his estate with the estate of the plaintiffs-respondents. If that question is answered in the affirmative it will follow from sections 128 and 134 of the Indian Contract Act that the respondents cannot proceed to recover anything on account of mesne profits from the appellant who stood as surety for the first defendant. In other words, the question is, whether the legal consequence of the creditor's act in taking over the first defendant's estate was to discharge the principal debtor. The principle of merger has been described in *Banarsi Das v. Maharani Kuar* (5) as a union in the same persons of the character of debtor and creditor and its origin has been traced to the *confusio* of Roman Law. In *Kudhai v. Sheo Dayal* (6), it has been further explained by Mahmood, J., who observes at page 575 that a man cannot be his own creditor or the mortgagee of his own rights. Lord Halsbury in Volume 13 of his *Laws of England*, page 146, states:—"At Law, when a less estate was vested in the same person as a greater estate without any intermediate estate between them, the less estate merged in the greater and extinguished, without regard to the intention of the parties concerned. But equity is not guided by the rules of law as to merger,"

(2) 28 M. 161; 14 M. L. J. 482.

(3) 39 Ind. Cas. 705; 44 C. 978; 25 C. L. J. 238; 21 C. W. N. 482.

(4) 26 M. 239; 12 M. L. J. 267.

(5) 5 A. 27; A. W. N. (1882) 140; 3 Ind. Dec. (N. S.) 5.

(6) 10 A. 570; A. W. N. (1888) 231; 13 Ind. Jur. 275; 6 Ind. Dec. (N. S.) 383.

(1) 12 B. 71; 6 Ind. Dec. (N. S.) 534.

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and so the question whether merger takes place "depends upon the intention, actual or presumed, of the person in whom the interests became united." So, as I observed in my judgment, in Civil Revision Petition No. 980 of 1917 [*Chidambaram Pillai v. Meenakshiammal* (7)], the question of merger is one of intention, and in the case of a limited owner the presumption is against a merger. Section 101 of the Transfer of Property Act which creates a statutory merger has no application to the present case of a personal decree obtained against the first defendant for future mesne profits at the rate of Rs. 75 per annum. But the principle of merger exists independently of Statute, and the Transfer of Property Act has been treated as codifying the law that already existed prior to its enactment. In *Kudhai v. Sheo Dayal* (6) the principle is stated to apply, whenever rights devolve either by inheritance or, are acquired under a valid transfer, if the result of such devolution or acquisition is that the estates of the judgment-creditor and the judgment-debtor, or of the mortgagee and the mortgagor become united in whole, or in part in the person of a single individual. From the intention of the parties, in the present case, it might be held that there was no merger when the second defendant, Naggammal, succeeded to the estate of her deceased son first defendant, as the former was a limited owner and the decree remained executable against the first defendant's estate under section 50, Civil Procedure Code. But when she surrendered the whole estate to the plaintiffs as being the nearest reversioners, reserving for herself nothing but a right of maintenance under Exhibit II, it cannot be supposed that these reversioners intended to keep alive a debt owed by the estate to themselves, a debt of which no mention is made in Exhibit II. They took over among others the properties which were pledged by the first defendant's guardian as security for reimbursement of the sureties in the event of their having to pay the first defendant's decree debt for mesne profits. What they must be deemed to have got in succession, by first defendant's untimely death and his mother's

release deed, was the balance of his estate, after wiping out his debt to them.

Respondent's Vakil attempted to support the lower Appellate Court's judgment by several other arguments. He contended that, the rules as to creditors and debtors would not apply to this case, as the bond was executed under section 145, Civil Procedure Code, in favour of the Court in the form given in Appendix H, No. 13. He maintained that, this procedure made the Court the creditor and prevented the surety from pleading discharge under section 133 or 135 of the Contract Act, on account of any variance of the terms of any composition between the creditor and the debtor. It is impossible to conceive how the execution of the surety bond in favour of the District Munsif converted that officer into a creditor in respect of the decree debt. Section 145 has been enacted for the purpose of expeditious enforcement of liabilities against sureties, in order to avoid the cumbrous procedure of assigning the bond to a decree-holder and his instituting a separate suit upon it. The surety can put forward in those proceedings any defence that is open to him, and for the purpose of appealing against any order that is made against him he is expressly declared to be deemed to be a party within the meaning of section 47. Though the security bond may be executed in favour of the Court, the Court holds it for the benefit of the decree-holder. No doubt it was held in *Ramanathan Pillai v. Doraiswami Ayyangar* (8) that if the surety wants to get the bond cancelled, he must proceed by regular suit, but it was admitted that he might become a party to execution proceedings when an application was made for an order against him. This case is not an authority for the startling proposition now advanced that in proceedings under section 145 a surety is precluded from raising any defence.

Then it was argued that the incidents connected with the merger of estates would not attach, where the decree-holders obtain the first defendant's estate long after delivery of their share of property and some

(7) 52 Ind. Cas. 842; 16 L. W. 678.

(8) 55 Ind. Cas. 363; 43 M. 325; 38 M. L. J. 65; 11 L. W. 45; (1920) M. W. N. 1141 27 M. L. T. 207.

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time after the estate vested in first defendant under a release deed of conveyance, and not by the mere operation of Hindu Law. But it is the surrender of the widow of her life estate by means of a deed that brings the Hindu Law into operation and it is immaterial when the surrender took place. Lastly, stress was laid on the fact that the arrears accrued during the life time of first defendant gave rise to a personal liability against him, which had not been extinguished. On the death of a judgment-debtor, however, execution can only, under section 50, Civil Procedure Code, be taken out against his property in the hands of his legal representatives. This judgment-debtor's property is now in the hands of the decree-holders. When it is apparent that they can now do nothing but take out execution against themselves, the argument ends in a *reductio ad absurdum*.

The appeal is allowed with costs here and in the lower Appellate Court, and the District Munsif's order dismissing the first and second respondent's petition is restored.

Venkatasubba Rao, J.—This appeal raises the question whether the plaintiffs are entitled to execute the decree under section 145, Civil Procedure Code, against the surety who is the appellant before us. The District Munsif held that the plaintiffs were not entitled but the Subordinate Judge reversed the decision of the District Munsif.

The facts may be briefly stated: The plaintiffs brought the action for partition of certain properties and for possession of their share. A decree was passed, which *inter alia* directed the first defendant to pay the plaintiffs mesne profits at the rate of Rs. 75 per annum from the date of the plaint. An appeal was filed to the District Court, and it was dismissed. A second appeal was preferred to the High Court and, stay of execution was ordered of the decree on the condition that security was furnished in respect of the mesne profits decreed. A security bond was then executed by the surety appellant, who undertook to be liable to the extent of Rs. 225 on account of the said profits. The second appeal was also ultimately dismissed. It is alleged by the plaintiffs that a sum of Rs. 203-12-0 is due to them on account of mesne profits from the date of the plaint till the date of the

delivery of the immoveable property decreed to them. The execution petition is in respect of that sum. The first defendant died after the sum now claimed by the plaintiffs accrued due and the second defendant, the mother of the first defendant, took possession of all the properties of the latter claiming to be his heir under the Hindu Law. The plaintiffs asserted a title to the said properties against the second defendant, on the ground that their father and the first defendant who were step-brothers divided their properties under a partition award and that according to the terms of that award the plaintiffs were entitled to succeed to the first defendant's properties. It may be noted that apart from any question of any special rule of succession, the second defendant, the mother of the first defendant, would under the Hindu Law inherit his properties. It is said that this special rule of succession was recognised and given effect to the second appeal to which the reference has been made, though I must confess this point is by no means clear to my mind and it is unnecessary to pursue this further for, as a matter of fact, the second defendant, as stated above, took possession of all the properties of the first defendant without at first recognising the title of the plaintiffs, but she subsequently surrendered the entire estate to the plaintiffs, who, on the date of the execution application, were in possession of it. It is not denied that the plaintiffs alone have come into possession of all the properties of the deceased first defendant, and that the said properties far exceeded in value the sum now claimed in the execution petition. The District Munsif as well as the Subordinate Judge assume that the plaintiffs succeeded to the properties of the first defendant as his heir, but the correct view would seem to be that the plaintiffs acquired the said properties by transfer from the second defendant who is the heir of the first defendant. The plaintiffs seek to recover the amount from the surety and the District Munsif dismissed the application on the ground that the debt was extinguished by reason of the fact that the qualities of debtor and creditor became united in the same person, *viz.*, the plaintiffs; and the extinction of the principal obligation put an end to that of the surety. The Sub-

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Judge, disagreeing with the District Munsif, held that the plaintiffs were entitled to recover the amount.

It seems to me that the Sub-Judge was clearly wrong. It is not denied that the plaintiffs became legal representatives of the first defendant. Nor is it denied that the properties taken possession of by the plaintiffs were worth considerably more than the amount claimed by the plaintiffs in execution. Under section 50, Civil Procedure Code, where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to execute it against the legal representative of the deceased judgment-debtor. The section further provides that where the decree is executed against such legal representative he shall be liable only to the extent of the property of the deceased which has come into his hands and has not been duly disposed of. Now what has happened? The plaintiffs became the legal representatives of their debtor, and they were, therefore, entitled to execute the decree against themselves to the extent of his property which has come to their hands and the plaintiffs must accordingly be deemed to have obtained satisfaction of their decree. The circumstance that the plaintiff did not actually take out execution against themselves and recover the sum in execution is immaterial and I am, therefore, satisfied that the principal obligation was in this case extinguished.

The debt due by the judgment-debtor having become extinguished, are the plaintiffs entitled to proceed against the surety? They are not. To my mind the question does not admit of any doubt. Cunningham and Shepherd in their Indian Contract Act, quote the following passage from Pothier when dealing with section 134:—"It results from the definition of a surety's engagement, as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety, it being the nature of an accessory obligation that it cannot exist without its principal." The learned commentators add, "the rule may also be put upon the less technical ground that, if the release of the surety did not follow from that of the debtor, the latter's release would be purely illusory, because the

consequence would be that the surety on being compelled to pay, would immediately turn round the debtor."

I find it impossible to hold that the creditor can proceed against the surety although the debt has been recovered. It has been argued on behalf of the plaintiffs that this rule which accords with common sense is not applicable to surety bonds executed, as in this case, in favour of the Court. Though this extraordinary contention was repeatedly urged by the plaintiffs' Vakil no authority was cited in support of it and I have no hesitation in rejecting it as utterly untenable.

It may be remarked that there is an additional circumstance which renders this argument palpably unsound. In consideration of his having executed the bond in question, the surety obtained from the first defendant a mortgage in respect of a property belonging to the latter, with a view to recoup himself out of that property in the event of his being compelled to pay the decree amount on the judgment-debtor making default. That property has passed to the plaintiffs and is in their possession along with the other properties of the judgment-debtor. If the surety is compelled to pay the amount he can immediately claim it from the principal debtor. He can on paying the amount proceed against the property in the hands of the plaintiffs themselves and get a refund of the sums, in virtue of the express contract between him and the judgment-debtor.

Another argument which has been advanced on behalf of the plaintiffs is this that when an application is made against a surety under section 145, he is precluded from raising a defence on the score of the decree having become satisfied and that he must pay the amount and then sue the plaintiffs again for the recovery of it. There is no warrant for this position and the argument must be rejected.

It has been further urged on behalf of the plaintiffs that the properties having been originally taken by the second defendant from whom only the plaintiffs obtained them, the principal obligation was not extinguished. I have dealt with this point above and I cannot accept the argument. The appeal must, therefore, be allowed.

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with costs in this and in the lower Appellate Court.

V. N. V.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 214 OF 1922.

February 21, 1923.

Present:—Mr. Kanhaiya Lal, J. C.

KUNJ BEHARI—PLAINTIFF

APPELLANT

versus

BHUTA—DEFENDANT—RESPONDENT.

Easements Act (V of 1882), s. 13—Easement—Absolute necessity—Right of way—Apparent and continuous easement—Alternative means of access.

An easement of necessity contemplates that there must be an absolute necessity, not removable by anything which the dominant owner can be reasonably expected to do before the law will compel an adjacent proprietor to submit to so detrimental a right as an easement on his land imposed against his will.

Dargi Lal v. Devi Lal, 48 Ind. Cas. 670, relied on.

A right of way is not an apparent and continuous easement as contemplated by section 13 of the Easements Act.

An absolute necessity for the exercise of a right of way vanishes where an alternative means of access is possible to a person as for instance, by opening a door or passage on his own land.

Appeal against a decree of the Additional Sub-Judge, Fyzabad, dated the 27th March 1922, upholding the decree of the Additional Munsif, Fyzabad, dated the 13th December, 1920.

Mr. Hari Kishen Dhaan, for the Appellant.

Mr. H. D. Chandra, for the Respondent.

JUDGMENT.—The question for consideration in this appeal is, whether the defendant is entitled to a right of way across certain land occupied by a temple and a *dharamsala* in the possession of the plaintiff. The entire property at one time belonged to Mangal, who is said to have

built a temple and a *dharamsala* on one portion of it and, planted a grove on the remaining portion behind. The way to the grove ran through the main gate-way close to the temple. The site belongs to the *zemindar*. Mangal died leaving a widow, *Musammal Phulhari*, who got possession of the property. She made a gift of the grove to Ram Gopal, who sold it to the defendant. She also mortgaged the building, known as the *dharamsala*, with possession, in favour of the plaintiff. The latter wants to restrain the defendant from passing over the land occupied by the temple and *dharamsala*, and also claims possession over a certain portion of unoccupied land, standing between the grove and the *dharamsala* building over which, it is alleged, a *kothri* at one time existed, the wall of which is said to have been demolished by the defendant.

The Courts below found, that the defendant had not dispossessed the plaintiff from that land. They further found that the defendant was entitled to a right of way over that land and across the land occupied by the temple and the *dharamsala*, for the purpose of the ingress into, and egress from, the grove. They dismissed the claim of the plaintiff accordingly.

It is admitted that since his purchase, the defendant has constructed high walls on three sides of the groves in the place of the old walls, which existed round the grove. There is a high way running on the south of the grove, and if the defendant so chooses, he can open a door in the southern wall of the grove, in order to have an ingress into the grove from the highway on that side. He has no absolute right to pass on the land occupied by the temple and the *dharamsala*, if he has means of access available towards the south by opening a way on that side. No right of way was reserved in the deed executed by *Musammal Phulhari* in favour of Ramgopal, and unless a right of way is absolutely necessary for the enjoyment of the property, or, in other words, unless no other means of access are possible, he cannot be allowed to enforce a right of way through the land of another. Section 13 of the Indian Easements Act (V of 1882) lays down that, where a person transfers immoveable property to another and an easement in the other immoveable property of the

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transferor is necessary for enjoying the subject of the transfer, the transferee shall be entitled to such easement. He cannot, however, claim to enjoy an easement over the property of the transferor, as it was enjoyed when the transfer took effect, unless the easement was apparent and continuous, or a different intention was expressed or necessarily implied.

The gift made by Musammat Phuljhari in favour of the vendor of the defendant was made on the 26th November, 1907, without any reservation, and no right of way could have been acquired since. A right of way is not an apparent and continuous easement. The defendant cannot, therefore, succeed, unless he can show that the right of way was absolutely necessary, or that the transferee had no other means whatsoever, of reaching the property transferred to him. A person cannot claim a right of way on the ground of convenience, if he has other means of access available. In *Wutzler v. Sharpe* (1) and *Sukhdei v. Kidarnath* (2) it was accordingly held that an easement of necessity was an easement without which the property sold could not be used at all, and not one merely necessary for more convenient enjoyment of the property. In *Municipality of the City of Poona v. Vaman Rajuram Gholap* (3) a person who purchased a plot of land adjoining his own land, having access to that plot through his own land, was held not entitled to a way of necessity over the land of the vendor, of which the plot sold formed a part. In *Krishnamarazu v. Marrazu* (4) and *C. H. Crowdy v. L. O. Reilly* (5) a similar view was taken. As observed in *Daroga Lal v. Devi Lal* (6) an easement of necessity contemplates that there must be an absolute necessity, not removeable by anything, which the dominant owner can be reasonably expected to do before the law will compel an adjacent proprietor to submit to so detrimental a right as an easement on his land imposed against his will. There is no such absolute necessity shown in this case, for

an alternative way is available on the south by opening a door or passage in that direction.

The appeal is, therefore, allowed and the claim of the plaintiff decreed for an injunction restraining the defendant from passing over the disputed land. The plaintiff will get his costs in proportion here and hitherto from the defendant who will bear his own costs throughout.

N. H.

Appeal allowed.

UPPER EURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 5 OF 1922.

July 11, 1922.

Present:—Mr. Brown, A. J. C.

RAMZAN KHAN—APPELLANT

versus

MARIAN BIBI—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 19
—Minor sons—Guardianship—Father, appointment of.

Where the parties are not European British Subjects, a Court is not authorised to appoint or declare the father as the guardian of his minor children. The father is the natural guardian and does not require appointment.

Mr. D. Dutt, for the Appellant.

Mr. R. K. Banerjee, for the Respondent.

JUDGMENT.—The appellant Ramzan Khan is the father and, the respondent Marian Bibi the mother of the two minor children, Abdul Gaffur *alias* Nga Khwe and Sakhina. The parents of the minors are not living together and the minors are living in the custody of the respondent. The appellant filed an application under the provisions of section 10 of the Guardians

(1) 15 A. 270; A. W. N. (1893) 151; 7 Ind. Dec. (N. S.) 390.

(2) 9 Ind. Cas. 628; 33 A. 467; 8 A. L. J. 280.

(3) 19 B. 79; 10 Ind. Dec. (N. S.) 534.

(4) 28 M. 495; 15 M. L. J. 255.

(5) 17 Ind. Cas. 966; 16 C. L. J. 417.

(6) 48 Ind. Cas. 670.

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and Wards Act of 1890, in which he asked that orders be passed appointing him guardian of the persons of the minors. The District Court dismissed the application on the ground that the appointment was not shown to be in the interest of the minors. Against that order the present appeal has been filed. It is objected on behalf of the respondent that, the provisions of section 19 of the Guardians and Wards Act preclude the making of the appointment asked for. That section lays down that, "Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the.... person....subject to the provisions of this Act with respect to European British subjects, of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor." It is not suggested by the appellant that he is unfit to be guardian of the persons of the minors and, obviously, if he were held to be so unfit, it would not be proper to appoint him. It seems to me, therefore, that this section, in clear and unmistakable terms, enacts that nothing in the Chapter can authorise the appointment of the petitioner. The section of the law which empowers the Court to make an order of appointment is section 7, which is included in Chapter II to which section 19 also belongs. There is no section outside Chapter II which gives the Court any authority in the matter. The question of the appointment of the guardian of the minor, whose father is living, was considered by this Court nearly thirty years ago in the case of *Maung Maung Gyi v. Maung Po Thu* (1). No definite decision on the interpretation of section 19 of the Act was then pronounced, as the appellant before the Court withdrew his application for appointment of guardian. But it was pointed out in the judgment that section 19 did preclude the appointment of the guardian of the person of a minor, unless the father was found to be unfit to be guardian. The only case that I have found which suggests that another interpretation might be put on the provisions of this section is the Lower Burma Case of *Po Cho v. Ma Nyein Myat* (2). In that case the

appellant had applied to be declared guardian of the person and property of his minor son. The application was dismissed by the Trial Court on the ground that, the appointment would not be for the moral, bodily and intellectual well being of the minor and for the welfare of his estate. The judgment of the Chief Court dealt with the application on the merits, and dismissed the appeal of the applicant on the ground that he had been divested of his rights to guardianship. It appears, therefore, to have been assumed that the Court would have had the power to make the appointment, if the appointment were otherwise suitable. The actual question as to the power of the Court in the matter was not, however, discussed, and the final result was the dismissal of the application. This case cannot be looked on as a direct authority for the view that the Court has power to appoint or declare the father as guardian of a minor.

It is suggested on behalf of the appellant that if the interpretation which I put on section 19 be accepted, the appellant would, in view of the decision of their Lordships of the Privy Council in the case of *Annie Besant v. Narayaniah* (3), have no remedy in the present case. It was held by the Chief Court of Lower Burma in the case of *Ma Shwe Ge v. Maung Shwe Pan* (4), that a suit for custody of a minor did lie in the ordinary Civil Court and it was pointed out by Thirkell White, C. J., in his judgment in that case that, under the provisions of section 19, it seems not to be within the competence of the District Court to declare or appoint a father to be a guardian of his minor children. Doubt was also expressed as to whether, if a suit for the custody of children did not lie, the provisions of section 25 of the Guardians and Wards Act would avail the father. The ruling in *Ma Shwe Ge's case* (4) has since been held by the same Court in the case of *Arunachallam Pillay v. Iyama* (5), to have been overruled by the decision in the Privy Council case to which I have referred. The case before

(1) 2 U. B. R. (1892-96), 412.

(2) 4 Ind. Cas. 1029; 5 L. B. R. 133; 3 Bur. L. T. 54.

(3) 24 Ind. Cas. 290; 38 M. 807; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 12 A. L. J. 1155; 41 I. A. 314 (P. C.).

(4) 2 L. B. R. 140.

(5) 29 Ind. Cas. 763; 8 L. B. R. 211; 8 Bur. L. T. 128.

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the Privy Council was not on all fours with *Ma Shwe Ge's case* (4) as in the former case the plaintiff sued for a declaration that he was entitled to the guardianship and custody of his sons. It may be that the effect of this ruling has been correctly interpreted in *Arunachallam Pillay's case* (5). But, however that may be, I cannot find any authority in the judgment of their Lordships for the view that a father can be appointed guardian under the Guardians and Wards Act. On the contrary, the following passage appears in the course of the judgment:—"and further, no order declaring a guardian could by reason of section 19 of the Guardians and Wards Act, 1890, be made during the respondent's life unless, in the opinion of the Court, he was unfit to be their guardian, which was clearly not the case." The parties to the present case are not European British subjects, and section 19 of the Act lays down, in very clear and unmistakable terms, that the Court is not authorised to appoint or declare a guardian of the person of a minor whose father is living, unless that father is unfit to be guardian. I can see no reason whatever for supposing that an application by the father himself was intended to be excepted from the provisions of this section. Had the Legislature intended to make such an exception, it would have been a simple thing to do so in explicit language. It seems to me that the section is capable of only one interpretation and that interpretation must be accepted by the Courts. Whether this interpretation will operate unfairly on the appellant, as is suggested on his behalf, is not for decision in this case. The view of the Legislature presumably was that the father is the natural guardian and does not require appointment. In that view of the case, and if it be held that the decision of the Privy Council debars the appellant from bringing a regular suit for the custody of his children, there would seem to be nothing to prevent him from making an application under section 25 of the Guardians and Wards Act. A doubt was expressed in *Ma Shwe Ge's case* (4) whether a person, who never had had the custody of the minor, could obtain such custody by means of an application under section 25. I am not prepared in this appeal to express any definite

opinion, either on this point or, as to whether a regular suit for custody of the minor would lie. However that may be, and whatever the results, I am of opinion that the District Court had clearly no authority whatsoever to appoint or declare the father, or any one else, to be guardian of the persons of the minors in this case. I dismiss this appeal with costs. Advocate's fee one gold mohur.

N. K.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 9, 1922.

Present:—Lord Dunedin, Lord Phillimore,
Sir John Edge and Mr. Ameer Ali.

KHATUBAI—APPELLANT

VERSUS

MAHOMED HAJI ABU AND OTHERS—
RESPONDENTS.

Converts—Hindu converts to Islam—Halai Memons of Porebunder—Succession of females.

There are among the Muhammadans certain groups whose ancestors were Hindus and professed the Hindu religion and were then converted to Islam. Among these groups may be reckoned Khojas, Suni Bohras, Molesalam Girasias, Cutchi Memons, Nassaporias Memons and Halai Memons.

The Halai Memons in Porebunder are governed by the Hindu Law with regard to the succession of females.

Appeal from the decree of the Bombay High Court reversing a decree of the Single Judge of the same Court in its Original Jurisdiction.

Messrs. *De Gruyther, K. C., and Farwell*, for the Appellant.

Messrs. *Upjohn, K. C., Raikes and Polak*, for the Respondents.

JUDGMENT.—The present appeal relates to the succession of one Haji Abu Haji Habib, who died intestate at Bombay on the 30th November 1914. The contest is between a daughter, the plaintiff

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and appellant, on the one hand, and a son and other members of the family, the defendants and respondents, on the other, and depends entirely upon what is the law of succession to be applied to the property of the deceased.

Now, the deceased was a Muhammadan. Accordingly, the Indian Succession Act does not apply, and if nothing more were known it would be obvious that the ordinary Muhammadan Law of succession would fall to be applied, which would mean that the appellant would succeed. But the deceased was not what may be termed an ordinary Muhammadan. There are among the Muhammadanis certain groups whose ancestors were Hindus and professed the Hindu religion, and were then converted to Islam. Among these groups may be reckoned, as is shown by decided cases, Khojas, Suni Bohras, Molesalam Girasias, Cutchi Memons, Nassapooria Memons; and, lastly, Halai Memons, to which group the deceased belonged. Now, with regard to the groups other than Halai Memons, it has been held by a succession of cases beginning with a case decided by Sir Erskine Perry in 1847, that the converts had retained their Hindu Law relating to the exclusion of females from succession, and that that law had been engrafted as a custom on the Muhammadan Law, although not in accordance with the rules of the Koran. In the present case, as is said by the learned Chief Justice, an entirely novel question is raised, *viz.*, what is the customary law governing the succession to a non-Cutchi Memon of Porebunder? Both the learned Judge of the first instance and the learned Judges of the Appeal Court held that the deceased was, so to speak, a Porebunder and not a Bombay Memon. These being concurrent findings of fact, their Lordships, while entirely agreeing with them, need not examine the evidence on which they are founded. It follows that the personal law of the deceased, so far as the question for decision in the present appeal is concerned, was the law of a Halai Memon of Porebunder.

It may be here well to say a word as to what is meant by a Halai Memon. A Memon, as the word denotes, is a convert. The name Memon, however, has not been, applied to all branches of Hindu converts,

e. g., as in the case of the Khojas. There was a body which came from Sind and settled in Cutch, and these have been designated as Cutchi Memons. Another body from the same place settled in the Halai Prant of Kathiawar, and these have been designated Halai Memons. Some of the Halai Memons pushed on to Bombay, where they have formed a community known as the Bombay Halai Memons. There was also an immigration to Bombay from Cutch, and the Cutchi Memons formed by themselves a separate community in Bombay from the Halai Memons. Now, it is admitted that, so far as the Bombay Halai Memons are concerned, they have been content for many years to have their property distributed on succession according to the tenets of the Muhammadan Law, so that if the deceased had been, in the proper sense of the word, a Bombay Halai Memon, the question of the succession would have been solved. But, as already stated, both Courts have found that he was not a Bombay Halai Memon, but a Porebunder Halai Memon. The question, therefore, is, does a Halai Memon domiciled in Porebunder follow the Hindu or Muhammadan Law with regard to the succession of females.

Voluminous evidence was taken which consisted of (1) the reports of set of judgments of the Porebunder Courts—Porebunder being a Native State, from whose Courts there is no appeal either to any appeal Court in India or to the King in Council; (2) oral testimony from Pleaders and from persons belonging to the community in Porebunder as to what the custom of succession was. The learned Judge of first instance, after a careful and elaborate judgment, came to the conclusion that the custom of succession according to Hindu Law was not sufficiently proved so as to oust the general application of the Muhammadan Law.

On appeal that judgment was reversed, and an equally careful and elaborate judgment pronounced, by the learned Judges of the Court of Appeal.

Their Lordships, after careful consideration, are in accordance with the views of the Appeal Court. The learned Trial Judge has, in their view, drawn a wrong inference from the fact that the Bombay Halai

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Memons follow the Muhammadan Law, and they cannot help thinking that this inference has coloured his views on the whole case. Finding that these Bombay Halai Memons practise in the matter of succession the Muhammadan Law, he has drawn the inference that when they came to Bombay from Kathiawar they brought that Law with them, and that, consequently, the community which they left also followed the Muhammadan Law. Their Lordships agree with Macleod, J., that this is not a necessary inference. If it is otherwise shown that the Kathiawar Halai Memons practised the Hindu Law excluding females from succession, it is equally easy to infer that the Bombay Memons, finding themselves among other Muhammadans who followed the Muhammadan Law in its purity, renounced the custom of the Hindu Law of succession in favour of the orthodox tenets of their own religion. An example of this may be found in the case of *Abdurahim Haji Ismail Mathu v. Halimabai* (1) (*the Mombasa case*). Of course, this is not an inference which itself need necessarily be drawn, but it counter-balances the other, and matters are, therefore, left as they were, viz., to depend on an enquiry as to what has been *de facto* the practice of the Halai Memons in Porebunder.

The decisions of the Porebunder Courts are minutely examined by Macleod, J. The most that can be said for the appellant was reduced in the cross-examination of her chief witness to this:—

“In Porebunder there is a conflict of decision, but the latest is that Hindu Law governs Halai Memons. That is the decision of the final Court of Appeal there—the Huzur Court.”

It has been objected to this last and most authoritative decision—for it was the decision of the highest Tribunal in Porebunder—that it is based on a misreading of the Mombasa case. It probably does go too far in thinking that their Lordships in that case laid it down as a general proposition that all Memons necessarily follow Hindu Law of succession. But that was not the only ground of judgment, and the judg-

ment remains as the last of the Porebunder Courts.

Their Lordships, however, are not inclined to take the view that that settles the matter, for the enquiry is not as to what is the Porebunder Law, but as to what is the Porebunder custom. But the judgments of the Courts are good as evidence, and they are borne out by the other evidence in the case. Here their Lordships are content to follow the result arrived at by Scott, C. J., who after a most careful examination of the evidence sums it up thus:

“On a consideration of all the cases above mentioned, the evidence seems to me to be all one way. Twenty-five cases are proved which indicate that Hindu Law was applied and not Muhammadan Law, and there is no clear case of the application of Muhammadan Law among Memons, settled at Porebunder.”

The learned Counsel for the appellant directed criticism to the character of certain of the witnesses, but such criticism is of small avail in contrast with the overwhelming effect of the negative result alluded to by the Chief Justice, that there is no clear case of succession according to the Muhammadan Law.

Their Lordships will, therefore, humbly advise his Majesty to dismiss the appeal with costs.

N. K.

Appeal dismissed.

Solicitors for the Appellant.—Messrs. Walton & Co.

Solicitors for the Respondent.—Messrs. T. L. Wilson & Co.

(1) 32 Ind. Cas. 413; 43 I. A. 35; 30 M. L. J. 227; 20 C. W. N. 362; (1916) 1 M. W. N. 176; 28 Bom. L. R. 635 (P. C.).

MAUNG PO MYA v. MA GYAN BON.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 577 OF 1921.

August 22, 1922.

Present.—Mr. Brown, A. J. C.

MAUNG PO MYA—APPELLANT

versus

MA GYAN BON, DECEASED, BY HER

LEGAL REPRESENTATIVE, MA TIN

—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 4, 5—Death of party to suit—Representation of estate—Procedure.

According to the provisions of O. XXII of the Civil Procedure Code, it is not necessary to bring all the heirs of the deceased on record as his legal representatives. [p. 206, col. 1.]

Ghamandi Lal v. Amir Begam, 16 A. 211; A. W. N. (1894) 22; 8 Ind. Dec. (N. S.) 136, dissented from.

Where a person has been added as a legal representative by the Court and has, as a matter of fact, represented the estate throughout, and no objection to the effect that the estate has not been properly represented has been taken at the hearing, the requirements of O. XXII of the Civil Procedure Code are fulfilled and the orders passed are binding on the estate, subject to the right of any person, not a party, to sue to have those orders set aside on the ground of collusion or fraud. [p. 207, col. 1.]

Second Appeal.

Mr. Maung Su, for the Appellant.

Mr. A. C. Mukerjee, for the Respondent.

JUDGMENT.—The suit out of which this appeal has arisen was filed by one Ma Gyan Bon in the Trial Court, where she obtained a decree in her favour for the redemption of a mortgage. After the suit had been heard, but before judgment had been pronounced, Ma Gyan Bon died. The present appellant Maung Po Mya who was a defendant in the original suit appealed to the District Court, and made the present respondent Ma Tin, Ma Gyan Bon's daughter, respondent, as legal representative of Ma Gyan Bon. No objection was taken to Ma Tin's representing the estate, and the appeal was dismissed. On the 22nd September 1921, Maung Po Mya filed the present appeal under the provisions of section 100 of the Code of Civil Procedure, against the decree of the lower Appellate Court, and again made Ma Tin the respondent as the legal representative of Ma Gyan Bon. When the appeal came on for hearing on the 28th

June, 1922, the learned Advocate for the respondent stated that the deceased Ma Gyan Bon had another child, one Maung Hla Baw, and claimed that Maung Hla Baw should have been added as legal representative. It was admitted on behalf of the appellant that Maung Hla Baw was a co-heir of Ma Gyan Bon, and application was then made by the appellant to add Maung Hla Baw as a respondent. To this objection is taken on behalf of Ma Tin, and the question now for decision is whether Maung Hla Baw should now be added as a legal representative of Ma Gyan Bon, and if not what the result will be of the failure to join him as a respondent. It has been suggested on behalf of the appellant that the provisions of r. 20 of O. XLI should be invoked. But it does not appear to me that it is possible to apply this rule to the present case. The Court has power to act under that rule only when the particular person it is desired to add was a party to the suit in the Court from whose decree the appeal is preferred. Maung Hla Baw was clearly not a party to the appeal in the District Court. Ma Gyan Bon was a party in the original suit, but to say that any person who is one of her legal representatives was also a party to that suit, seems to me to be unduly stretching the meaning of the terms of the rule. And if the Court cannot add Maung Hla Baw under the provisions of this rule, it is difficult to see how he can be added at this stage of the proceedings. Under the provisions of r. 4 of O. XXII when a sole defendant dies, the Court is bound on application to cause the legal representative of that defendant to be added as a defendant in his place, and under the provisions of rule 11, in the case of appeals, the word defendant, includes respondent. If a legal representative is so added, then the suit or appeal may proceed as against the estate of the deceased. When a question arises as to who is or is not the legal representative of the deceased, that question is to be decided by the Court under the provisions of r. 5. But the proper time to raise the question, as to who is the legal representative, is obviously before the hearing of the suit or appeal proceeds. Until that question is settled, the suit or appeal cannot proceed at all. The present respondent should ob-

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viously, therefore, have raised the question, as to who was legal representative of Ma Gyan Bon, in the Lower Appellate Court before the appeal was heard. He did not do so, with the result that for the purposes of that appeal the estate was represented by Ma Tin alone. It seems to me to be too late now to raise the point, and if it were raised Maung Hla Baw could not now be added as the period of limitation for an appeal against him has long expired. There is not, and never has been, any application by Maung Hla Baw to be made a party, either in this Court, or in the Lower Appellate Court. The question has arisen solely because the respondent Ma Tin hopes that the failure to add him as party may result in the failure of the appeal. But I can see no reason why the absence of Maung Hla Baw should have any such result. It is true that the decision in the case of *Ghamandi Lal v. Amir Begam* (1) appears to support the contention of the respondent on this point. In that case the appellant died during the pendency of the appeal, and one only of his three heirs was brought on to the record as legal representative of the deceased, and it was held that the deceased was not properly represented, and that the appeal must, therefore, fail. The learned Judges who decided that case remarked that the term legal representative must, where there are more than one legal representative, be read in the plural, and that unless they are all added there is no proper representation of the deceased. But they apparently recognised that this argument could not be carried to its logical conclusion, as they further remarked that if all the legal representatives were not willing to be added as appellants they should be added as respondents. But the addition of the remaining legal representatives as respondents could not make the appellant any more representative of the estate than he was before. The appeal would still be prosecuted only by a partial representation of the estate. And the hopeless confusion that might arise from this interpretation of the law being strictly followed is obvious. No litigant would be

safe when the opposite party died. That party might add a number of legal representatives, but not know of the existence of some others, and his suit would then have to fail, or be of no effect. A different view of the law on this point was taken by the High Court of Madras in the case of *Kadir Mohideen Marakkayar v. Mulukrishna Ayyar* (2). In the course of the judgment in that case the following passage occurs:—"In our opinion a person whom the plaintiff alleges to be the legal representative or one of the legal representatives of the deceased defendant, and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate. . . . If the true legal representative or all the legal representatives, do not intervene, it can be due only to his or their laches. This is the principle of representation which obtains under the English Law, when it is necessary that the representative of a person deceased be made a party to a pending suit and that principle is reproduced in section 38 of the Probate and Administration Act. A person prosecuting or defending a suit as the legal representative of a deceased party will of course be accountable to others who, like himself, are also the legal representatives of the deceased or to the true legal representative, as the case may be." The provisions of O. XXII seem to me to be framed for the sole purpose of providing for the continuance of litigation on a party dying or changing his legal character. If, under r. 5 of the Order, a question is raised at the proper time as to who is the legal representative or who are the legal representatives, then for the purpose of the suit, but for that purpose only, the Court has to decide the point. The Court quite obviously cannot under the provisions of that Order come to any binding decision as between the various claimants to the estate. All that it can decide is who is to represent the estate for the purposes of the suit. And once the Court has decided on that point, then the person the Court adds to the record as legal representative, is the legal representative

(1) 16 A. 211; A. W. N. (1894) 22; 8 Ind. Dec. (N. S.) 136.

(2) 26 M. 230; 12 M. L. J. 368.

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for the purposes of that suit, just as surely as if he were appointed for the purpose by a District Judge under the provisions of section 38 of the Probate and Administration Act. When, as in the present case, one person has been added as legal representative in the First Court of Appeal, and that person has, as a matter of fact, represented that estate throughout the hearing of that appeal, and no objection, to the effect that the estate has not been properly represented, has been taken at the hearing, then it appears to me that the requirements of O. XXII of the Code have been fulfilled, and the orders passed are binding on the estate, subject to the right of any person, not a party, to sue to have those orders set aside on the ground of collusion or fraud. The present case is somewhat complicated by the fact that Ma Gyan Bon herself was dead before the first appeal was filed, and has never been personally a party to the appeal. But for the purposes of the representation of her estate the appeal proceedings must be looked on as merely a continuation of the proceedings of the Trial Court. And the same general principles would apply in a case where, as in the present case, the deceased died before the appeal was filed, and in a case where the death took place during the pendency of the appeal. In either case the death has taken place during the pendency of the proceedings. There is no suggestion here of collusion or fraud or that Ma Gyan Bon's interests are not properly represented. The conclusion I come to, therefore, is that it is too late now to add Maung Hla Baw, who has never himself applied to be added as a party to this appeal, but that the appeal can proceed, and that the orders passed in the appeal will bind the estate of Ma Gyan Bon, subject to any possible right Maung Hla Baw may have to sue subsequently to have the decree set aside on the ground of fraud or any other good ground. I, therefore, reject the application to add Maung Hla Baw as a party to the appeal, and direct that the hearing of the appeal do proceed.

N. K.

*Application for substitution rejected.***MADRAS HIGH COURT.**

CIVIL APPEAL NO. 85 OF 1922.

November 1, 1922.

Present.—Mr. Justice Krishnan and
Mr. Justice Ramesam.THONA SINA NAINA MUHAMMAD
ROWTHER—DEFENDANT—APPELLANT
versusMONA MOONA ABDUL RAHAMAN ROW-
THER—PLAINTIFF—RESPONDENT.*Civil Procedure Code (Act V of 1908) s. 11, Expt. IV, application of—Res judicata—Suit for possession as joint purchaser—Subsequent suit as owner by inheritance, maintainability of.*

Though under O. II, r. 2, Civil Procedure Code, a plaintiff is not bound to join in one suit all the causes of action he has got against the defendant, he is bound to bring forward all the grounds in support of the claim or title he is litigating unless such union leads to confusion. [p. 209, col. 2.]

If a person sues for possession on the strength of his title, he must establish his title in that very suit by urging and proving all that would go to establish his title and cannot reserve one or more of such grounds for a future suit. [p. 209, col. 2.]

Where a plaintiff's suit for possession as co-owner on the strength of his title under a joint purchase is dismissed, a second suit for possession on the strength of his title as owner by inheritance is barred by section 11 read with Explanation IV of the Civil Procedure Code since in both cases the plaintiff was litigating under the same title, namely, his ownership and ought to have combined both the claims in the first suit. [p. 209, col. 1.]

Srimul Rajah Montoo Vijaya Raganadha Bodha Goroosamy Periya Odaya Taver v. Katama Natchiar, 11 M. I. A. 50; 10 W. R. P. C. 1; 2 Sar. P. C. J. 212; 20 E. R. 20. *Woomatara Debea v. Kristo-raminee Dossee*, 11 B. L. R. 158, 18 W. R. 163. *Kameswar Prshad v. Raj Kumari Ruttan Kcer*, 20 C. 79; 19 I. A. 234; 6 Sar. P. C. J. 241; 10 Ind. Dec. (N. S.) 53 (P. C.), *Moosa Goolam Ariff v. Ebrahim Goolam Ariff*, 16 Ind. Cas. 70; 40 C. 1; 16 C. W. N. 937; 23 M. L. J. 215; 16 C. L. J. 642; 14 Bom. L. R. 1211; 12 M. L. T. 449; 5 Bur. L. T. 211; (1912) M. W. N. 1097; 10 A. L. J. 486; 6 L. B. R. 119; 39 I. A. 237 (P. C.), *Masilamania Pillai v. Thiruvengadam Pillai*, 31 M. 385, *Gariya Rangaswamy Palrudu v. Majji Appalaswamy*, 34 Ind. Cas. 456; (1915) 1 M. W. N. 286, *Guddappa v. Tirkappa*, 25 B. 189; 2 Bcm. L. R. 872, relied upon.

Ramaswami Ayyar v. Vythinatha Ayyar, 26 M. 760 at pp. 774, 775; 13 M. L. J. 448, *Saminathan Chetty v. Palaniappa Chetty*, 26 Ind. Cas. 228; 41 I. A. 142; 18 C. W. N. 617; 17 New Law Reports 56; 83 L. J. P. C. 131; (1914) A. C. 618; 110 L. T. 913 (P. C.), *Thrikathal Mazathil Ramun v. Thiruthiyil Krishnan Nair*, 29 M. 153; 16 M. L. J. 48. *Mangalathammal v. Veerappa Goundan*, 52 Ind. Cas. 813; (1919) M. W. N. 287, distinguished.

A plaintiff cannot by claiming in a subsequent suit a larger or a smaller share of the property in dispute in a former suit get rid of the effect of *res judicata*. [p. 210, col. 1.]

NAJNA MUHAMMAD ROWTHER v. ABDUL RAHAMAN ROWTHER.

Appeal against a decree of the Court of the Second Additional Subordinate Judge, Madura, in Original Suit No. 56 of 1921.

Messrs. A. Krishnaswami Iyer and Patanjali Sastri, for the Appellant.

Mr. K. V. Krishnaswami Iyer, for the Respondent.

JUDGMENT.

Krishnan, J.—This is an appeal by the defendant against the decree of the Second Additional Subordinate Judge of Madura, in Original Suit No. 56 of 1921, on his file. The only point argued before us by the appellant is that the present suit is barred by *res judicata* under section 11, read with Explanation IV, of the Civil Procedure Code. The Subordinate Judge has held that it is not so barred and hence the appeal by the defendant.

The plea of *res judicata* is based on the former suit, Original Suit No. 1 of 1916, brought by the present plaintiff along with the widow and daughter of his deceased brother, one Muthu Mahomed Rowther, against the heirs of one Varisai Rowther, defendants Nos. 1 to 5 and against the present defendant as the 6th defendant, and against the heirs of his third deceased brother Naina Mahomed Rowther. His case there was that the properties in suit, the title-deeds of which stood in the name of Muthu Mahomed Rowther were purchased by all the three brothers with their joint earnings, *benami* in the name of Muthu Mahomed and they really belonged to all of them in equal one-third shares. One of the items sued for was a house in Madura Town. Muthu Mahomed had executed a sale-deed regarding it to one Varisai Rowther and after the latter's death it had been sold by his heirs defendants Nos. 1 to 5 to the 6th defendant and he was in possession. It was alleged by the plaintiff that the sale-deed to Varisai Rowther was a nominal transaction not intended to convey title and, that the 6th defendant had no title either, as he was a purchaser with notice of the defect of title. The present plaintiff, therefore, claimed a one-third share for himself and plaintiffs Nos. 2 and 3 claimed another third share as heirs of Muthu Mahomed allowing the other one-third to the heirs of Naina Mahomed.

The Subordinate Judge who tried the suit found that the property was not the joint acquisition of the brothers but belonged to Muthu Mahomed alone and on that finding he dismissed the plaintiff's claim. He also found that the sale to Varisai Rowther was a nominal one, and that the 6th defendant obtained no title as he was a purchaser with notice of the infirmity of title of his vendor. He thus gave a decree to plaintiffs Nos. 2 and 3 as the heirs of Muthu Mahomed, but only for a one-third share, as they had not asked for more, although they were entitled to a five-eighths share under the Muhammadan Law of inheritance on his finding. Plaintiff did not appeal but the 6th defendant filed an appeal in the High Court. Plaintiffs Nos. 2 and 3 filed a memorandum of objection claiming their five-eighth share in the properties under the Muhammadan Law on the footing that the whole property belonged to Muthu as found by the Subordinate Judge. The High Court dismissed the 6th defendant's appeal, but gave a decree for five-eighth share to plaintiffs Nos. 2 and 3. They have executed that decree and got possession of that share.

It is for the balance three-eighth share of the house in Madura that the plaintiff brings the present suit against the 6th defendant. He now claims as the sole residuary heir to Muthu Mahomed being his sole surviving brother. Defendant contends that the plaintiff "might and ought to have" claimed this relief in the alternative in the previous suit and, not having done so, he is barred by section 11 read with Explanation IV from claiming it again.

The previous suit was so far as the present defendant is concerned, a suit for his ejectment from the sued house on the ground that he had no valid title to it, or in other words that, he was a trespasser: and it was based upon plaintiff's title as owner by joint purchase with two others. The prayer for partition was only against the heirs of his brother. It did not concern the present defendant. It is conceded that in that suit plaintiff might have put forward his claim to ownership by inheritance as heir to Muthu Mahomed as an alternative claim. In fact though the case of the plaintiffs Nos. 2 and 3 was also one based on Muthu

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Mahomed being entitled to only a third share as joint purchaser, they were given a decree for their five-eighths share in the whole property on the footing that it belonged solely to Muthu Mahomed. Plaintiff could have got relief on the same footing in that suit if he had put forward his claim as Muthu Mahomed's residuary heir.

The question then is, whether he "ought" to have put his present claim forward in the suit. The ruling in *Woomatara Debea v. Kristohaminee Dossee* (1) is in point, where their Lordships of the Privy Council held that a suit to recover property on the ground that it was part of plaintiff's Taluk was barred by a previous suit for the same land on the ground that it was *tanifir* land, or land which was obtained by adverse possession, as the two claims should have been combined in the first suit. In the case before us the first case was for possession against the defendant as owner on the strength of plaintiff's title by purchase, the present case is again for possession on the strength of plaintiff's title as owner by inheritance. In both cases plaintiff is litigating under the same title, namely, his ownership. He should, therefore, according to this ruling, have combined the two claims in the first suit.

In that case their Lordships followed an earlier ruling of theirs in *Srimut Rajah Mootoo Vijaya Ragamadha Bodha Gooroo-swamy Periya Odaya Taver v. Katama Natchiar* (2), where in the first suit the party rested his title upon the property being the separate property of the Zemindar, whereas in the second suit he claimed title under a Will. That plea was held to be barred.

The case in *Woomatara Debea v. Kristohaminee Dossee* (1) was referred to in *Ramaswami Ayyar v. Vythinatha Ayyar* (3). The learned Judge, while distinguishing it from the case before him, which was one of redemption of a mortgage different from the one sought to be redeemed in the first case, though on the same property, observes that the suits in *Woomatara Debea v. Kristohaminee Dossee* (1) were "both suits based

upon plaintiff's title as owner" and that "the case is an authority only for the position that if one is dispossessed of land and brings a suit to recover possession on the strength of his title, he must establish his title in that very suit by urging and proving all that would go to establish his title and cannot reserve one or more of such grounds for a future suit; and this is what is laid down in Explanation IV to section 13, Civil Procedure Code, 1882, which is the same as Explanation IV to section 11 of the present Code. Even taking this restricted view of the scope of the decision without deciding whether it is correct to so restrict it, it appears clear that the present case falls within it and is covered by the Explanation.

The Privy Council again held in *Kameswar Pershad v. Raj Kumari Rullan Koer* (4) that a suit to enforce a charge on property barred a second suit for the same amount on a personal covenant to pay under the same agreement. Their Lordships say that "the question whether the second claim ought to have been put forward in the first case depends on the particular facts of each case. When matters are so dissimilar that their union might lead to confusion, the construction of the word "ought" would become important; in this case matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur, and it appears to their Lordships that the matter "ought" to have been made a ground of attack in the former suit." This case shows that if a person has two grounds on which he could base his claim or title to a thing, he must bring forward both in the first suit itself and he will be barred from bringing a second suit, unless, indeed, the union leads to confusion. In the case before us the joining together of the two claims the one under a purchase and the other as heir would have led to no confusion or embarrassment. If plaintiff failed to prove the joint purchase he alleged, the property must have necessarily been taken to be Muthu Mahomed's as the deed was in his name and as the defendant claimed title through him for his alternative claim he would then have to prove only that

(1) 11 B. L. R. 158; 18 W. R. 163.

(2) 11 M. I. A. 50; 10 W. R. P. C. 1; 2 Sar. P. C. J. 212; 20 E. R. 20.

(3) 26 M. 760 at pp. 774, 775; 13 M. L. J. 448.

(4) 20 C. 79; 19 I. A. 234; 6 Sar. P. C. J. 241; 10 Ind. Dec. N. S. 53 (P. C.).

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he is a residuary to get relief on that ground. In either case the invalidity of the 6th defendant's title must be proved so that the addition of the alternative case will have led to no confusion at all and no embarrassment to plaintiff in leading his evidence.

The case in *Kameswar Pershad v. Raj Kumari Rullan Koer* (4) was followed by their Lordships again in *Moosa Goolam Ariff v. Ebrahim Goolam Ariff* (5). Thus, it would seem clear on the authority of the Privy Council ruling that the plaintiff should have put forward all his grounds of attack to recover the suit house from the defendant and, not having put forward his claim based on his right of inheritance in the former suit, he is now barred from doing so. The fact that plaintiff claimed in the first suit a one-third share by partition whereas now he claims a specific three-eighths share which alone is left with the defendant, the balance having been recovered from him by Muthu Mahomed's widow and daughter, can make no difference to the application of the rule of *res judicata*, for, according to both his claims, the defendant had no right to any portion of the property, he being a trespasser. A plaintiff cannot by claiming a larger or a smaller share in the same property than in his first suit get rid of the effect of *res judicata* against him. In both cases the relief against the defendant is to recover possession from him of the whole or part of the same property.

Besides the above-mentioned authorities, the appellant cited *Masilamania Pillai v. Thiruvengadam Pillai* (6), *Gariya Rangaswamy Patrudu v. Majji Appalaswamy* (7) and *Guddappa v. Tirkappa* (8). The respondent, on the other hand, has quoted a number of cases where it was held that the second suit was not barred but I think it is not necessary to discuss them all. It is not possible to reconcile all the cases; but it may be conceded that a plaintiff is not bound, under O. II, r. 2, to join in one suit all the causes of action he had

got against the defendant; but that principle is not one applicable to the question before us which refers to a plaintiff's duty to bring forward all the grounds of his attack in support of the title that he is litigating. Reference must, however, be made to two of the cases relied on by the learned Vakil for the respondent, *Ramaswami Ayyar v. Vythinatha Ayyar* (3), a decision of this Court and *Saminathan Chetty v. Palaniappa Chetty* (9), a decision of the Privy Council in an appeal from Ceylon. In the former case it was ruled that the dismissal of a suit to redeem one mortgage did not bar a subsequent suit to redeem another mortgage on the same property. I agree with this decision, as the two suits are different from one another being based on two different contracts. The title or jural relationship in the two litigations are different as the terms of the two mortgages which regulate that relationship are different. But I do not wish to be understood as agreeing to all the observations in that judgment. That case is really an illustration of the rule that a plaintiff is not bound to combine different causes of action in the same suit and does not apply here.

The Privy Council case cited is *Saminathan Chetty v. Palaniappa Chetty* (9). The first suit was on certain promissory notes, which failed as the notes were found to have been materially altered. The second suit was for money due under a certain award or settlement for which the notes had been given. The question considered in that case was not one of *res judicata* but whether a second suit was barred by reason of section 34 of the Ceylon Procedure Code, corresponding to O. II, r. 2 of our Code. Their Lordships held that the claim on the notes and the claim on the original consideration under the award or settlement were quite independent claims and constituted "two inconsistent and mutually exclusive causes of action" and, therefore, the second suit did not offend against the section quoted. No question of the kind before us was raised and we cannot, therefore, treat it as an authority on that question.

(5) 16 Ind. Cas. 70; 40 C. L. J. 16 C. W. N. 937; 23 M. L. J. 215; 16 C. L. J. 642; 14 Bom. L. R. 1211; 12 M. L. T. 449; 5 Bur. L. T. 211; (1912) M. W. N. 1097; 10 A. L. J. 486; 6 L. B. R. 119; 39 I. A. 237 (P. C.).

(6) 31 M. 385.

(7) 34 Ind. Cas. 456; (1916) 1 M. W. N. 286.

(8) 25 B. 189; 2 Bom. L. R. 872.

(9) 26 Ind. Cas. 228; 41 I. A. 142; 18 C. W. N. 617; 17 New Law Reports 56; 83 L. J. P. C. 131; (1914) A. C. 618; 110 L. T. 913 (P. C.).

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For the above reasons I hold that the present suit is barred by section 11, Explanation IV, Civil Procedure Code, and must be dismissed. I allow the appeal and dismiss the suit with defendant's costs throughout.

Ramesam, J.—The facts are fully stated by my learned brother.

The decision depends on a construction of the words "litigating under the same title," taken with Explanation IV in section 11, Civil Procedure Code. As a large number of decisions, including those of the Judicial Committee, are available as guides, it is futile to attempt to work out the details in the application of the section by the mere consideration of the words of the section. On an analysis of the decisions cited before us, the following propositions may be gathered from them (without attempting to generalise):—

(1) Where the creditor (hypothecatee) of a Hindu widow claimed to recover the debt from a reversioner who got into possession of the estate through a surrender by the widow, a claim based on that ground or on express covenant at the time of surrendering, to pay the debt, is barred by a prior suit to recover the identical debt where it was based on the ground that it was beneficial to and binding on the reversioner *Kameswar Pershad v. Raj Kumari Ruttan Koer* (4).

(2) Where the first suit was to redeem one mortgage it does not bar a suit to redeem a mortgage of a different date though the property sought to be redeemed and the principal amount of the mortgage are identical: *Ramaswami Ayyar v. Vythinatha Ayyar* (3), *Veerana Pillai v. Muthukumara Asary* (10) and *Thrikkai Madathil Raman v. Thiruthiyil Krishnen Nair* (11).

(3) Where the first suit was based merely on the relationship of landlord and tenant between plaintiff and defendant (and not on plaintiff's title as owner or otherwise) a second suit based on title is not barred: *Mangalathimmal v. Veerappa Goundan* (12).

In the first case the claimant litigates under the same title but not in the second and third cases.

(4) Where the plaintiff sought to recover the property as owner, a second suit to

recover the same property also as owner is barred, even though the details for the ownership are different from those in the first

It is scarcely necessary to add that in cases 1 and 4 the facts which are the basis of the second suit must have existed at the time of the first suit to attract the bar of *res judicata*. The fourth proposition is supported by *Woomatara Debea v. Kristokaminee Dossee* (1), *Moosa Goolam Ariff v. Ebrahim Goolam Ariff* (5), *Guddappa v. Tirhappa* (8), *Masilamania Pillai v. Thiruvengadam Pillai* (6) and *Gariya Rangaswamy Patradu v. Majji Appalaswamy* (7).

In my opinion the decision in *Subrahmaniam Chetti v. Authinarayana* (13), Second Appeal No. 1606 of 1914 and Second Appeal No. 1391 of 1917 (unreported) are inconsistent with *Woomatara Debea v. Kristokaminee Dossee* (1). I also agree with Seshagiri Aiyar, J.'s dissent in *Gariya Rangaswamy Patradu v. Majji Appalaswamy* (7) from the remarks at page 779 of *Ramaswami Ayyar v. Vythinatha Ayyar* (3).

In the application of the fourth proposition it must be remembered that the claim in the second suit must be either substantially identical with or part of the claim in the first suit.

Coming to the present case, can there be any difference for the purpose of *res judicata* merely because (1) the share claimed by the plaintiff in the present is three-eighths and that in the former case was one-third and (2) there was a claim for partition in the first suit and none now? I think not. In the first place, the share to which plaintiff was entitled in the former suit on the footing that all the three brothers originally acquired the property was not one-third but one-third plus three-eighths of one-third or eleven-twenty-fourths, the plaintiff being entitled to the extra one-eighth by reason of succession from the second brother. Though the result of this succession was overlooked in so far as the two-thirds claimed by all the three plaintiffs in the former suit were concerned, it was a claim for ejectment against the present defendant whether the two-thirds consisted of one-third belonging to 1st plaintiff and one-third to 2nd and 3rd plaintiff or eleven-twenty-fourths to 1st plaintiff and five-twenty-

(10) 27 M. 102.

(11) 29 M. 153; 10 M. L. J. 48.

(12) 52 Ind. Cas 813; (1919) M. W. N. 287.

(13) 7 M. L. J. 288.

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fourths to 2nd and 3rd plaintiffs. The fact that a partition was asked for because the heirs of the first brother did not join as co-plaintiffs was a mere accident and does not change the character of the suit.

The share now claimed (*viz.*, three-eighths) by the plaintiff was certainly less than the eleven-twenty-fourths to which he was entitled at the time of the former suit (even on the allegation of acquisition by all the three brothers) though by an oversight as to the results of the death of the second brother, his title was described as that to a third; and it certainly overlaps substantially the claim actually made. If the shares are identical though there is no claim for partition in the second suit, it cannot be said that the second suit is not barred and the non-identity of the shares is a mere accident and can make no difference for the application of the principle. In *Balbhaddar Nath v. Ram Lal* (14), *Shivram v. Narayan* (15) and *Konerrav v. Gurra* (16), the plaintiff's right as co-owner using the term generally was admitted in the first and only the fact of a partition resulting in plaintiff's right to a specific plot was in dispute. In the interval between the two suits, he continued to be co-owner and the second suit for partition was not barred. In *Nilo Ramchandra v. Govind Ballai* (17) (a suit for *vatan* property) some of the defendants in the first suit admitted plaintiff's right though not the one who was the contesting defendant in the second suit. In *Thandavan v. Valli-amma* (18) and *Dhanapala Chetty v. Anantha Chetty* (19), the first suit was for a declaration and there was neither identity of suit nor identity of issue as the validity of the Will in one case and the construction of the Will in the second were not in question in the first suit. In *Allunni v. Kunjusha* (20), the *Karnavan* had not exercised his right to resume as *Karnavan* at the time of the first suit. In Second Appeal No. 1391 of

1917 if the plaintiff's right to his own undivided share was admitted in the first suit, that decision would have been distinguishable like *Vengapayyan v. Karimbanakal Parvati* (21) and the cases in *Konerrav v. Gurra* (16). As it is, I am not able to agree with it. It cannot be said either in Second Appeal No. 1391 of 1917 or in the present suit that if the second claim was made alternatively in the first suit, the first suit would have been bad for misjoinder of parties and of causes of action either under the present Code or of the old Code. In the result, I agree with my learned brother that the plaintiff's suit should be dismissed with costs throughout.

Appeal dismissed.

V. N. V.

(21) 26 M. 501.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 134 OF 1922.

August 15, 1922.

Present:—Mr. Brown, A. J. C.

MA TIN—APPLICANT

versus

MA CHIT—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 18—*Trusts Act* (II of 1882), s. 3—“Trust,” meaning of—*Suit for recovery of property entrusted to goldsmith—Court of Small Causes, jurisdiction of.*

The meaning of the word “trust” occurring in Art. 18 of the Second Schedule to the Provincial Small Cause Courts Act is analogous to the meaning assigned to it in section 3 of the Trusts Act. [p. 213, col. 2.]

Where a person brings a suit to recover certain property entrusted by him to a goldsmith for work to be done on it, the suit is not one relating to a trust within the meaning of Art. 18 of the Second Schedule to the Provincial Small Cause Courts Act. [p. 213, col. 2.]

Kariar Devi v. Surasti, 9 P. R. 1908; 98 P. L. R. 1908; 28 P. W. R. 1908, relied on.

Application.

Mr. Maung Su, for the Applicant.

JUDGMENT.—The respondent, Ma Chit, sued the applicant, Ma Tin, in the Small Cause Court of Minbu for the recovery of

(14) 26 A. 501; 1 A. L. J. 228.

(15) 5 B. 27; 3 Ind. Dec. (N. S.) 19.

(16) 5 B. 589; 3 Ind. Dec. (N. S.) 388.

(17) 10 B. 24; 5 Ind. Dec. (N. S.) 399.

(18) 15 M. 336; 2 M. L. J. 130; 5 Ind. Dec. (N. S.) 586.

(19) 18 Ind. Cas. 973; 24 M. L. J. 418; 13 M. L. T. 305; (1913) M. W. N. 322.

(20) 7 M. 264; 8 Ind. Jur. 135; 2 Ind. Dec. (N. S.) 768.

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certain properties or their value Rs. 102-6. According to her plaint the properties in question were entrusted by her to the first defendant, a goldsmith Maung Po Aung, to do certain work on them. When she asked Maung Po Aung for the properties back, he told her that Ma Tin had taken the properties in question away, saying that she had been requested by Ma Chit to do so. Ma Tin admitted taking certain pieces of gold and bangles from Maung Po Aung which, she was told, were entrusted to him by Ma Chit, but she says that Ma Chit had been her servant, that she had lost property to the value of Rs. 120 whilst Ma Chit was in her employ, and that it was agreed that the gold bangles which she got from the goldsmith should be taken as part payment towards this Rs. 120. The Trial Court found that the agreement alleged by Ma Tin was not proved, and gave the plaintiff a decree for the return of the properties, or Rs. 102-6, against both the defendants. Ma Tin has now come to this Court in revision under the provisions of section 25 of the Provincial Small Cause Courts Act. Four grounds are set forth in the application before the Court. The second ground raises questions of fact which are not matters for consideration in revision. The third ground claims that the suit is barred by limitation; but the suit was brought well within three years from the date of the alleged entrustment, and it has not been suggested that any shorter period than three years is the period prescribed by the law of limitation in this case. The fourth ground is of a general nature, and raises no specific point. When the case came on for hearing as to admission, nothing was in fact said in support of these three grounds which have been practically abandoned. The application has been argued on the first ground only, and that is that the Small Cause Court should have held that the jurisdiction of that Court was barred as falling within Art. 18 of the First Schedule of the Provincial Small Cause Courts Act. That Article excepts from the cognizance of a Court of Small Causes "a suit relating to a trust, including a suit to make good, out of the general estate of a deceased trustee, the loss occasioned by a breach of trust, and a suit by a co-trustee to enforce against the estate of a deceased

trustee a claim for contribution." It is contended that the suit brought by Ma Chit was a suit relating to a trust. It does not seem to me possible to uphold this contention. A trust is defined in section 3 of the Indian Trusts Act, 1882, as "an obligation annexed to the ownership of property and arising out of the confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner." In the present case the plaintiff says that she entrusted the properties to the first defendant, but her case is that she was, and still is, the owner of the properties. She does not allege that any confidence was reposed in and accepted by her, or was declared and accepted by her. Whatever confidence there was, was reposed in and accepted by Maung Po Aung, who is not alleged to be the owner of the property. There was, therefore, no trust within the meaning of section 3 of the Indian Trusts Act. That Act is not in force in the Minbu District. But there seems to be little doubt that, in framing Art. 18 of the Schedule to the Small Cause Courts Act, the Legislature intended the word "trust" to bear a meaning at least analogous to the meaning as defined in the Indian Trusts Act.

No authority has been cited before me in favour of the view that a suit of the nature of the present suit is a suit relating to a trust within the meaning of Art. 18, and such authority as I have been able to find is in support of the view that I now take. In the case of *Kartar Devi v. Surasti* (1) the plaintiff alleged that certain moveable properties had been deposited for safe custody with the defendant, and sued for recovery of that property or its value. It was held that the suit was one for the recovery of the moveable property or its value, and not one relating to a trust. The circumstances of that case were very similar to those of the present case, and the view there taken is the view now taken by me. It seems to me quite clear that Art. 18 is not applicable to a case like the present. The value of the suit in the present case was under Rs. 500 and it is not suggested that any other of the Articles in the Second Schedule of the Small Cause Courts Act is

(1) 9 P. R. 1908; 98 P. L. R. 1908; 28 P. W. R. 1908.

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applicable. I hold, therefore, that the suit brought by Ma Chit was within the jurisdiction of the Court of Small Causes. I dismiss this application summarily.

N. K.

Application dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 250 OF 1921.

November 10, 1922.

Present:—Mr. Justice Krishnan and
Mr. Justice Ramesam.

RATHANAMASARI AND OTHERS—

APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA

IN COUNCIL, REPRESENTED BY

THE COLLECTOR OF SALEM—

RESPONDENT.

Evidence Act (I of 1872) ss. 35, 124—Land acquisition proceedings—Report made by Tahsildar, whether relevant—Objection under s. 124 not taken in Trial Court—Objection, whether can be taken in appeal—Market-value of buildings—Method of determination.

The report of a Tahsildar and his valuation statement in land acquisition proceedings are admissible in evidence under section 35 of the Evidence Act as reports made in obedience to orders passed by his Superior Officers and in discharge of his official duty. [p. 216, col. 1.]

Where, in a Land Acquisition proceeding, private and correct copies of the report of the Tahsildar and his valuation statement were taken by a claimant and filed in Court and exhibited without objection on the part of the Government:

Held, that it was not open to Government in appeal to claim privilege as regards the documents under section 124 of the Evidence Act as communications made in official confidence. [p. 216, col. 1.]

Venkatachella Chettiar v. Sampathu Chettiar, 1 Ind. Cas. 705; 32 M. 62; 4 M. L. T. 317; 19 M. L. J. 263, *Nagaraja Pillai v. Secretary of State*, 26 Ind. Cas. 723; 39 M. 304, referred to.

In determining the market-value in a Land Acquisition case, a plot consisting of buildings and a garden is more satisfactorily valued by capitalising the rental value rather than by separately valuing the buildings and the land on which the buildings stand. [p. 217, col. 1.]

Appeal against the award of the District Court, Salem in Land Acquisition Case No. 9 of 1915.

Mr. S. T. Srinivasagopalachari (with him Messrs. L. A. Govindaraghava Aiyar and K. S. Rajagopala Aiyangar), for the Appel-

lants.—On the application of my friend Mr. L. A. Govinda Raghava Iyer who appeared on the former occasion, your Lordships directed the Government to send up certain documents for inspection. They have now been sent in a sealed cover.

They consist of two reports by the Tahsildar and a special valuation report in land acquisition proceedings. The Government Pleader claims privilege for the documents. The question of privilege depends on section 124 and section 164 of the Evidence Act read together. Privilege under section 124 is subject to inspection by Court under section 162 and is not absolute: See *Nagaraja Pillai v. Secretary of State* (1) and *Venkatachella Chettiar v. Sampathu Chettiar* (2). The Court has always power to inspect documents and determine if the objection is well-founded.

No privilege can attach in this case because none was claimed, since Government undertook to produce two of the documents, and did in fact actually produce one of them.

Secondly, there is no inherent objection to admissibility of such documents. The question is one of privilege or benefit which can be waived by the Government or destroyed by the other party getting at those documents even though surreptitiously. There is evidence in the case which stands uncontradicted that the Tahsildar permitted the claimant to make private though unauthorised copies of these documents which were in fact filed without objection, and it has not been suggested that the copies filed are not correct and true copies.

Thirdly, the documents are merely valuation reports. They may be adverse to the Government but cannot on that account be said to be made in such official confidence that the public interests would suffer by its disclosure. No privilege can be claimed in the present case.

On the valuation itself, the Judge has adopted a 20 years' value. The lands and the buildings must have been separately valued. The proper test of computation in the present case is to see in what way the property can be laid out in the most

(1) 26 Ind. Cas. 723; 39 M. 304.

(2) 1 Ind. Cas. 705; 32 M. 62; 4 M. L. T. 317; 19 M. L. J. 263.

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lucrative and advantageous manner [*Premchand Burrall v. Collector of Calcutta* (3)], with reference to special adaptability for building purposes, [*Manji Khetsey, In the matter of* (4)] and its potential value. [*Dorabji Cursetji Sheroff, In re* (5).]

Even on the basis of rental valuation, 25 years' purchase must have been allowed and not 20 only [*Secretary of State for India in Council v. Sham Bahadur* (6)], and in any case the rental basis must have been fixed having regard to its future potentialities. The prior acquisition though of a small plot furnishes the best datum for calculating the market-value.

Mr C. Madhavan Nair, for the Collector.—The privilege under section 124 is absolute and is incapable of being waived, and has not been waived. The error of the Government Pleader in producing documents does not operate as estoppel against the Collector. Bare faced fraud in getting hold of these documents, even if acquiesced in by an official, does not deprive the statutory privilege vested under section 124.

Secondly, the documents are irrelevant and inadmissible in evidence. They are only communications made by one official to another and do not constitute an entry in the discharge of his official duty or duty enjoined by any law: *Malikarjuna Dugget v. Secretary of State* (7). On the merits, no scheme or plan has been filed by the claimant. No evidence has been let in on the potential value of land for building purposes and arguments based on building schemes and potential value cannot be raised now for the first time in appeal.

As to valuing the land and buildings separately, in a rent case, Appeal Suit No. 262 of 1921 [*Kathissibai v. Revenue Divisional Officer, Calicut* (8)], it has been held in an elaborate and well-considered judgment that premises comprising land and buildings are more satisfactorily valued on rental basis.

Compensation awarded to a small bit of land on a former occasion cannot afford satisfactory data in fixing the price of a big plot of land.

The award given below is quite proper.

JUDGMENT.—This is an appeal in a Land Acquisition Case against the decree of the District Court of Salem. Three plots of lands, survey Nos. 29, 34 and 35, suitable for house building, were acquired for the purpose of building a hostel for the Salem College in 1915, the date of the notification being July 1915. On plots Nos. 34 and 35, there was a bungalow and that was also acquired. The Deputy Collector awarded in the first instance for the three plots of land including the bungalow and the houses standing on them Rs. 12,170-13-8 and 15 per cent. the statutory compensation in addition. The District Judge has increased that award to Rs. 15,620 including the 15 per cent. for compensation. The claimants have appealed to this Court and they claim that their properties are worth more and that they should get Rs. 8,333-5-7 extra, that is, Rs. 23,953-5-7 in all.

At the opening of the case the learned Advocate for the appellants wanted us to admit in evidence in this Court the Tahsildar's reports of the 18th June 1913 and the 26th September 1913 and a special valuation statement submitted by him on the 12th June 1913. With reference to that prayer we called for a report from the lower Court and also the original documents in a sealed cover. The report and those documents have now come up before us. The learned Government Pleader has objected to their being admitted in evidence under section 124 of the Indian Evidence Act and also because he contended that they were irrelevant as evidence. As regards section 124 of the Indian Evidence Act, it is hardly necessary to go into any detailed consideration of the meaning of that section, for we notice that copies of all these three documents had been filed in the lower Court as Exhibits A and J, apparently without any objection on the part of the Government Pleader that they were privileged documents, under section 124 which should not be admitted in evidence, for we do not see anything in the lower Court's records or judgment to show

(3) 2 C. 103; 1 Ind. Jur 267; 1 Ind. Dec. (N. S.) 353.

(4) 15 B. 279; 8 Ind. Dec. (N. S.) 189.

(5) 10 Bom. L. R. 675.

(6) 10 C. 769 at p. 774; 5 Ind. Dec. (N. S.) 515.

(7) 14 Ind. Cas. 401; 35 M. 21.

(8) 70 Ind. Cas. 82; 16 L. W. 891; 31 M. L. T. 409; (1923) M. W. N. 54; (1923) A. I. R. (M.) 31.

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that any objection was raised. These copies were proved to be correct copies taken by one of the claimants and he swore to that effect in the witness-box. After having done that, we do not think it can be claimed any more that they are communications made in official confidence. If the Government intended to take the objection under section 124, the learned Government Pleader in the lower Court should have objected to these copies going to the record. Now that these copies are on the record in this case we cannot consider the communications made to be communications made in confidence. That being so, we must overrule the objection under section 124 of the Evidence Act. It is not necessary to refer to the authorities on the point, namely, *Venkatachella Chettiar v. Sampathu Chettiar* (2) and *Nagaraja Pillai v. Secretary of State* (1). They do not touch the point before us.

As regards the next plea that the documents are irrelevant, we are unable to uphold that contention of the learned Government Pleader. We think they are relevant under section 35 of the Evidence Act. The Tahsildar made these reports in obedience to an order passed by his superior officer and in discharge of his official duties. Whether it is a duty enjoined on him by the law of the country to send up these reports or not, he was bound, as an officer subordinate to the Deputy Collector, to make the report when he was called upon to do so and the report was made as an official report after such enquiries as the Tahsildar could make. His report is kept on the record of this Land Acquisition Case in the Collector's Office and thus it comes expressly within the words of section 35. But it is hardly necessary to put the originals on record because there are correct copies already filed and it is sufficient to refer to them, if necessary, for our purposes here. As a matter of fact, we may observe that no reliance has been placed upon these documents by either side.

As regards the merits of the case we may observe at the outset that there is very little evidence on record to enable us to come to a satisfactory conclusion as to the market-value of the properties acquired. Properties forming Survey Nos. 34 and 35

seem to stand on a somewhat different footing from property forming Survey No. 29, for the two former are accessible to the road on two sides, whereas the latter is not so and is inferior land with no road access and faces the river. We will, therefore, consider their market-value separately.

Taking Survey Nos. 34 and 35 with the buildings standing on them first, the District Judge has adopted the method of capitalising the rental value of these plots. They are $8\frac{1}{2}$ acres in extent and have a fairly large building on them. They have been let for twenty years prior to 1911 to the Police Department for Rs. 75 a month, subsequently to Government for the Sankari Deputy Collector's Office, and for a few months thereafter to one Mr. Levinge. All through the rent has been Rs. 75, except during the short period when Government was in occupation for the purpose of locating the Deputy Collector's Office when the Municipal tax was paid by Government. The learned Judge capitalises the net rental at twenty years' purchase and arrives at the figures Rs. 13,100 as the proper value of the plot. It has been argued strenuously before us by the learned Advocate for the appellant that this method was not correct and that the land and the buildings should have been valued separately and the District Judge should have taken into consideration the compensation paid by Government for a former acquisition of a plot of land 18 cents in extent under Exhibit H for the purpose of laying a road. The price then paid was at the rate of Rs. 15 a cent, which would work out to Rs. 1,500 an acre. We do not think that this acquisition of such a small plot of land for which only a small sum of money was paid can be made the basis of valuation for a large plot like the one now in question before us. It is impossible to say that such an acquisition stands on the same footing as the present acquisition, nor can we properly deduce the market-value of the land from such an acquisition as that, for when very small plots are acquired the actual rates at which they are acquired are not often properly scrutinised, the whole cost of the acquisition being small.

The appellant's next contention is, that the $8\frac{1}{2}$ acres of land on which the buildings stand should also be valued separately and

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that the buildings should also be valued separately and the two added together to get the total market-value of the plots with the buildings standing thereon. That is hardly the way in which property consisting of a house and garden is valued in the market. We think that a plot consisting of a house and a garden is much more satisfactorily valued in the manner in which the District Judge has done, by capitalising the rental in the absence of other evidence which would give a more satisfactory value. Taking the monthly rental in this case, viz., Rs. 75, and making allowance for the Municipal tax payable on the land Rs. 150, and the payment to the *mittadar* Rs. 20 a year, charged upon this land, deducting also what one of the claimants who gave evidence in the case says he spent for the repairs and upkeep of this building, viz., Rs. 50, we get a net annual rental of Rs. 680. The learned District Judge has taken a month's rental as the cost of repairs. That will ordinarily be so, but here we have special evidence, and there is nothing to contradict it, that Rs. 40 or Rs. 50 were spent for repairs. Taking, therefore, Rs. 680 as the net annual rental, and taking twenty years' purchase, which we think is a fair figure to adopt and a figure which is ordinarily adopted in most cases, the value of these two plots with the buildings on them will come to Rs. 13,600. This, we think, may well be accepted as the total value of these two plots.

It is in evidence that the building itself is separately valued at Rs. 6,500 and odd. Deducting that figure from this and taking the rest as the value of the land, the value of the land would work out to Rs. 850 an acre, which, we think, under the circumstances of the case, is not at all an improper value, for evidence has been adduced on behalf of Government, Exhibits I, II and III, which would show that the value of the land in the neighbourhood would seem to have been Rs. 400 an acre. It is quite true that those lands were lands of an inferior character being rather low in level and required to be raised for building purposes. That would, of course, account for the difference in the amount that we are now awarding for the land acquired under the Act and their market-value.

It is also suggested that in taking this method of rental valuation for calculation of the value, we ought not to include the whole of the $8\frac{1}{2}$ acres as part of the property but should allot a certain proportion of the land to the bungalow reasonably sufficient for the comfortable occupation of the bungalow and take the value arrived at by the capitalisation method as the value of that portion of the land and the bungalow, valuing separately the rest of the land; because it is contended that this is a good building site and the rest of the land could be utilized for building purposes. There is in this case no evidence of the existence of any scheme for building on that property nor of any intention either by the owners or by others to build on it. Furthermore, it is a matter for speculation as to how much of the land should be allotted to the bungalow and whether, if such an allotment is made, the rent may not be affected. We do not think that we will be justified in making any speculation such as this and, therefore, we take it that the value arrived at correctly represents the market-value of these two plots.

Turning now to plot No. 29 we think the value given by the lower Court is too low for this. It is not used at present as a building site but as a garden. The method of capitalisation of the rental value is not the proper method to use for ascertaining the value of such a land. We think it is much better to take the value of the land in the neighbourhood, as proved by Government itself, as the value of this land also. The Deputy Collector has arrived at the figure of Rs. 400 an acre. As regards this land also we do not think it necessary to reduce that figure at all. Taking the value then at Rs. 400 an acre, three acres and 15 cents will be worth Rs. 1,260. From this has, however, to be deducted a certain amount representing the capitalized value of the assessment payable to the *mittadar*. The total assessment was Rs. 30 on these three plots. We have already given credit for Rs. 20 on the two plots Nos. 34 and 35 leaving Rs. 10 to be allowed for this plot. Taking twenty years' purchase here also we must deduct a sum of Rs. 200 as the capitalized value of the *mittadars* assessment leaving Rs. 1,060 as the value payable to the claimants.

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The claimants have also been awarded the value of certain trees standing upon these lands, viz., Rs. 162, and this has also to be added to the price of the property. The total price according to us will, therefore, come to Rs. 14,822. To this must be added 15 per cent., the statutory allowance under the Act, which comes to Rs. 2,233-4-9. Thus, the total comes to Rs. 17,645-11-9 and this is our award in the place of that given by the District Judge.

The learned Advocate for the claimants claims that he should be given interest under section 28 of the Land Acquisition Act on the excess awarded over the amount given by the Collector. We think he is justly entitled to this and we award him interest at 6 per cent. from the date the Collector took possession of this land to the date of payment into Court of the excess which has been awarded to him by us.

The final question on which we have to decide is as regards costs. The Government have filed a memorandum of objections claiming the costs in the lower Court. What the learned Judge did there was, to refuse to give costs to the claimants because they have exaggerated their claim considerably. We do not think there is any ground for interference with that order. As regards the costs of this appeal we think a similar order will be the most proper in this case. There will, therefore, be no order as to costs either in the appeal or in the memorandum of objections.

V. N. V.

Decree modified.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 51 AND 248
OF 1921.

January 25, 1923.

Present:—Mr. Justice Ross.

RAMDAS SHA — DEFENDANT—APPELLANT
versus

DAMODAR PRASHAD AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Custom—User of vacant land—Ramlila performances—Marriage processions—Cattle, tying of, during rainy season—Owners of land, rights of.

A custom whereby the residents of a village claim to use a certain piece of land for playing Ramlila for putting up marriage

processions, for keeping *khallhan* and for tying cattle during the rainy season is neither too general nor unreasonable nor uncertain. [p. 220, col. 1.]

Mohidin v. Shivalingappa, 23 B 666 at p. 667; 1 Bom. L. R. 170; 12 Ind. Dec. (N. S.) 445, *Kuar Sen v. Mamman*, 17 A 87; A. W. N. (1895) 10; 8 Ind. Dec. (N. S.) 381, *Bhola Nath Nundi v. Midnapore Zemindary Co.*, 8 C. W. N. 425; 31 C. 503; 31 I. A. 75; 14 M. L. J. 152; 8 Sar. P. C. J. 611 (P. C.), *Hall v. Nottingham*, (1876) 1 Ex. D. 1; 45 L. J. Ex. 50; 33 L. T. 697; 24 W. R. 58, referred to.

Where such a right as the above is established the owner of the land is not prevented from settling or developing it, so long as he does not interfere with the rights established by the villagers. [p. 219, col. 2.]

Appeals from a decision of the Additional Subordinate Judge, Saran, dated the 1st October and the 9th October 1920, reversing the decisions of the Munsif, Fourth Court, Chapra, dated the 8th September and the 23rd December 1920.

Mr. Nirsu Narain Sinha, for the Appellants.

Mr. Sambhu Saran, for the Respondents.

JUDGMENT.—These are two appeals against the decrees of the Additional Subordinate Judge of Saran reversing the decisions of the Munsif of Chapra in two suits brought by the plaintiffs with regard to two small plots of land. Second Appeal No. 51 of 1921 relates to Title Suit No. 538 of 1918 the subject of which was 14 *kathas* of land, bearing Survey Plot No. 772. Second Appeal No. 248 of 1921 relates to Title Suit No. 539 of 1918 which was concerned with a plot of land measuring 14 *kathas* 6 *dhurs* and bearing Survey Plot No. 724. The allegations in the plaints in the two cases were similar and both cases were dealt with in a single judgment on appeal by the Subordinate Judge and I shall deal with both in this judgment.

The case for the plaintiffs was that the land was *gairmajrua am* and that the people of the village used the land for the purposes of *khallhan* and for putting up marriage processions coming to the village, and for playing Ramlila and for tying cattle in the rainy season. The defence was that the land was waste land which the defendant No. 1, the landlord, was entitled to settle and that she had in fact settled it with defendant No. 2. The plaintiffs sought a declaration of their rights to and recovery of possession of the land, and in Suit No. 539

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a mandatory injunction on the defendant No. 2 to remove certain structures which he had built on the land.

The Munsif dismissed both the suits, but the Subordinate Judge passed a decree declaring the rights of the plaintiff and restoring them to possession. The finding of fact on which his decision is based is that the villagers, without interruption by the *malik*, have been using the land for performing *Ramlila*, for putting up marriage processions, for keeping *khalihans* and for tying cattle during the rainy season from time immemorial. Now, an objection is taken to the form of the decree. It is conceded by the learned Vakil for the respondents that this finding of fact does not entitle the plaintiffs to a decree for possession. The land belongs to the landlord and the plaintiffs have certain rights over it. This does not entitle them to the possession of the land but only to a declaration of their rights. It is said that there should also be an injunction, but no injunction was prayed for in Suit No. 538, while the mandatory injunction asked for in Suit No. 539 was not apparently pressed in the Courts below because there is no finding that the houses said to have been built on this plot of land make it impossible for the plaintiffs to exercise their customary rights. The only decree, therefore, that can be passed in this case is a decree declaring the rights of the plaintiffs.

The grounds on which the decree passed by the Subordinate Judge is attacked are, first, that the rights found cannot be an easement; that even if they do amount to an easement they will not prevent the landlord from developing and settling the land; and, lastly, that the issue of limitation has not been tried and, therefore, the case must go back. With regard to the last point, it is true that an issue of limitation was raised but there is nothing to show in the judgments of the Courts below that this point was pressed; nor does there seem to be any substance in the issue because, according to the defendants' own case, the land was settled in 1325, the year in which the suit was brought, and as this is plainly a suit in which the period of limitation is 12 years there can be no substance in the argument and I think it unnecessary

to direct a remand of the case for a determination of the issue.

I now turn to the substantial question in the case. It is conceded by the learned Vakil for the respondents that it is not a case of easement. The argument on behalf of the appellants is, therefore, admitted. The plaintiffs' rights do not amount to an easement and they do not prevent the landlord from developing and settling the land. Effect has been given to this argument by removing that part of the decree which gave the plaintiffs' possession. There is nothing to prevent the landlord from settling the land and developing it, so long as he does not interfere with the rights which the plaintiffs have acquired. The learned Vakil for the respondents puts his case on the basis of custom. That such customs as are here claimed have been recognised in India is clear from the reported cases. Thus, in *Mohidin v. Shivlingappa* (1), the right of burial within a limited area of land was recognised as a good custom. Similarly, in *Kuar Sen v. Mammen* (2), the custom of exhibiting *tezias* and *alums* and using a certain *Chabutra* as a sitting place during *Moharram* was recognised as a good custom. In *Bhola Nath Nundi v. Midnapore Zemindary Co.* (3) the right of pasturage in the land of another was recognised. It is said that the case has not been treated as a case of custom; that the learned Subordinate Judge has alternated between two views: in one part of his judgment he seems to treat the land as village common in which the plaintiffs had proprietary rights and in another part he has treated their rights as an easement, but he has nowhere directed his attention to a consideration of the essentials of custom. It is true that the Subordinate Judge is not very clear in his treatment of the case, but, as he says distinctly enough that it is not a case of easement. His finding, which I have already quoted contains all the necessary elements. He finds what rights the plaintiffs have been exercising from time immemorial. It is contended on behalf of the appellants that this custom is not a

(1) 23 B. 666 at p. 667; 1 Bom. L. R. 170; 12 Ind. Dec. (N. S.) 445.

(2) 17 A. 871 A. W. N. (1895) 10; 8 Ind. Dec. (N. S.) 381.

(3) 8 C. W. N. 423; 31 C. 503; 31 I. A. 755; 14 M. L. J. 152; 8 Sar. P. C. J. 611 (P. C.).

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good custom because it is unreasonable and uncertain. There is no uncertainty about it, because the elements have been specifically set forth in the plaint and specifically found in the judgment. It is said to be unreasonable because it excludes or may exclude the landlord from the use of his land altogether. A similar objection was taken in the case of *Hall v. Nottingham* (4), where the custom set up was the custom for the inhabitants of a parish to enter upon certain land in the parish, and erect a Maypole thereon, and dance round and about it, and otherwise enjoy on the land any lawful and innocent recreation at any time in the year; but there it was found that such a custom was neither too general nor uncertain nor unreasonable. I see nothing unreasonable about the custom claimed in this case.

The result is that the appeals must substantially fail, but there must be a variation in the form on the decree. The suits are decreed with costs to this extent that the rights of the plaintiffs to perform the Ramlila and to put up marriage processions and to have their *khalihan* and tie cattle during the rainy season on the land in suit are declared. There will be no costs of the appeals.

Z. K.

Decree varied.

(4) (1876) 1 Ex. D. 1; 45 L. J. Ex 50; 33 L. T. 697; 24 W. R. 58.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 870 OF 1921.

November 9, 1922.

Present:—Mr. Justice Ramesam.

KOILPILLAI SAMBAN—DEFENDANT—
PETITIONER

versus

SAPPARIMUTHU SAMBAN AND OTHER
PLAINTIFFS—RESPONDENTS.

*Provincial Small Cause Courts Act (IX of 1887),
s. 17—Application to set aside ex parte decree—
Application for chalan—Delay in issuing chalan—
Deposit, delay in making, whether can be excused.*

Where on an application to set aside an *ex parte* decree under section 17 of the Provincial Small

Cause Courts Act on the last day of limitation, the defendant applied for a *chalan* and on account of the delay of the officer of the Court, the *chalan* was issued some days later and the decree amount was deposited immediately on the issue of the *chalan*:

Held, that the application for the *chalan* in those circumstances was equivalent to the deposit, and the provisions of section 17 must be deemed to have been complied with.

Mihomed Akbar Jaman Khan v. Sukhdeo Panday, 10 Ind. Cas. 51; 13 C. L. J. 467, *Munna Lal v. Radha Kishan*, 30 Ind. Cas. 186; 37 A. 591; 13 A. L. J. 793, followed.

A Court has power to excuse a delay in making the deposit under section 17 of the Provincial Small Cause Courts Act.

Sudalaimuthu Kudumban v. Andi Reddiar, 66 Ind. Cas. 104; 45 M. 628; 15 L. W. 494; 42 M. L. J. 484; (1922) M. W. N. 266; 30 M. L. T. 342; (1922) A. I. R. (N. S.) 186, followed.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the order of the District Munsif, Tuticorin, in C. M. P. No. 385 of 1921 in S. C. S. No. 1454 of 1920.

Mr. A. Swaminatha Iyer, for the Petitioner.—This is an application to revise an order refusing to set aside an *ex parte* decree under section 17 of the Provincial Small Cause Courts Act on the ground that the deposit which must accompany the application was made out of time. The Court held also there was no jurisdiction to excuse delay. The Judge is wrong on both points. The 30 days prescribed for setting aside the *ex parte* decree expired during the vacation. The application was made on the re-opening day. The *chalan* was asked for at once; but on account of the mistake by an officer of the Court, it was issued 5 days later and deposit was made at once. The application for issue of *chalan* must be deemed to be deposit in itself.

The maxim *nunc pro tunc* clearly applies and the position is well-settled by authorities: See *Munna Lal v. Radha Kishan* (1) and *Mahomed Akbar Jaman Khan v. Sukhdeo Panday* (2).

Secondly, the Judge was in error in thinking he had no power to excuse delay: See

(1) 30 Ind. Cas. 186; 37 A. 591; 13 A. L. J. 793;

(2) 10 Ind. Cas. 51; 13 C. L. J. 467.

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the recent decision in *Sudalaimuthu Kudamban v. Andi Reddiar* (3). There was no negligence on the applicant's part and the delay must be excused.

Mr. T. L. Venkatarama Iyer, for the Respondents.—The question is whether the High Court can interfere in revision. The learned Judge has found delay as a question of fact; also that the defendant was guilty of laches. This Court will not interfere with the discretion of the Court below in a matter like this even if the decision is wrong.

JUDGMENT.—Following the decisions in *Makomed Akbar Jaman Khan v. Sukhdeo Panday* (2) and *Munna Lal v. Radha Kishan* (1), (the latter of which was cited before the District Munsif but not distinguished or otherwise dealt with by him), I hold that when the party has applied for a *chalan* and the delay in issuing the *chalan* is the delay of the officers of the Court and after the issue of the *chalan*, he deposited the amount immediately, the maxim *nunc pro tunc* applies and the application for *chalan* (in such circumstances) is equivalent to the deposit.

Even if excusing delay is necessary, the view of the District Munsif that the High Court by its rules cannot affect section 17 of the Provincial Small Cause Courts Act is clearly opposed to *Sudalaimuthu Kudamban v. Andi Reddiar* (3). The statement of the District Munsif that the deposit was not made in time on account of the negligence of the petitioner is opposed to all the facts that appear on the record. Not mentioning to the office that the *chalan* is wanted urgently cannot be regarded as negligence. Therefore, even if it were necessary to excuse the delay, I hold this is a case in which the delay ought to be excused. I reverse the order of the District Munsif and direct him to dispose of the petition according to law. The petitioner will have the costs of the revision petition. Costs in the lower Court will abide the result.

V. N. V. *Petition allowed.*

(3). 66 Ind. Cas. 104; 45 M. 628; 15 L. W. 494; 42 M. L. J. 484; (1922) M. W. N. 266; 30 M. L. T. 342; (1922) A. I. R. (M.) 186.

CALCUTTA HIGH COURT.

CIVIL RULE No. 545 OF 1922.

August 17, 1922.

Present.—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

ASUTOSH CHATTERJEE—PETITIONER
versus
UPENDRA CHANDRA AICH—OPPOSITE PARTY.

Calcutta Rent Act (III B. C. of 1920), ss. 2 (f) (ii), 15, 18—Order fixing standard rent under s. 2 (f) (ii)—Revision by President of Tribunal.

An order of the Rent Controller fixing the standard rent for certain premises under section 2 (f) (ii) of the Calcutta Rent Act is open to revision by the President of the Calcutta Improvement Tribunal under section 18 of the Act.

The Calcutta Rent Act contemplates "fixing" of the standard rent even in cases not coming under section 15 of the Act; in other words, in cases coming under section 2 (f) (ii) of the Act.

Rule against an order of the Court of the President of the Calcutta Improvement Tribunal, in Case No. 218 of 1921.

Babu Amarendra Nath Bose, for the Petitioner.—The learned President is wrong in thinking that he cannot exercise his powers of revision under section 18 as there has been no 'fixing' of the standard rent by the Controller under section 15.

The word 'fixing' has not been determined in the Act. It means not only 'settling,' but also 'determining' or 'specifying.' The ascertainment of a certain definite thing which can be ascertained by evidence has been termed 'fixing' in the Act itself. Under section 8 no increase of rent allowable under the Act can be realised until the service of a certificate from the Controller 'fixing' the standard rent. This must include cases under clause (i) of section 2 (f) as the addition of 10 per cent. allowable under that clause is an increase of rent. The Controller is said to 'fix' the standard rent by finding out what the rent was on the 1st November 1918 and thus adding 10 per cent. to it. Also where, under section 7, the Controller increases the standard rent to the extent of the increase in the amount of Municipal rates, the increase comes within the purview of section 8 and the Controller is said to 'fix' the standard rent in granting the increase. Section 18 does not refer to section 15 at all. I am concerned with the meaning

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of 'fixing.' If 'fixing' has one meaning at one place in the Act, it will have the same meaning throughout the Act. Maxwell's Interpretation of Statutes, 6th Edition, page 556, also *Mahomed Akil v. Assadunnessa Bibee* (1) (per Peacock, C. J.)

In section 15 itself in sub-section (3) (b) fixing means only deducting the amount of hire for the furniture. Similarly, under sub-section (2) what the Controller does is to find out the rent on the 1st November 1918 and then add to it the price of food and hire for furniture.

There is nothing in the Act to confine revision under section 18 to 'fixing' under section 15. In the Bombay Act (VII of 1918) section 6 specifies from which section revision lies.

I submit, therefore, section 18 applies to a case like the present where there has been no 'fixing' in the sense of settling the rent.

Babu *Abinash Chandra Ghosh*, for the Opposite Party.—Standard rent may be divided into two classes—(1) statutory standard rent, mentioned in clauses (i) and (ii) of section 2 (f), given certain circumstances, the standard rent is certain, cannot be altered or varied.

(2) equitable standard rent, mentioned in clause (iii) of section 2 (f).

The Act makes a distinction between these two. Statutory standard rent exists from the very beginning of the Act. The equitable does not come into existence before the Controller has fixed it. The word 'fixing' does not apply to statutory standard rent at all.

[CHATTERJEE, J.—If one party says it is 50 and the other party says it is 70, and the Controller finds it is 50, is that not 'fixing'?

'Fixing' does not include finding out the rate agreed upon or stipulated between the parties.

[CHATTERJEE, J.—'Fixing' is not defined in the Act.]

Section 8 refers to the increments that

have been spoken of in sections 5 and 7. Once the statutory rent is altered under sections 5 and 7 it becomes equitable and it is 'fixed.' Statutory standard rent is unalterable. It can be recovered without a certificate.

[CHATTERJEE, J.—Would not a certificate be required under section 8 for realising the increase of 10 per cent. allowed under clause (i) of section 2 (i).]

This 10 per cent. is included within the standard rent. Section 8 contemplates increase over and above the standard rent. Statutory standard rent inclusive of the 10 per cent. is recoverable under section 4. It is only where the standard rent exceeds the statutory rent that section 8 applies.

In the Burma Act (II of 1920), of which our Act is a copy, section 8 specifically mentions sections 5 and 7. Here they thought specific mention of the section was unnecessary.

[PANTON, J.—The inference would be the other way.]

Section 15 does not help my friend. In sub-section (2) the sum has not been fixed by Statute and the Controller has a discretion in the matter. In clause (3) (b) also discretion is given to the Controller, no statutory figure is irrevocably fixed by the Legislature.

In section 15 (1) the expression used is 'certifying,' whereas in sub-sections (2) and (3) the expression used is 'fixing.' This last is also the expression used in section 18. It is the intention of the Legislature to make a distinction between the two terms.

I applied for 'certifying,' the Controller also has "certified." In certifying his decision is limited to finding out certain circumstances and the rent follows the lead of those circumstances.

In the case of statutory standard rent there is no need of revision by a superior Tribunal. It is in the case of equitable standard rent where there is a discretion allowed to the Controller that there is a revision by a superior Tribunal.

JUDGMENT.—This Rule arises out of proceedings under the Calcutta Rent Act and the question involved is, whether the President of the Tribunal is right in hold-

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ing that an application for revision under section 18 of the Act could not be made in this case, because there was no decision of the Controller fixing the standard rent.

The landlord stated that the premises were let out at a rent of Rs. 70; the tenant, on the other hand, stated that it was Rs. 50 only. The tenant applied to the Rent Controller for certifying the standard rent.

The Rent Controller, after a consideration of the evidence, came to the conclusion that the rent should not be more than Rs. 50 per month inclusive of taxes, and that the rent was fixed at this rate when the applicant came in, and he made the following order: "Rupees fifty inclusive of taxes is, therefore, the standard rent of this portion (eastern) of the premises occupied by the applicant under section 2 (f) (ii) of the Act."

Both parties applied to the President of the Tribunal under section 18 of the Act, and he was of opinion that an application for revision under section 18 could be made only in cases where the Rent Controller fixes the standard rent under the provisions of section 15 of the Act that as the Controller's decision in the present case has been given expressly under section 2 (f) (ii) of the Act, he did not fix any standard rent for the premises and that, therefore, the order was one which could not be revised under section 18 of the Act.

Now, section 18 provides for an application for revision to the President of the Tribunal if the decision of the Controller fixing the standard rent for any premises is questioned. There is no doubt that there was a decision of the Controller in this case. The only question is, whether there was a decision fixing the standard rent.

The standard rent is defined in section 2, clause (f), and it means (i) the rent at which the premises were let on the 1st day of November 1918, or when they were not let on that date, the rent at which they were last let before that date and after the 1st day of November 1915, with the addition, in either case, of 10 per cent. on such rent; (ii) in the case of any premises which were or shall be first let after the 1st day of November 1918, the rent at which the premises were or may be first let: (iii) in the cases

specified in section 15; the rent fixed by the Controller.

The word "fix" has not been defined in the Act. It, no doubt, means "to settle" and that is the view which has been taken by the learned President. It also means "to specify" or "to determine" (see the Oxford Dictionary). In the absence of any definition of the word in the Act, we do not see any sufficient reason for limiting the word to the case of settlement of the rent by the Controller, unless there is a clear indication in the Act that the word is used in that restricted sense. We do not find any such indication. On the other hand, reference to some of the other sections would indicate that the expression "fixing" is applicable not only to the cases specified in section 15, but also cases coming under the 1st and 2nd clauses of section 2 (f). Thus, section 8 provides that "wherever an increase of the rent of any premises is allowable under the provisions of this Act, no such increase shall be recoverable until the expiry of one month after the landlord has served on the tenant a notice in writing of his intention to increase the rent, accompanied by a certificate from the Controller fixing the standard rent." It appears from the terms of this section that no increase of the rent allowable under the Act can be recovered unless notice be served upon the tenant accompanied by a certificate from the Controller fixing the standard rent. This will cover a case of the rent originally payable on the 1st November 1918 with the addition of the statutory 10 per cent. on such rent.

It is contended, however, by the learned Pleader for the opposite party that that section contemplates a case where the rent exceeds the standard rent because the additional 10 per cent. is included in the standard rent under section 2 (f).

There is no doubt that the 10 per cent. is included in the standard rent but the 10 per cent. addition is an "increase of the rent" which is allowable under the provisions of this Act, because section 2 (f) is also a provision of the Act, and the section seems to lay down that no sum in excess of the rent originally payable can be recovered without a certificate from the Controller fixing the standard rent,

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where, of course, there is a dispute between the parties.

The learned Pleader for the opposite party pointed out that section 8 of the Burma Rent Act (II of 1920), which has been followed by the Calcutta Rent Act, lays down that the certificate of the Controller fixing the standard rent must be served along with a notice upon the tenant only in cases mentioned in sections 5 and 7, but that the clauses (a) and (b) of section 8 which thus limit the application of the section, have been omitted from the Calcutta Rent Act. The natural inference, however, from that omission would be that, instead of confining the operation of section 8 to certain cases, *i. e.*, section 5 and 7, the Calcutta Rent Act provides generally for a notice wherever an increase of the rent of any premises is allowed. The learned Pleader also contended that the word "certifying" has been used in the Act as distinguished from "fixing." But the two expressions refer to two different things. The certificate is to be granted after the rent is fixed and it is to be granted to either of the parties. We do not think, therefore, that the use of the two expressions leads to the conclusion that the fixing of rent by the Controller can be made only under the provisions of section 15.

It appears, therefore, that the Act contemplates fixing of the standard rent by the Controller even in cases not coming under section 15; in other words, in cases coming under section 2 (f) (i); and if the word "fix" has been used in that section in a particular sense, we must give the word the same meaning in other portions of the Act where it occurs.

We are accordingly of opinion that the order of the Rent Controller is liable to revision under section 18 of the Act. The order of the President is, therefore, set aside and the case is sent back to his Court in order that he may hear the applications made to him by both the landlord and the tenant and dispose of them according to law.

The opposite party, however, must pay the costs of the petitioner, the hearing fee in this Court being assessed at 2 gold mohurs. The costs in the lower Courts will abide the result.

B. N.

Order accordingly.

BOMBAY HIGH COURT.

CIVIL, EXTRAORDINARY APPLICATION No. 65 OF 1922.

November 7, 1922.

Present.—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.
BAI BALAGAVRI—PLAINTIFF—

• APPLICANT

versus

MOTILAL GHELABHAI—OPPONENT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 1—Application to sue in forma pauperis—Part claim paid into Court by opponent, effect of.

On an application to sue as a pauper, whether a fee is prescribed for the plaint or not, the subject-matter of the suit cannot be taken into consideration in calculating the plaintiff's means. The mere fact that the opponent pays in or deposits in Court a part of the claim, is no ground for rejecting the application for leave to sue as a pauper. [P. 225 cols. 1 & 2.]

Fatma Bai v. D. R. Umrigar, 5 Ind. Cas. 688; 34 B. 638; 12 Bom. L. R. 102, followed.

Dwarika Nath Narayan v. Madhavrao Vishvanath, 10 B. 207; 5 Ind. Dec. (N. S.) 524, not followed.

Application against an order passed by the Munsif, Extra Joint Subordinate Judge at Surat, in Pauper Application No. III of 1921.

Mr. G. S. Mulgaonkar, for the Applicants.
Mr. H. V. Divatia, for the Opponents.

JUDGMENT.

Macleod, C. J.—The applicant presented a petition to the Court to be allowed to file her suit *in forma pauperis*. Objection was taken by the respondent that the applicant was a minor. If she was a minor, then she could not make any application, and the question whether she was a pauper or not could not arise. Unfortunately, the Judge, having come to the conclusion that the applicant was a minor, also went on to deal with the question whether she was a pauper. Although we think that part of the order which directs that the applicant might bring a suit by her next friend was perfectly correct, we think that the Judge ought not to have directed that proper Court-fees must be paid on such suit and thereby determined the question of pauperism. It is, therefore, necessary for us to express an opinion on the question whether in that decision the Judge was

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wrong. Under the Explanation to O. XXXIII, r. 1, a person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint, or, where no such fee is prescribed, when he is not entitled to property worth Rs. 100 other than his necessary wearing apparel and the subject-matter of the suit. In this case a fee was prescribed for the plaint. The defendant, in order to get rid of the contention of the applicant that she was a pauper, produced certain ornaments and cash which he admitted belonged to the applicant worth about Rs. 600, and said that he was willing to give them to the applicant, and, therefore, she was possessed of sufficient means to pay the fees. The applicant intended to claim in her suit a much larger amount than what was admitted to be due by the defendant. I do not think it can be said that, owing to the defendant's offer, the plaintiff was possessed of sufficient means to pay the prescribed fee. In a suit where no fee is prescribed by law for the plaint, no admission or even payment into Court by the defendant can be taken into consideration.

In *Dwarka Nath Narayan v. Madhavray Vishwanath* (1), the defendant produced in the Court, on an application by the plaintiff to sue as a pauper, certain of the articles which were claimed, and the learned Judge seems to be of opinion that it made no difference whether a fee was prescribed for the plaint or not. If any part of the subject-matter of the suit was paid into or deposited in Court it ceased to belong to the subject-matter of the suit and became the property of the plaintiff.

In *Fatma Bai v. D. R. Umrigar* (2), while sitting on the Original Side, I declined, with all due respect, to follow that decision. To this extent I can agree with the learned Judge that, whether a fee is prescribed or not the subject-matter of the suit cannot be taken into consideration in calculating the plaintiff's means. But in my opinion that protection continues during the whole course of the proceedings, so that an application to sue as a pauper in either case cannot be rejected,

merely because the opponent pays in or deposits in Court part of the claim. The applicant is not obliged to take out of Court what is deposited or paid in, and cannot, therefore, if he chooses to allow the deposit or payment made in Court to remain there, be said to be possessed of means to pay the Court-fees as if the deposit or payment were actually in his possession. The time when the application is made to institute a suit as a pauper, is the point of time which the Court has to consider when the application comes to be dealt with, and the subject-matter of the suit is in no case at the disposal of the applicant for payment of fees. If, however, at any point of time afterwards it is alleged that the applicant has become possessed of sufficient means to pay the fees, then no doubt when that fact is brought to the notice of the Court, the question of pauperism would be reconsidered, and the party once held to be a pauper might be directed to pay the Court-fees. In this case, therefore, we direct that it is open now to the applicant, through her next friend, to make an application to file a suit as a pauper, and that application must be dealt with on the lines we have now laid down. If no further application is made, the applicant must pay the costs of this application. If the application is filed through her next friend, and if the application is admitted, then the costs will be costs in the suit.

Crump, J.—I concur.

W. C. A.

Rule made absolute.

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 307 AND 308 OF 1922.

December 22, 1922.

Present:—Mr. Justice Spencer and Mr.

Justice Venkatasubba Rao.

THE OFFICIAL RECEIVER OF
TANJORE—APPELLANT

versus

B. S. NATARAJA SASTRIGAL, AND OTHERS
—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 5, 56, 57, 75, 79—Rules framed under s. 79—Official Receiver, removal of—Review, power of—Appeal—"Person aggrieved", meaning of—Special Receiver, when to be appointed.

The Official Receiver is one of the persons who have a right of appeal under section 75 of the Provincial Insolvency Act, if they are aggrieved by the

(1) 10 B. 207; 5 Ind. Dec. (N. S.) 524.

(2) 5 Ind. Cas. 688; 34 B. 638; 12 Bom. L. R. 102.

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order of a Court acting in its insolvency jurisdiction. [p. 227, col. 1.]

Official Assignee of Madras v. Rama Chandra Iyer, 5 Ind. Cas. 974; 33 M. 134; 7 M. L. T. 214; (1910) M. W. N. 147, relied upon.

The expression "person aggrieved" in section 75 of the Provincial Insolvency Act means a person who has suffered a legal grievance, that is, a person against whom a decision has been pronounced, which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something. [p. 228, col. 2.]

Ex parte Sidebotham, In re Sidebotham, (1880) 14 Ch. D. 458; 49 L. J. Bk. 41; 42 L. T. 788; 28 W. R. 715. *Ex parte Official Receiver, In re Reed, Bowen and Co.*, (1887) 19 Q. B. D. 174; 56 L. J. Q. B. 447; 56 L. T. 876; 35 W. R. 860; 4 Morrell 225, relied upon.

Although the Provincial Insolvency Act does not contain any provision for reviewing orders already passed, such power must be implied from the provision contained in section 5 of the Act. [p. 227, col. 2.]

No Court has the power to remove an Official Receiver from his office. But where the appointment of an Official Receiver to take charge of a particular insolvency is concerned, the proviso to r. 11 of the rules framed by the Madras Government under section 79 of the Act allows the party to apply to the Court to set aside the appointment of the Official Receiver and to ask that a Special Receiver may be appointed in his place. [p. 227, col. 2.]

It is of general importance that all insolvencies should be kept within the control of the Official Receiver, unless very exceptional reasons, such as reasons connected with the personality of the Receiver, are put forward to deprive him of that control. [p. 228, col. 1.]

The words "otherwise directs" in section 57 (2) of the Provincial Insolvency Act, refer not only to the point of time when the appointment of a Receiver under section 56 is made, but also to the period subsequent to the appointment. That is to say, the Court may not at the initial stage appoint a Special Receiver, but it may, if good grounds are shown, remove the Official Receiver appointed originally at any time whatever. [p. 229, col. 1.]

Appeal against an order, dated the 27th July 1922, of the District Court, East Tanjore at Negapatam, in Insolvency Petition No. 3 of 1921.

Appeal against an order, dated the 15th August 1922, of the District Court, East Tanjore at Negapatam, in I. A. No. 405 of 1922, in I. P. No. 3 of 1921.

Messrs. T. M. Krishnaswami Iyer and S. Subramania Iyer, for the Appellant.—The District Judge is wrong in reviewing his order appointing the Official Receiver. When once an order of adjudication is made, property vests in the Official Receiver (S. 57). The District Judge has no power to review

it. A power of review is not inherent in a Court but is statutory. It cannot be implied.

The Official Receiver here is an aggrieved person, since by the second order he is removed from office. He has, therefore, a right of appeal under section 75 of the Act. *Official Assignee of Madras v. Rama Chandra Iyer* (1), *Ex parte Sidebotham, In re Sidebotham* (2), *Ex parte Official Receiver, In re Reed, Bowen and Co.* (3). I contend that under the Provincial Insolvency Act and the Rules thereunder, Courts have no power to remove an Official Receiver when an order of appointment is made and property has vested.

Even on the merits, the District Judge is wrong. The reasons assigned are not correct. The appointment of a Special Receiver would diminish the income of the Official Receiver. The properties have been leased. The lands are accessible from Tanjore equally as from Negapatam. An Official Receiver cannot be lightly or easily superseded for imaginary reasons.

Messrs. T. V. Muthukrishna Iyer and T. V. Ramanatha Iyer, for the Respondent.—There is no right of appeal. The Official Receiver is not a person aggrieved within the meaning of section 75 of the Act. A Court has power when it thinks it necessary for special reasons to appoint Special Receiver.

Under section 5, the Insolvency Court has the same powers as the Civil Court under the Civil Procedure Code.

An Official Receiver is as much subject to the orders of Insolvency Court as an ordinary Receiver is subject to the directions of the Civil Court.

Rules 8, 11, 12, framed by the Madras Government nowhere lay down that an Official Receiver cannot be removed and such a prohibition cannot be implied from negative powers under the Act and the Rules. On the merits, the interests of the administration of the insolvent's estate required a Special Receiver in this case and the appointment of Special Receiver, being a matter of discre-

(1) 5 Ind. Cas. 974; 33 M. 134; 7 M. L. T. 214; (1910) M. W. N. 147.

(2) (1880) 14 Ch. D. 458 at p. 465; 49 L. J. Bk. 41; 42 L. T. 788; 28 W. R. 715.

(3) (1887) 19 Q. B. D. 174; 56 L. J. Q. B. 447; 55 L. T. 876; 35 W. R. 860, 4 Morrell 225.

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tion, a Court of Appeal will not lightly disturb the discretion of the lower Court.

JUDGMENT.

Spencer, J.—The appellant is the Official Receiver of the Tanjore District. He appeals against the orders of the District Judge of East Tanjore, appointing Special Receiver in I. P. No. 3 of 1921, instead of the Official Receiver, in whom the insolvent's property would ordinarily vest under section 57 of Act V of 1920. It appears that when the adjudication of insolvency was made, the District Judge vested the property in the Official Receiver on the 26th July 1922. The next day, at the instance of the Vakil for some of the insolvents, the District Judge reconsidered his order and substituted "Special Receiver" for "the Official Receiver" in his order. Section 57, clause 2, permits the Court to make such an order for special reasons. The Official Receiver moved the Court to reconsider this second order, but the District Judge declined to do so on the 15th August 1922.

In these appeals a number of points have been raised on either side. It is contended that the Official Receiver is not entitled to appeal under section 75 and that, even if he is so entitled, the Court has given good reasons for appointing a Special Receiver in the present case and that we should not interfere with the District Judge's discretion. On the other hand, the appellant contends that the Court, having passed a final order on the 26th of July, had no power under the Provincial Insolvency Act to review that order; secondly, that the Rules framed under the Madras Provincial Insolvency Act, which have the effect of law, by virtue of section 79, clause 3, give no power to a Court to remove an Official Receiver once appointed (*vide* r. 8) and lastly, that the reasons given by the District Judge for appointing a Special Receiver are not sufficient reasons for making an exception to the general rule.

On the first point it is clear from section 75 that the Official Receiver is one of the persons who has a right of appeal if he is aggrieved by the order of a Court acting in its Insolvency Jurisdiction. *Official Assignee of Madras v. Rama Chandra Iyer*

(1) affords an instance where the Official Assignee, who stands in a similar position to the Official Receivers in the *Muffasal*, was regarded as a person aggrieved and was permitted to appeal. That case proceeded largely on the authority of an English case *Ex parte Sidebotham, In re Sidebotham* (2). It appears from the notes at page 459 that the question of the removal of the Trustee was one of the matters that came up for consideration, and the learned Judges declared that a Trustee in Bankruptcy would be entitled to appeal from an order of the Court, if he thought it unjust, and that he would be a person 'aggrieved' if a decision had been pronounced which had wrongfully refused him something to which he was entitled. I hold, therefore, that the appellant has a right of appeal.

Although the Provincial Insolvency Act does not contain any provision for reviewing orders already passed, section 5 provides that the Court "shall have the same powers, and shall follow the same procedure as it has and follows in the exercise of Original Civil Jurisdiction." I am, therefore, not prepared to hold that the District Judge acted illegally in altering his order after it had been passed.

Next, the provision in r. 12 that "the Court may remove or discharge any Receiver or *interim* Receiver other than an Official Receiver" appears to have been so worded in consideration of the fact that, under section 57 of the Act, the power of appointing Official Receivers is vested in the Local Government and, therefore, no Court has the power to remove an Official Receiver from his office. Where the appointment of an Official Receiver to take charge of a particular insolvency is concerned, the proviso to r. 11 allows the party to apply to the Court to set aside the appointment of the Official Receiver and to ask that a Special Receiver may be appointed in his place. Even if that proviso was intended to apply particularly to cases where orders of adjudication have been made by the Official Receiver himself, unless the contrary appears, we may assume that Courts have powers to make such orders from time to time as are necessary for dealing with the insolvent's estate. Under section 16 of the General Clauses

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Act, whenever a power to make an appointment is conferred, the authority having such power must be deemed to have power also, to remove any person appointed by it in exercise of that power. I, therefore, hold that the District Judge was legally empowered to set aside his own order appointing the Official Receiver, if there were special reasons for doing so.

The reasons given in the District Judge's order are that it was better in the interest of all parties concerned that a Special Receiver residing in Negapatam should be appointed to deal with the insolvent's property. The Official Receiver was an *interim* Receiver before the adjudication, and there is nothing to show that any personal reason existed for his being superseded. The property of the insolvents is not situate at Negapatam where the Special Receiver lives, but in a village which is accessible from Tanjore as well as from Negapatam; and during the management of the *interim* Receiver, he was leasing out the lands and doing such other necessary acts for the management of the insolvent's estate. The remuneration of Official Receivers, who are paid a fixed salary by Government, depends partly upon the receipts obtained by them in administering various estates in their District, and those receipts will be diminished if Special Receivers are appointed superseding the authority of the Official Receiver. The reasons given by the District Judge and those appearing in the affidavits of the creditors are not sufficient, in my opinion, to outweigh the general importance of keeping all insolvencies within the control of the Official Receiver, unless very exceptional reasons, such as reasons connected with the personality of the Receiver, are put forward to deprive him of that control.

The District Judge's order must be vacated and in lieu thereof the Official Receiver will be directed to take charge of the insolvent's estate. The appellant's costs in Civil Miscellaneous Appeal No. 307 of 1922, in this Court will be defrayed out of the insolvent's estate. There will be no order as to costs in Civil Miscellaneous Appeal No. 308 of 1922. First respondent will bear his own costs in Civil Miscellaneous Appeal No. 307 of 1922 in this Court.

Venkatasubba Rao, J.—The first question to be decided is, whether the Official Receiver is entitled to appeal against the orders passed. Is he a person aggrieved under section 75 of the Act? On the 26th July, 1922, an order of adjudication was made and the Official Receiver was appointed Receiver of the property of the insolvents. On the following day, the District Judge varied his order of the 26th, and appointed a Special Receiver thereby rescinding the appointment of the Official Receiver. The latter applied for the setting aside of the order made on the 27th of July and, on the 15th of August the District Judge passed an order refusing to reconsider his decision. The Official Receiver has filed two appeals, one against the order of the 27th of July and the other against that of the 15th of August.

Various cases were cited in the argument bearing on the interpretation of the words "person aggrieved." But I think it is sufficient to refer to two of them. In *Ex parte Sidebotham, In re Sidebotham* (2) James, L. J., observed that if the Court acted on a report by the Comptroller in Bankruptcy that the trustee had been guilty of a misfeasance, or neglect, by which the estate has sustained a loss which the trustee ought to make good, the trustee would be entitled to appeal from the order of the Court, if he thought it unjust. This observation is, no doubt, *obiter* but is entitled to great weight. The Lord Justice said, "A person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something. Lord Esher, M. R., in *Ex parte Official Receiver, In re Reed, Bowen & Co.* (3) referring to the definition given by James L. J., observed that the words used were "legal grievance" and not "pecuniary grievance" or grievance to person or property," and further added that "a person aggrieved" must be a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand.

I think the Official Receiver suffered a legal grievance and he was 'wrongfully

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deprived of something." He was removed from office and his application to reconsider the order was refused. He was entitled to say that his appointment should not have been set aside; he had a right to ask that he should be restored to office. He was aggrieved by the orders made against him.

This leads me to the consideration of the second question, can the Court remove an Official Receiver who has been appointed Receiver of an insolvent's estate from his office of such Receiver of that estate? The answer would depend upon the construction of section 57, clause (2).

Section 56, clause (1), and clauses (1) and (2) of section 57 run thus:-

Section 56 clause (1) :—"The Court may, at the time of the order of adjudication, or at any time afterwards, appoint a Receiver for the property of the insolvent, and such property shall thereupon vest in such a Receiver."

Section 57 clause (1) :—"The Local Government may appoint such persons as it thinks fit (to be called) 'Official Receivers' ... under this Act within such local limits as it may prescribe."

Section 57, clause (2) :—"Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the Receiver for the purpose of every order appointing a Receiver or an *interim* Receiver, issued by any such Court, unless the Court for special reasons otherwise directs."

It will be seen that an Official Receiver becomes in virtue of his holding that office, a Receiver of the property of the insolvent, if a Receiver for the property is appointed. The Court, however, for special reasons may otherwise direct. In my opinion the words "otherwise direct" refer not only to the point of time, when the appointment of a Receiver under section 56 is made but also to the period subsequent to the appointment. That is to say, the Court may not only at the initial stage appoint a Special Receiver for valid reasons but it may, if good grounds are shown, remove the Official Receiver appointed originally at any time whatever. This construction will avoid an absurdity, *viz.*, that the Official Receiver once appointed

can never be removed by the Court, even though he may be guilty of misappropriation or fraud, or is shown to have an interest adverse to that of the creditors of the insolvents. I am, therefore, of the opinion, that under section 57, clause (2), the Court has the power to remove the Official Receiver from his office of Receiver for the property of an insolvent.

It has been argued that r. 12 of the Insolvency Rules negatives this power. I must say that there is considerable force in this argument. If this be the effect of r. 12, I am prepared to hold that it is *ultra vires*.

It has next been pointed out that rule 11 specifically provides for the setting aside of the appointment of the Official Receiver and for the appointment of a Special Receiver. If this be the right construction, r. 11 would be inconsistent with r. 12. I am inclined to think that the proviso refers only to the case specified in clauses (4) and (5) *i.e.*, to the Official Receiver appointed for the property of the insolvent "in cases where the Official Receiver is empowered to make orders of adjudication." The decision of the question, however, does not depend on a construction of these rules, but I would take this opportunity to suggest that a revision of rr. 11 and 12 may be made.

The third point relates to the merits of the appeal. The Official Receiver was removed on the ground that his head-quarter was at Tanjore that, there was a single Receiver appointed by the Government for the two Districts, the East and West Tanjore and that, therefore, a person in the locality should be preferred. The Government has appointed one Official Receiver for the area comprised within the two Districts, and if the reason given by the District Judge should be held sufficient to appoint a Special Receiver, the reason would exist in every case and the Official Receiver could never be appointed Receiver for any property within the jurisdiction of the District Judge of East Tanjore. I am utterly unable to regard this a special reason under section 57 of the Act.

I, therefore, agree with the order proposed by my learned brother.

V. N. V.

Z. K.

Order accordingly.

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PATNA HIGH COURT.

FIRST CIVIL APPEAL, NO. 7 OF 1921.

February 17, 1923.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Foster.

Raja MAKUND DEB—DEFENDANT

APPELLANT

versus

Sri JAGANNATH JENAMONI—

PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Age of adoption—Putreshti jag ceremony, whether necessary—Parent giving in adoption whether must sit on bedi—Widow, power of, to give in adoption—Motive for adoption—Public policy.

The passage attributed to the Kalika Purana, which lays down that a boy to be adopted must be below five years of age, cannot be relied upon as authentic, and the adoption of a child over five years of age, is permissible under Hindu Law. [p. 235, col. 2.]

Ganga Sahai v. Lekhraj Singh, 9 A. 253; 5 Ind. Dec. (N. S.) 604, relied upon.

The *putreshti jag* ceremony is not essential to the validity of an adoption even amongst the regenerate classes. [p. 236, col. 2.]

Once it is determined that an adoption is otherwise valid, provided the *upanayana* ceremony, the culminating point of the second birth, has not been performed, although the other initiatory rites, including tonsure, have already taken place in the natural family of the adopted son, the necessity for the *putreshti jag* ceremony disappears. [p. 237, col. 1.]

It is not necessary for the validity of an adoption that the person giving in adoption should actually sit upon the *bedi* during the *datta homa* ceremony. [p. 237, col. 1.]

Under the Hindu Law a widow can give her son in adoption if her husband has during his lifetime given his consent to it. [p. 237, col. 2.]

A mother may give her son in adoption even without her husband's express consent, in cases where such consent cannot be obtained, as where he is dead or has joined a religious order. [p. 237, col. 2.]

The mere fact that an adoptor had mixed motives in making an adoption is not sufficient in law to render the adoption invalid. The presumption is that his motive was the ordinary one which operates in such cases. If in addition there were other motives of a worldly nature which also induced him to do that which he had an absolute right to do, this would not in any way affect the validity of his act. [p. 238, cols. 1 & 2.]

Public policy does not concern itself with the motives which induce a person to exercise his lawful rights without risk of injury to any body. [p. 238, col. 1.]

Appeal from a decision of the Additional Subordinate Judge, Cuttack, dated the 2nd March, 1921.

Messrs. S. C. Mukharji and M. Subha Rao, for the Appellant.

Mr. J. N. Bose, for the Respondent.

JUDGMENT.

Dawson Miller, C. J.—The suit out of which this appeal arises was instituted on the 30th May, 1919, by the respondent Sri Jagannath Jenamoni against the appellant Sri Raja Makund Deb Gajapati Maharaja to obtain a declaration of the respondent's status as the adopted son of the appellant and a further declaration that Jagadananda Deb was not the appellant's adopted son. Jagadananda Deb was also impleaded as a defendant in the suit but he died on the 23rd July, 1920, after filing a written statement but before the case came to trial. In the plaint there was also a prayer for a further declaration that the appellant was the trustee on behalf of the respondent of the sum of Rs. 1,00,000 made over to the appellant by the plaintiff's elder brother the then Raja of Bamra at the time of the adoption, namely, on the 2nd October 1918.

The respondent, who was the plaintiff in the suit, is the third son of the late Raja Sachidananda Tribhuban Deb, Chief of the Feudatory State of Bamra in Orissa. Before his adoption his name was Lal Mohini Mohan Deb.

The appellant, the surviving defendant in the suit, is the Raja of Puri and as such is the Superintendent of the celebrated temple of Jagannath at that place.

The deceased defendant Jagadananda Deb was the younger son of the *Zemindar* of Bada Khemidi in the District of Ganjam, and popularly known as the Raja of Ganjam.

It is the respondent's case that ever since the year 1905 when he was a child of six years of age negotiations had, from time to time, taken place between his family and the appellant, or those acting on his behalf, with a view to bring about his adoption by the appellant. No definite agreement was for sometime arrived at, and in the year 1914 the negotiations were temporarily allowed to drop. In 1918 after his father's death, the negotiations were renewed with his mother and his eldest brother, the then Raja or Chief of Bamra with the result that after many interviews between the parties or their representatives an agreement in writing dated the 23rd September, 1918, was executed by the appellant, whereby he undertook to take in adoption the respondent and, to perform the *datta homa*

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ceremony. During the negotiations the respondent's brother, as the head of his family, had insisted upon certain conditions being agreed to, before he would consent to the adoption. These related mainly to the completion of the education of the respondent, then 18 years of age, and provisions for his separate residence and, freedom of restraint over his movements, and these terms were incorporated in the agreement signed by the appellant. The Raja of Bamra had also insisted that the proposed adoption should be notified to the Local Government and its consent obtained. The Local Government was consequently informed of the proposed adoption and, their consent thereto was solicited and, on the 16th July, 1918, the Government intimated that they had no objection to the proposed adoption. A further question arose with regard to a settlement, which the Raja of Bamra had promised to make at the time of the adoption. It appears that a sum of Rs. 80,000 in currency notes had been set aside by the respondent's late father as his younger son's portion of the estate but no formal settlement of this sum appears to have been made. There was a further sum of Rs. 20,000 in War Bonds which had been purchased in the respondent's name by his brother the then Raja of Bamra. The Raja of Bamra wished to settle this money for the benefit of his brother making the appellant the trustee. The appellant, on the other hand, wished to have a free hand in the disposal of the money as he thought fit. No definite agreement appears to have been come to as to the settlement of this money, but it was arranged that the matter should be left in the hands of Babu Dhanapati Bannerji, the retained Pleader of the Puri Rajah, who had taken a prominent part throughout in the negotiations. Dhanapati Bannerji would appear to have felt some embarrassment in settling this matter of difference between his client and the Bamra family and, up to the time of the adoption nothing definite had been settled by him or agreed to between the parties concerned, and the fund, forming one lakh of rupees, was in fact handed over to the appellant at the time of adoption. The Raja of Bamra undoubtedly was under the impression that the money

was to form a trust fund, in the hands of the Raja of Puri, as trustee, for the benefit of his brother and, this impression finds support from the fact that in two telegrams dated the 25th and 27th September sent by Dhanapati Bannerji from Puri to the Private Secretary of the Raja of Bamra, the Bamra family was urged to come immediately to Puri for the celebration of the ceremony as all the terms had been assented to unconditionally. In the agreement of the 23rd September, 1918, the only mention of this question of a settlement is that which appears in clause 1 of the agreed terms which provides: "That I, Shri Raja Makund Deb, taking my seat on the *datta homa beili* shall take the amount, settled with the Pleader Babu Dhanapati Bandopadhyaya, from him at the time of *datta homa* and at the same time shall take in adoption Lal Mohini Mohan Deb from your respected Rajmata and shall duly perform the *datta homa*."

One of the issues in dispute between the parties at the trial was whether the appellant was a trustee on behalf of the respondent in respect of this fund.

With regard to this issue, the learned Additional Subordinate Judge found that the Rs. 80,000 which were paid in currency notes, at the time of the adoption, to the appellant were transferred to him absolutely in consideration of the adoption without any conditions being attached and, further, that there could be no trust regarding the War Bonds amounting to Rs. 20,000 as they stood in the respondent's name and, Rs. 5,000 thereof had been paid to Dhanapati Babu as his remuneration under the directions of the Puri Raja. There is no longer any dispute upon this issue as the respondent has not challenged the propriety of the Judge's finding in this respect. The matter is only important in so far as it has any bearing upon the question raised by the appellant and argued before us in this appeal, to the effect that the adoption is invalid by reason of the appellant having been induced to consent thereto by a bribe. In order to complete the story upon this part of the case, in so far as it appears from the evidence, it will be convenient to state here that on the 2nd October, 1918, the date when the adoption took place, a post-script

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was added to the deed of agreement of the 23rd September and signed by the appellant to the following effect:-

"Be it further stated that I received the money to my satisfaction from Dhana-pati Babu as agreed upon and I sat on the *dutta homa bedi*. Be it further stated that I adopted the son for the perpetuation of my family, for offering *pinda* and water to my ancestors, for the management of the Seba of Jagannath Mahaprava and for the preservation of the family prestige."

The story of the negotiations, and the agreement finally come to, and the journey of the respondent with his brother and his mother, the Rajmata, together with a numerous retinue to Puri, and how they were received there with great pomp and ceremony, together with the details of the adoption ceremony which took place at the appellant's house on the following day before a large gathering and the subsequent life of the respondent at Puri are set out at length in the plaint. A vast mass of evidence, both oral and documentary, was adduced at the trial in support of the case pleaded, but the most remarkable feature of this litigation is that the appellant, by his written statement, pleads that the whole story is a pure invention from beginning to end. He denies that he ever entered into any negotiations with the Raja of Bamra, or that any body acted on his behalf or with his authority, and he denies all knowledge of the matters alleged in the plaint. He repudiates his signature to the various documents which he is alleged to have signed. He denies that any adoption ceremony took place or that any money was received by him on that occasion. He further pleads that, at some previous date not definitely stated, but which appears from the written statement of the deceased defendant to have been the 2nd March 1916, in the presence of a select company he took in adoption the second defendant who was then about one year old and that he has never adopted anybody else. In addition he pleads that the respondent's mother had no authority from her deceased husband to give her son in adoption and that his *upanayana* ceremony had already been performed before the date of the alleged adoption, a fact which amongst the twice-born classes,

to which the parties in this case belong, would render the adoption void and inoperative. The written statement of the deceased defendant, Jagannanda Deb, was not printed in the record before us but we allowed a copy of it to be added to the file. That defendant, besides traversing the allegations in the plaint, pleaded that he was adopted by the Raja of Puri on the 2nd March 1916. He further pleads that even if a form of adoption was gone through as alleged by the respondent it is invalid for the following reasons: (1) because of the previous adoption of himself; (2) because of the age of the respondent who had attained majority and was incapable of being given in adoption, (3) because the respondent's *upanayana* ceremony had already been performed, (4) because of the want of consent of the respondent's natural father, and, (5) because the appellant was induced by a bribe of a lakh of rupees to receive the respondent in adoption.

Six issues were framed for determination at the trial:-

(1) Whether the first defendant executed the agreement of the 23rd September, 1918, and is it valid and binding?

(2) Whether the plaintiff was adopted by the first defendant on the 2nd October, 1918, as alleged by the plaintiff: and, is the adoption valid and legal and (*sic*) against public policy?

(2) (a) Is the defendant estopped from questioning the validity of plaintiff's adoption on the ground of deceased defendant's alleged adoption, now that, that defendant died (added on the 24th July 1920)?

(3) Whether the second defendant was adopted on the 2nd March, 1916, and if so, is the adoption valid?

(4) Whether defendant No. 1 was paid one lac of rupees as alleged by the plaintiff? Is he a trustee on behalf of the plaintiff in respect of the same?

(5) To what relief, if any, is the plaintiff entitled?

All these issues except the second part of No. 4 were found in favour of the respondent and a decree was passed declaring that the respondent, and not the deceased defendant, was duly adopted by the appellant and consequently, the respondent was entitled to all the right and privileges

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of an adopted son. The prayer for the declaration regarding the money was refused.

From this decision the Raja of Puri has appealed. The story told by the respondent was supported by numerous witnesses and much documentary evidence. The learned Judge found that the plaintiff's case in this respect was amply proved and that the evidence in support of the appellant's story was thoroughly unreliable. So clear and overwhelming is the evidence put forward on behalf of the respondent, as to the fact of an adoption ceremony having taken place, that the learned Counsel for the appellant has not asked us to question the finding of the learned Additional Subordinate Judge upon this point, nor did he contend that the story of a previous adoption could be supported. He has, however, questioned the validity of the adoption upon certain legal grounds. In the first place he contends that the age of the respondent, namely, 18 years, at the date of adoption renders the ceremony invalid according to Hindu Law amongst families of the twice-born classes, secondly, he contends that certain ceremonies essential to the validity of adoption under the *duttaka* form were not complied with, thirdly, he objects that the respondent's mother had no authority from her deceased husband to give her son in adoption and that this want of capacity on her part is fatal to the validity of the ceremony. The fourth and last point taken is that the passing of money as a consideration for the adoption is forbidden by Hindu Law and contrary to public policy and renders the transaction void.

No specific issue was raised at the trial as to any of these points, although, the second issue may be regarded as wide enough to cover them. It further appears that none of the points was raised in the written statement of the appellant except that dealing with the want of capacity of the Rajmata to give her son in adoption. In the written statement of the deceased defendant the points relating to the age of the respondent and the passing of a bribe as well as the capacity of the Rajmata are, however, taken. It is further to be noticed that the learned Additional Subordinate Judge in dealing with the second issue, which he does at

great length, nowhere mentions any of the points now taken before us in appeal, except in so far as he deals with the evidence of the fact of adoption and, I can only conclude that they were not urged before him at the trial, nor has it been suggested in argument before us that he omitted to deal with any point that he was asked to decide. As these contentions, for the most part, raise questions of law requiring no further evidence and as they affect the status of the respondent, we consented to hear the argument of the learned Counsel for the appellant.

In support of the first point reliance is placed upon a passage in the Kalika Purana quoted with approval by the author of the Duttaka Mimansa (section 4, verse 22). The authority of the Kalika Purana is unquestionable and the treatise known as the Duttaka Mimansa of Nanda Pandit is also regarded both in Bengal and amongst the followers of the Benares School of Hindu Law as of great authority. It may be stated here that the parties belong to the Kshatriya caste and are governed by the Benares or Mitakshara School of Hindu Law. If the quotation from the Kalika Purana, as it appears in the Duttaka Mimansa, is to be accepted as authentic and binding, there is much to be said for the appellant's contention. In Setlur's translation of the Duttaka Mimansa the passage is as follows:—

"22. Another special rule is propounded in the Kalika Purana; son given, and the rest though sprung from the seed of another, yet being duly initiated under his own family name, become sons. O Lord of the earth, a son having been initiated under the family name of his father, unto the ceremony of tonsure inclusive, does not become the son of another man (*anyatas*). The ceremony of tonsure and other rites (*chudaya*) of initiation, being indeed performed under his own family name, sons given, and the rest may be considered as issue: else, they are termed slaves. After their fifth year, O King, sons given and the rest are not sons. (But having taken a boy five years old, the adopter should first perform the sacrifice for male issue. But the son of twice married woman, immediately on being born, he should duly take as a son. Having performed positively (*vai*) for such, immediately on being born, the

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burnt sacrifice for the son of a twice married woman, the man should complete every initiatory rite, the ceremony for a male borne (*jatakarma*) and the rest. The burnt sacrifice for the son of a twice married woman, being completed, from these (*tatas*) a son of that description, is filially related."

The exact meaning of this passage is somewhat obscure, and the rest of the section consisting in all of 79 verses is given up to its elucidation. The effect of the passage as explained by the author of the *Dattaka Mimansa* appears to be that, a son whose tonsure ceremony has been performed in the family of his natural father cannot validly be adopted as a son given, and, as this ceremony ought to be performed (according to the author) not later than the fifth year, no boy above that age is capable of being so adopted.

Much controversy has raged round this passage and much ingenuity has been expended in endeavouring to explain away a rule which appears to be at variance with actual practice. In the earliest *Smritis* there is no such prohibition. The only restriction imposed by *Manu* is that the adopted son should belong to the same class or caste as his adoptive father. "He whom his father, or mother with her husband's assent gives to another as his son, provided that the donee have no issue if the boy be of the same class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water" (*Manu* Chapter IX, 168, Jones' translation; see also *Mitakshara* Chapter I, section XI, verse 9). As Dr. Gour has pointed out in a recent work, (*The Hindu Code*, page 337) "In ancient times neither age nor marriage was a bar to adoption and an instance is frequently cited of the adoption of *Sunah Sepha* by *Vishwamitra* in the Vedic age. The restrictions consequent on age and marriage are unquestionably innovations of a later age." In this respect there is no reason to suppose that the learned author is not accurate. Apart from the passage quoted from the *Kalika Purana* and adopted by the *Dattaka Mimansa* and a few other treatises, there is no ancient authority for the proposition that a child over five years of age cannot be validly adopted in the *Dattaka* form. The authenticity of the passage

in question was questioned even before the date of the *Dattaka Mimansa* itself, if we accept the view that the *Dattaka Chandrika*, a work of equal authority, is of earlier date. The *Dattaka Chandrika* quotes the disputed passage and adds "As for what they quote thus from the *Puranas*, that is unauthentic" (*Dattaka Chandrika* section 2 verse 25). It then proceeds to state that, "were it even authentic, the interpretations given by some, that one initiated in ceremonies down to that of tonsure under the family name of the natural father bears no filial relation to the adopter, but such relation obtains where the ceremonies commencing with that of tonsure are performed by the adopter only, and if a child whose tonsure has been completed by the natural father or one past five years of age be adopted, in that case the filial relation does not accrue, are inaccurate." Alternative interpretations are then given and, in verse 30 the reference to the fifth year is said to apply only to Brahmins seeking the fruit of holiness resulting from a study of the *Vedas*. The translator of these two commentaries, Mr. Setlur, points out that the text of the *Kalika Purana* on which the limitation as to age of the adopted son is based, has been held to be spurious by the author of the *Dattaka Chandrika* and, that all the High Courts and many of the modern text writers are agreed in holding that the Hindu Law imposed no restrictions as to age and, whatever be the age of the adopted son, it is now settled that his adoption is valid if made before *upanayana*, if he belongs to any of the regenerate classes, and before marriage if he belongs to the *Sudra* caste. (See Setlur's *Complete Collection of Hindu Law Books on Inheritance*, page 388). Nilakantha the author of the *Vyahara Mayukha* (Chapter IV, section 5, paragraph 20) points out that not much reliance is to be placed on the disputed passage as it is not found in two or three copies of the *Kalika Purana*. Sir Thomas Strange says:—"The affiliation of one 'whose coronal locks have not been reduced to the form of his patriarchal tribe' is constantly inculcated. The age for this operation is the second or third year after birth, but it may be extended to the eighth which with Brahmins is the general period of the investiture,

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except for such as are destined for the priesthood upon whom it is performed at five. The stipulation, therefore, of five years as the extreme age for adoption may have reference to Brahmins of this description." (Hindu Law, Volume I, page 89) Rai Sahib Vishvanath Narayan Mandlik, a Sanskrit scholar of repute, in his work on the Mayukha (page 471) says "As regards age there is no restriction whatever. The only text restricting age is the one said to be from the Kalika Purana." He then refers to the authorities who have disputed the genuineness of the passage including Krishna Bhatta, who regards the passage as spurious, but even assuming it to be genuine explains it as referring to a son to be adopted by a King as his successor. W. H. Macnaughten, a recognised authority, says the authenticity of the passage is doubtful (Hindu Law, page 74). None of the modern text writers so far as my research goes, place any reliance on the five years limit and some of them go so far as to say that, there is no valid authority for limiting the age at all. The late Shastri Golap Chandra Sarkar in his Tagore Law Lectures strongly advocates this view and, contends that even the performance of the *upanayana* ceremony in the family of the natural father is no bar to a subsequent adoption. "It should, however, be observed" says the learned author "that if you leave aside the passage in the Kalika Purana the authenticity of which is doubted, then there is no authority in Hindu Law for the proposition that any of the initiatory ceremonies must be performed in the adopter's family in order to cause filial relation, in other words, that if all or any of the initiatory rites for a person have been performed in the family of his birth, he becomes incapable of being adopted into any other family. The passage of Vasishtha relied upon by the author of the Dattaka-Chandrika does not lay down the rule that the *upanayana* ceremony must be performed in the adopter's family, nor can such a rule be fairly inferred from it. Nor is there any passage of law declaring that in the case of Sudras marriage is a bar to adoption" (Sarkar's Hindu Law of Adoption, Second Edition, page 361).

The early case-law on the subject affords

little or no guidance for the decision of the present case, but in 1887 Mr. Justice Mahmood of the Allahabad High Court in a learned and elaborate judgment, in which Straight, J., concurred, reviewed the authorities at great length and arrived at the conclusion that the disputed passage in the Kalika Purana could not be relied upon as authentic and that the *upanayana* ceremony, which, in the case of Kshatriyas, may be performed as late as the 22nd year was the limit of age for a valid adoption (See *Ganga Sahai v. Lekhraj Singh* (1). I see no reason to differ from the decision of the Allahabad High Court arrived at after careful consideration in so far as it decided that the 'passage attributed to the Kalika Purana cannot be relied upon as authentic and that the adoption of a child over 5 years of age is permissible. The question whether, after the *upanayana* ceremony has been performed, a person belonging to the Kshatriya caste can be adopted does not arise in the present case as it is now admitted that the respondent's *upanayana* ceremony had not been performed at the date of his adoption. In my opinion the adoption of the respondent is not invalidated by reason of his age.

The second point urged before us raises the question whether the adoption ceremony was performed according to the correct ritual. The omissions urged were (1) that the Rajmata did not sit upon the *bedi* at the time when the *dutta homa* was performed (2) that the *charu homa* was not performed, (3) that the *sankalpa* was not performed, and, (4) that the *putreshti jag* ceremony was not performed, and that this was essential as the respondent's tonsure ceremony had already taken place in the family of his natural parents. With regard to each of these points except the last no difficulty presents itself as there was evidence on the record from which a decision can be come to. With regard to the question of the *putreshti jag* ceremony there is no direct evidence from which it can be said whether that particular ceremony was performed or not. No point was raised as to this either in the pleadings or issues and no question was asked about

(1) 9 A. 253; 5 Ind. Dec. (N. S.) 604.

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it in cross-examination, although the evidence of Raj Guru Raghu Nath Brahma, the *purohit* of the Puri Raja, whose forefathers were Raj Gurus before him and who took the leading part in the performance of the ceremony, stated that the *kulachar* (family customs) of the Puri Raja were performed on the adoption. Moreover the point was not taken before the Trial Court; nor was it raised amongst the 75 grounds of appeal set out in the appellant's memorandum of appeal. For these reasons I consider that we should not allow this question to be argued before us now, but in case this appeal should go further I propose to state shortly my opinion on the assumption that this particular ceremony was not in fact performed. The foundation upon which its performance is claimed as a necessary adjunct to a valid adoption is the disputed passage in the Kalika Purana already referred to. The view that it was necessary in cases where the tonsure ceremony had already been performed, appears to be based upon the explanation of the passage given in *verses* 49 and 52 of section 4 of the Dattaka Mimamsa, which has been interpreted by some authorities as meaning that adoption even after tonsure may be validated by the performance of the *putreshti jag*, or sacrifice for male issue, but not otherwise. If however the text upon which it is founded is not authentic the explanation can have no greater authority. The only case quoted in support of the appellant's contention on this point is *Luchmun Lall v. Mohun Lall* (2) in which Dwarka Nath Mitter, J., is reported to have said that the performance of the *putreshti jag* is essential to the validity of an adoption in the Dattaka form amongst the three superior classes. In the later case of *Katki v. Lakpati Pujari* (3) the Calcutta High Court expressed the view that the words *putreshti jag* in the former judgment were inadvertently used for *datta homa*, and on this assumption refused to follow it in the case of an adoption of a son belonging to the same *gotra* as his adopted father. Again in this Court in the case of *Sheo Lotan Rai*

v. Bhirgun Rat (4) it was held that the *putreshti jag* ceremony was a matter of form and not essential to an adoption. It is true that in that case the parties belonged to the same *gotra*, and, in so far as the view expressed applies to parties belonging to different *gotras*, it was *obiter*. In *Asita Mohan Ghose v. Nerode Mohan Ghose* (5) the Calcutta High Court also held that the *putreshti jag* was not an essential element in the ceremony of adoption, but this was in the case of Sudras. Apart from the *dictum* attributed to Dwarkanath Mitter, J., in *Luchmun Lall v. Mohun Lall* (2) which has been characterised as a *lapsus linguae* in a later case in the same High Court, there is no direct authority in the appellant's favour on this point. Although the question is not free from doubt. I should be prepared to hold if necessary that the ceremony is not essential to the validity of an adoption even amongst the regenerate classes. In this connection I would refer to the view of Sir Thomas Strange who in dealing with the mode and form of adoption says: "There must be gift and acceptance, manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary... And even with regard to the sacrifice of fire, important as it may be deemed, in a spiritual point of view, it is so with regard to the Brahmin only; according to a constant distinction, in the texts and glosses upon matters, of ritual observance, between those who keep consecrated the holy fire, and those who do not keep such fires, *i.e.*, between Brahmins and other classes." He then refers to the decision of Sir John Anstruther, C. J., in the case of the Raja of Nolkissen and continues: "And, even with regard to Brahmins, admitting their conception in favour of its spiritual benefit, it by no means follows that it is essential to the efficacy of the right for civil purposes, but the contrary is to be inferred and the conclusion is, that its validity, for these consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age. and not

(2) 16 W. R. 179.

(3) 27 Ind. Cas. 39; 20 C. W. N. 19; 20 C. L. J. 319.

(4) 41 Ind. Cas. 375; 2 P. L. J. 481; 1 P. L. W. 784.

(5) 35 Ind. Cas. 127; 20 C. W. N. 901.

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being either an only or the eldest son of the giver; the prescribed ceremonies not being essential. Not that an unlawful adoption is to be maintained; but that a lawful one, actually made, is not to be set aside for any informality that may have attended its solemnization." (Hindu Law Volume I, page 95).

Indeed, I think, it may be said that once it is determined that an adoption is valid provided the *upanayana* ceremony, the culminating point of the second birth, has not been performed, although the other initiatory rites, including tonsure, have already taken place in the natural family of the adopted son, the necessity for the *putreshthi jag* ceremony disappears. The necessity for its performance appears to be founded upon an ingenious interpretation of the questionable passage in the Kalika Purana as a means of explaining away that which did not commend itself as acceptable. It is significant also that in a case arising in one of the very centres of Hindu religious worship no one has suggested until the case was argued in appeal that the omission of the *putreshthi jag* was a bar to the validity of the adoption. It was left to the ingenuity of Counsel to raise the point for the first time in argument before us, although it finds no place amongst the various grounds of appeal formally taken.

With regard to the other matters arising under the second question for decision, they do not appear to me to present any difficulty. That the Rajmata did not sit upon the *bedi* when the *datta homa* was performed is admitted. She was a few feet away behind the *pardha* but in a position to hear and see what was going on. The *adan prodan* or giving and taking, which is the most essential part of the ceremony and, the *sankalpa* or vows were carried out behind the *pardah*, and in these she took a leading part. The respondent and the appellant having subsequently left the *pardah* hand in hand and taken their seats upon the *bedi*, the *datta homa* was performed by the Brahmans who officiated, the *bedi* being in the quadrangle where the guests were seated. No authority has been cited to us to support the view that the giver should actually sit upon the *bedi* during the *datta homa* ceremony.

Being a *pardanashin* lady of high estate it is hardly likely that the Rajmata would appear in public before so large an assembly of strangers and there is no reason based on principle or authority why it should be essential for her to do so. Again it has been left to the ingenuity of Counsel to suggest this as a defect in the ceremony.

The evidence as to the *sankalpa* was discussed by the learned Judge of the Trial Court, but the only question raised in this connection was the credibility of the witnesses and he accepted their evidence. The evidence was that of those best qualified to speak of it as it was that of the persons who took part in the ceremony. Their evidence was corroborated by other witnesses who were near enough to hear what was going on and the appellant was not called to contradict them. I can see no reason for differing from the finding of the learned Judge.

As to the *charu homa* no special point appears to have been made of this at the trial, but one of the witnesses Mahant Gadadhar Ramanuj Das, a guest at the ceremony, states that he saw *ghee*, *charu* and twigs passed into the sacred fire. Other witnesses speak in general terms of the performance of the *datta homa*. The officiating priest Raghunath Brahma, who was cross-examined at great length as to the *datta homa*, also speaks to the offering, of *samid* (firewood), *ghee* and *chura*. There can be no doubt that these ceremonies were duly performed and I so find.

The third point can be disposed of shortly. It is admitted that a widow can give her son in adoption if her husband during his life time has consented. In my opinion there is evidence sufficient to establish such consent. Further it appears to be well settled that a mother may give her son in adoption even without her husband's express consent in cases where such consent cannot be obtained, as where he is dead or has joined a religious order. The text of Manu has already been quoted in an earlier part of this judgment. In Colebrook's translation the words "with her husband's assent" do not appear. Vijnaneswara's comment is as follows: "He who is given by his mother with her husband's consent while her husband is absent or incapable

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though present, or without his assent after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given becomes his given son (*dattaka*). Mitakshara Chapter I, section XI, verse 9).

Sir, Thomas Strange says "Of her own mere authority the mother cannot, in general, give her son to be adopted, any more than she can adopt, her husband living, unless he has emigrated, or entered into a religious order. But his assent may be presumed; and, after his death, she does not want it, a widow having this power, and a wife, also, if the distress be urgent." (Hindu Law Volume 1, pages 81 and 82). The Dattaka Mimansa and the Dattaka Chandrika both recognise the right of a widow to give her son in adoption on account of the impossibility of obtaining her husband's consent. (Dattaka Mimansa IV, 12; Dattaka Chandrika I, 31). The case-law is all to the same effect and no authority has been quoted in support of the contrary view. This question must be determined against the appellant.

The fourth and last point *viz.*, that the adoption was induced by a bribe is one which is not pleaded by the appellant and it is difficult to see how he can be heard to urge it. But even, were the plea now permissible, the mere fact that the appellant had mixed motives for the adoption would not be sufficient in law to render it invalid. The appellant had a right to adopt a son and no question of fraud or coercion arises. It also appears from the appellant's own statement in the post-script to the agreement of the 23rd September 1918 that, his object in making the adoption was the perpetuation of his family and other sufficient reason. It is true that in the case of adoption by a widow a corrupt motive has in one case at least been held to be contrary to the Shastras [*Sitaram Pandit v. Harihar Pandit* (6).] That was not a case where the adoption was called in question, but one where the point arose whether the payment of a bribe to a Hindu widow as an inducement to her to adopt a son to her deceased husband could be regarded as a valid consideration for a subsequent transfer

by the adopted son of a portion of the estate of his deceased adoptive father. In the same High Court in an earlier case, it was held that the receipt of money by a widow as an inducement to adopt a son was not sufficient to rebut the presumption that, she also made the adoption from motives of duty. The fact that her motives were of a mixed character did not render the adoption invalid [*Mahableshvar Fondba v. Durgabai* (7).] In a later case in the same Court it was held by the majority of the Full Bench that in the Bombay Presidency a widow having a power to adopt and a religious benefit being caused to her deceased husband by the adoption, any discussion of her motives in making the adoption was irrelevant. *Ramchandra v. Mulji Nanabhai* (8).

This appears to be in accordance with the observations of their Lordships of the Privy Council in *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (9) where it was said "Their Lordships think it would be very dangerous to introduce into... these cases of adoption nice questions as to the particular motives operating on the mind of the widow." In the present case the appellant's right to adopt is not disputed. It must be presumed that his motive was the ordinary one which operates in such cases and this is what he himself has said. If in addition there were other motives of a worldly nature which also induced him to do that which he had an absolute right to do, I can see no reason why, where the rights of no other person are infringed, this should in any way affect the validity of his act. One ground upon which the appellant's argument was based was that of public policy, but public policy does not concern itself with the motives which induce a person to exercise his lawful rights without risk of injury to society.

Before concluding this judgment two further matters should be mentioned: The learned Counsel for the appellant wished to contend that the appellant was mentally incapable of understanding

(7) 22 B. 199; 11 Ind. Dec. (N. S.) 714.

(8) 22 B. 558; 11 Ind. Dec. (N. S.) 954.

(9) 1 M. 174; 4 I. A 1; 1 Ind. Jur. 63; 26 W. R. 21; 3 Sar. P. C. J. 669; 3 Suth. P. C. J. 353; 1 Ind. Dec. (N. S.) 116. (P. C.).

(6) 8 Ind. Cas. 625; 35 B. 169; 12 Bom. L. R. 910.

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the effect of his actions, and that the adoption was invalid on that account. This point was not taken in the written statement and was not raised in the issues. Nor was there any evidence which would support the contention. The evidence at the most shows that he was childish and perhaps eccentric and we refused to permit the question to be raised in appeal.

Further, the learned Counsel for the appellant after completing his argument in opening the case and after the reply on behalf of the respondent, in replying to the whole case wished to raise the point that there was no evidence that the *upanayana* ceremony had been performed as a part of the ceremony of adoption and that this was in itself sufficient to invalidate the adoption ceremony. As this question had nowhere been raised and had not even been put before us in the opening of the learned Counsel for the appellant we refused to hear him upon this point at that stage of the case.

In my opinion this appeal fails and should be dismissed with costs.

Foster, J.—I agree.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL, NO. 205 OF 1922.

February 15, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

Rao Bahadur MAN SINGH—

APPELLANT

versus

Maharani NAWLAKHBATI AND

ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appeal—Additional evidence.

Petitioner failed to adduce evidence on a particular issue in the Trial Court, on the assurance of the opposite party that that issue would not be pressed. On appeal the High Court allowed the opposite party to address arguments on that issue:

Held, that the High Court had power, under the circumstances, to allow the petitioner to pro-

duce additional evidence on that particular issue under O. XLI, r. 27, of the Civil Procedure Code. [p. 241, col. 2.]

ORDER.—This is an application on behalf of the plaintiff for permission to produce additional evidence. The plaintiff desires to examine Rai Bahadur Surja Prasad, Babu Anirudh Prasad, Rai Sahib Nilmoney Dey and Maulvi Abdul Salam and, he also asks for permission to further cross-examine the respondent Maharani Nawlakhbati.

The circumstances are somewhat peculiar. The suit is a suit for a declaration that by virtue of a deed of surrender dated the 18th December, 1918, executed by the widows of Maharaja Sir Harballav Narayan Singh, the plaintiff's father and, the defendant second party became entitled to immediate possession of all the properties left by Maharaja Sir Harballav Narayan Singh Bahadur and, for possession of the properties appertaining to the estate of Maharaja Sir Harballav Narayan Singh. Maharaja Sir Harballav Narayan Singh died on the 1st April, 1907, leaving behind him two widows, Maharani Tarabutti since deceased, and the defendant Maharani, Nowlakhbutty, a daughter, Padmabutti, since deceased, and two grandsons, being the sons of the daughter, Gobind Singh, since deceased, and the defendant second party, Rudra Protap Singh. The plaintiff is the son of Gobind Singh, and he alleges in his plaint that, the widows of Maharaja Sir Harballav Narayan Singh on the 18th December, 1918, executed a deed of surrender, by virtue of which his father Gobind Singh and the defendant second party became entitled to succeed to the estate left by Maharaja Sir Harballav Narayan Singh. The defendant second party is not supporting the case of the plaintiff, and he contends, in his written statement, that the Ranis were wholly incompetent to execute the deed of surrender and that the deed did not operate to vest the estate of Sir Harballav Narayan Singh in the plaintiff's father and in him. He has also in his written statement raised a question whether there was an intelligent execution of the deed of surrender by the widows of the late Maharaja. Maharani Nowlakhbutty, the surviving widow of the late Maharaja also contests the plaintiff's suit, and makes the

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following allegation in paragraphs 6 and 6A of her written statement.

"6. That the allegations made in paragraphs 7 and 8 of the plaint are not wholly correct. In the year 1916 the Maharanis expressed their desire to the Collector of Bhagalpur of relinquishing their (widows') estate in favour of the elder grandson Rao Bahadur Gobind Singh but the Collector of Bhagalpur informed them that they could not relinquish in favour of one of their grandsons. After that the Maharanis filed a petition that they should be permitted by the Court of Wards to surrender their life-interests in favour of both the grandsons in equal shares, but the Hon'ble Board of Revenue disallowed the prayer of the Maharanis and the Maharanis were informed of the above order of the Hon'ble Board of Revenue, but in spite of that the Maharanis are alleged to have executed a deed of relinquishment in favour of both the grandsons."

"6 (a). That the defendant No. 2 of whom the Maharanis were very fond, was ordered by the Government to leave the district owing to his suspected complicity in the murder of the late Maharaja Bahadur. The plaintiff's father represented to the Maharanis that it was necessary to have a deed executed by them, so that the Government might be induced to allow the defendant No. 2 to return to Bhagalpur district and the Maharanis on that misrepresentation without any proper and independent advice, signed the alleged deed of surrender without properly understanding its effect. This defendant submits that in the circumstances the deed is legally invalid and inoperative."

On the pleadings of the parties the Court framed certain issues for trial and one of the issues framed by the Court, namely, Issue No. 3 is as follows:—

"Whether the deed of surrender dated the 18th of December, 1918, was executed by the Maharanis, widows of Sir Harballav Narayan Singh Bahadur, under misrepresentation without getting any independent advice and without knowing or understanding its contents? Is it legally valid or operative?"

This was the main issue of fact which the Court had to try, but it appears that during the examination of Maharani Nowlakhbatty the Court of Wards, who was then in-charge of the estate left by Sir Harballav Narayan

Singh Bahadur, intimated to the Court that it will not press Issue No. 3. It ought to be mentioned here that Maharani Nowlakhbatty was examined as a witness on behalf of defendant No. 2 and in this litigation the Manager of the Court of Wards appeared in the record as the guardian of defendant No. 1. The case was opened on the 10th of May, 1922, and from the 10th of May, 1922, up to the 1st of June, 1922, it was understood by everybody that Issue No. 3 would not be pressed by the Court of Wards on behalf of Maharani Nowlakhbatty. But that issue was also raised at the instance of the defendant second party, and it appears that some evidence on that issue has been adduced both by the plaintiff and by the defendant second party. This was the position up to the 1st June, 1922. On the 31st of May, 1922, after the close of the evidence and when the plaintiff's Vakil was actually arguing the case, the Government Pleader put in a petition with a copy of the order from the Board of Revenue intimating that Maharani Nowlakhbatty was no longer a ward under the Court of Wards as the Court of Wards had released the estate in favour of Maharani Nowlakhbatty. The Government Pleader stated that he had no authority to represent the Maharani any further in the suit. On the 1st of June, 1922, Maharani Nowlakhbatty appeared through another Pleader and filed a petition praying that the written statement filed by the defendant No. 2 may be considered as her written statement and praying further that she should be allowed to press Issue No. 3. The Court heard the arguments and expressed the view that to allow the Maharani to press Issue No. 3 would be to prejudice the plaintiff. In the result he declined to accede to the prayer of defendant No. 1.

In my opinion, the Court should not have rejected the petition of defendant No. 1. As a ward of the Court of Wards, she was completely bound by the act of her guardian; but the moment her disability ceased, she was entitled to put her own case before the Court. That case was raised in the written statement filed on her behalf by the Court of Wards, and the Court could not deny her the right to put forward that case before the Court. The question of prejudice was

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easy of solution for all that the Court had to do was to adjourn the hearing of the suit, so as to enable the plaintiff to adduce evidence to meet the case of the defendant. In this Court the question has been argued, whether defendant No. 1 should be allowed to press Issue No. 3. We have taken the view that she should be allowed to press that issue, and the learned Government Advocate has argued before us that to allow her to do so would be to prejudice him. Mr. K. B. Dutt on behalf of the respondent argues before us that Issue No. 3 was there in the record and that the plaintiff has already adduced evidence on that issue. Now, it seems to me that Issue No. 3 could be raised only by defendant No. 1 and not by defendant No. 2; and although the plaintiff has given some sort of evidence on that issue, I am not prepared to hold that he should not be allowed to adduce further evidence on that issue, since this issue has, by subsequent events, become a very important issue in the case. The learned Government Advocate appearing for the plaintiff contends that defendant No. 1 should not be allowed to press Issue No. 3, and that we should not go into that issue at all, since it was not open to defendant No. 2 to raise that issue. On the hypothesis that the deed of surrender was not intelligently executed by the Maharanis, and that it did not operate so as to vest the estate in the plaintiff's father and in defendant No. 2, defendant No. 2 is a necessary party to the suit only in so far as he has not joined the plaintiff in bringing the suit. In other words, defendant No. 2 is only a *pro forma* party, and, on his own case, he has no interest in the estate, either vested or contingent, so as to entitle him to raise Issue No. 3. I think the learned Government Advocate is right in his contention that it is not open to defendant No. 2 to raise Issue No. 3; but I also think that we would not be doing complete justice between the parties, if we denied defendant No. 1 the right to press Issue No. 3 before us. The learned Government Advocate then contends that we should allow him an opportunity to examine the witnesses mentioned in the petition, as they are material witnesses on Issue No. 3. Mr. K. B. Dutt opposes the application, and he contends before us that we

could not accede to the plaintiff's application without violating the terms of O. XLI, r. 27. There is force in Mr. Dutt's arguments, but it seems to me that we could not allow defendant No. 1 to re-open Issue No. 3 without giving an opportunity to the plaintiff to meet her case. Had the learned Subordinate Judge allowed the application of defendant No. 1, it would have been his clear duty to allow the plaintiff to produce such evidence as he thought necessary to meet the case of defendant No. 1. It must be remembered that the evidence which would enable defendant No. 1 to press her case is already in the record, as it has all been produced at the instance of defendant No. 2; but the plaintiff did not pay any serious attention to this issue, as he took the view (rightly, in my opinion) that it was not open to defendant No. 2 to press that issue. I think that we have jurisdiction to allow additional evidence to be produced under paragraph (a) of O. XLI, r. 27 (1); but it must be distinctly understood that such additional evidence must be only on Issue No. 3, and on no other issue.

We allow the application, and we direct that a commission do issue to Mr. Sri Narayan Sahay, Barrister-at-law, and an Advocate of this Court, for the examination of Maharani Nowlakhbutty, returnable to this Court within two weeks from the date hereof. The office will forthwith make over to Mr. Sahay a copy of the order together with a copy of the paper-book. The office will fix a day for the further hearing of this appeal, when we shall proceed to record the evidence of the witnesses named in the petition. The plaintiff may obtain, on application to the office, summonses to the persons named in the petition to require their attendance in this Court on the date that may be fixed for the further hearing of this appeal.

Z. K.

Application allowed.

VITHALRAO SHESHGIRIRAO MOKTESAR v. VITHALRAO SONDEKAR.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 47 OF 1922.

November 19, 1922.

Present:—Sir Norman Macleod, Kt.,

Chief Justice, and Mr. Justice Crump.

VITHALRAO SHESHGIRIRAO MOK-

TESAR—APPELLANT

versus

VITHALRAO SONDEKAR—

RESPONDENT NO. 2.

Hindu Law—Joint family—Debt incurred by manager on pro-note—Family liability of—Pleadings—Suit on pro-note against manager of Hindu family—Claim on debt itself—Amendment of plaint.

Although the members of a joint Hindu family are not liable in a suit on a promissory-note signed by one of the members of the family as manager in his own name, they would be liable in a suit for the debt which was due under the note.

A suit based on a promissory note signed by the manager of a joint Hindu family cannot be treated by the Court as a suit for the debt for which the promissory note was passed. The plaintiff, if he wishes to make other members of the family liable, must ask for an amendment of the plaint at the earliest opportunity.

Krishna Ayyar v. Krishnasami Ayyar, 23 M. 597; 8 Ind. Dec. (N. S.) 819 and *Krishnanand Nath Khare v. Raja Ram Singh*, 66 Ind. Cas. 150; 44 A. 393; 20 A. L. J. 233; (1922) A. I. R. (A) 116, referred to.

Appeal from the decision of the District Judge, Kanara, in Appeal No. 25 of 1921, reversing the decree passed by the Sub-ordinate Judge at Sirsi, in Civil Suit No. 430 of 1920.

Mr. Y. N. Naikar, for the Appellant.

Mr. G. S. Mulgaokar, for Respondent No. 2.

JUDGMENT.—The plaintiff sued to recover Rs. 532-6-5 from the defendants as balance still due on a promissory-note dated October 17, 1917, passed by defendant No. 1 to plaintiff with future interest and costs. In the Trial Court a decree was passed in favour of the plaintiff against all the defendants. Defendant No. 2 appealed. By the directions of the District Judge his name was scored out of the decree. The question at issue was whether in a suit on a promissory-note signed by the first defendant alone in his own name the second defendant could be joined as a party. Various cases have been cited in which questions have arisen whether a member of a joint Hindu family could be held liable in a suit filed on a promissory-note signed by one of the members

of the family as manager in his own name. Reliance was placed by the appellant on the case of *Krishna Ayyar v. Krishnasami Ayyar* (1). Though it was held that all the members of the undivided family were liable on a promissory-note signed by the manager of the family, it seems to me that the judgments of Shephard, J., and Subrahmaniam Aiyar, J., were based on the fact that all the members of the family were liable for the debt which was due under the promissory-note in suit. Therefore, they could be taken as being sued on the debt and not on the promissory-note.

Then in *Krishnanand Nath Khare v. Raja Ram Singh* (2), it was held that there was no inherent reason why the managing member of a joint Hindu family could not in that capacity execute in his sole name a promissory-note which should be binding on the family as a whole and the property owned by it.

It seems to me, with all due respect, that the judgment was based mainly on the difficulties which might arise if a Hindu joint family could not be sued on a promissory-note unless all the members had signed it. The real point is whether a suit which is primarily a suit on a promissory-note and, therefore, a suit to which particular rules of procedure apply, could also be treated as a suit for the debt for which the promissory-note was passed. If that were permissible difficulties would arise, because the issues in a suit on a promissory-note would be entirely different from the issues which would be raised in a suit against the whole family to recover debt. I think an application should have been made in the first instance for amendment of the pleadings when the point was taken that only the party signing the note could be liable in a suit based on the note itself. It is obvious that defences which would be open to members of the family when sued for a debt would not be open to the person who passed the note, so that with regard to other members of the family the trial would take an entirely different course from the trial against the original maker of the note. It seems to

(1) 23 M. 597; 8 Ind. Dec. (N. S.) 819.

(2) 66 Ind. Cas. 150; 44 A. 393; 20 A. L. J. 233; (1922) A. I. R. (A) 116.

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me, therefore, that in this suit if the plaintiff seeks to make other members of the family liable the plaint is defective, and he ought to have asked for amendment of his plaint at the earliest opportunity, when evidence could have been led on the proper issues which would arise between the plaintiff and the other members of the family as debtors. I do not think, therefore, that in second appeal we could possibly say that the learned District Judge was wrong in striking out the second defendant's name from the decree on the ground that this was a suit on a note, and not a suit on any pre-existing debt. No injustice will result as the plaintiff has a decree against five defendants and if any of them on paying the debt desire to seek contribution from the second defendant, he can do so in a separate suit. The appeal, therefore, will be dismissed with costs.

W. C. A.

Appeal dismissed.

N. H.

MADRAS HIGH COURT.

ORIGINAL, SIDE APPEAL No. 57 OF 1921.

September 4, 1922.

Present.—Sir Walter Schwabe, Kt.,

Chief Justice, and Mr. Justice Wallace.

V. S. GOVINDACHARIAR AND OTHERS—

DEFENDANTS—APPELLANTS

versus

NATTU KESAVA MUDALIAR—PLAINTIFF

—RESPONDENT.

Construction of contract—Implied terms—Agreement permitting certain things to be done—Prohibition as to others, whether implied.

The Court ought not to imply a term on a contract unless there arises from the language of the contract itself and the circumstances under which it is entered into such an inference that the parties have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied. [p. 245, col. 1.]

The Moorcock, (1889) 14 P. D. 64; 58 L. J. P. 73; 60 L. T. 654; 37 W. R. 439; 6 Asp. M. C. 373. *Hamlyn v. Wood*, (1891) 2 Q. B. 488; 60 L. J. Q. B. 734; 65 L. T. 286; 40 W. R. 24, relied upon.

Where the parties have entered into a contract relying upon a certain interpretation of the law, it is not open to the Court, when the law has been differently interpreted or possibly altered, to imply as a term in the contract what the parties would have stipulated for at that time, if they had thought about it or if the law had been otherwise. [p. 245, col. 1.]

Where the trustees of two rival temples between whom certain disputes existed as to pro-

cessions and festivals entered into an agreement promising not to interfere with certain processions and festivals of each temple:

Held, that it could not be necessarily implied from the terms of the agreement that all other processions and festivals except those mentioned in the agreement had been prohibited. [p. 246, col. 2.]

Appeal from the decree of Mr. Justice Phillips, dated the 18th February, 1921, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 570 of 1919.

Mr. T. R. V. Sastry, for the Appellants.—The question in the case turns on the construction of the contract of 1846. (1) The first contention is that there is no express prohibition of more than 23 days' festival in the contract. (2) If any prohibition is to be read into it, the whole contract is void as being without consideration, being in excess of the powers of the trustee of a Hindu temple, and is further bad as involving a breach of trust and is opposed to public policy and is unenforceable. The provision as to prohibition of more than 23 days' festival in the U temple does not find a place in the contract and there is no reason why, in law, Courts should imply such an onerous term clearly not in the contemplation of the parties entering into the contract. The law as it then stood under the Sudder Decisions was almost conclusive against the free rights of new institutions. And so there was no necessity to provide for it. The Courts will not infer into a contract as part of its terms what the contracting parties themselves had left to be governed by the law, what was regarded as a legal obligation cannot be now converted into a contractual obligation. The contract is perfectly intelligible and consistent as it is, without the addition of this term. Terms cannot be implied into a contract which are not there, unless a Court is driven to it by circumstances—none of which exist in the present case. *The Moorcock* (1) and *Hamlyn v. Wood* (2).

[SCHWABE, C. J.—If we are with you on the question of construction, it will be unnecessary for you to address us on the other questions of law argued before

(1) (1889) 14 P. D. 64; 58 L. J. P. 73; 60 L. T. 654; 37 W. R. 439; 6 Asp. M. C. 373.

(2) (1891) 2 Q. B. 488; 60 L. J. Q. B. 734; 65 L. T. 286; 40 W. R. 24.

GOVINDACHARIAR v. NATTU KESAVA MUDALIAR.

the learned Trial Judge.]

Quite so; because in the plaint the cause of action, as set out shows that the breach for the first time occurred in November 1918, when for the first time the defendants performed a 24th day festival in a year prior to that or taking the contract as for the 23 days there is no allegation of any breach. The suit as brought is, therefore, not maintainable.

Mr. R. Kuppuswami Iyer, for the Respondent.—The point was not taken before the learned Trial Judge.

[SCHWABE, C. J.—The learned Judge's judgment proceeds on the assumption that there is a contract for more than 23 days. The point has been distinctly taken before us, in the appeal grounds. Why should we imply terms into Exhibit A?]

Looking at the history of the two temples and their close proximity it is a necessary term to be read into the contract.

The Y temple was clearly the older and more important of the two temples. The law as then understood clearly negated the right to conduct new processions or any procession for newly installed deities. The U temple had no legal rights whatsoever. The contract must be construed in the light of the law as it was then understood. Both parties conceded certain rights in others; Y temple to U processions for a certain number of days and U temple to all Y processions. The restricted statement of rights involves a negation of other rights. A term must be implied that U will carry on no new processions in addition to the 23 fixed by agreement. The observations in *Hamlyn v. Wood* (2) are in my favour. (The other points were not gone into.)

JUDGMENT.

Schwabe, C. J.—I regret to be called upon to give a decision in this case which would, in my opinion, have been much better disposed of if the parties had brought to a successful issue the negotiations for a settlement which, we were informed, were taking place. As these negotiations have failed, the parties are entitled to our judgment.

The facts of the case, so far as they are relevant, are that, the plaintiff represented a temple of the deity Vishnu of very old

standing indeed. Throughout the arguments the plaintiff's temple has been referred to as the "Y" temple. The defendant's temple is said to be a temple founded somewhere about 1832 and the principal deity installed in that temple is known as Vendanta Desikar, himself at one time a worshipper of Vishnu. The followers and worshippers of that temple have been referred to in this case as those of the temple "U." The two sets of worshippers belonging to the two great divisions of the Vaishnavite religion, the northern and southern may be referred to as U and Y owing to the shape of their Namams. The U temple is practically adjacent to the Y temple and there is no doubt that it was at times exceedingly inconvenient to the Y temple to have the U temple there, because it had processions in streets and music and other things which might interfere and probably did interfere with the reverent and decent worship observed at the Y temple. At that time the Sudder Court had decided and it was then accepted as law, that no new procession and no procession for any newly installed deity could be lawfully carried on in the streets, and that any one objecting to such things could, by applying to the Court, get an injunction restraining them. In fact, the Sudder Court had established the principle that, as far as the legality was concerned, only the old established procession could be allowed or permitted. The parties very naturally tried to find a *modus vivendi* and they entered into an agreement Exhibit A, and another agreement of about the same date, 26th January, 1846, which is not produced before us, but is recited in Exhibit A. The terms of the document are quite clear. It recited that there had been disputes, ever since the institution of the Vedanta Desikar temple, about the processions through the streets and other disputes relating to some complaint of the U temple against some action of the Y temple. The contract then recites the agreement entered into, by the Y temple in favour of the U temple, and it recites an agreement to the effect that the U temple should be at liberty to hold processions of its deity through the streets on 23 specified days and that, on 17 other days, if, in bringing the god out of the temple for short distances through the street on the way to the ball,

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that short procession clashed with some procession of the Y temple, then the U temple's procession should be fixed for some other convenient time. No doubt this latter part would necessarily imply an agreement by the Y temple not to interfere with the conduct on those 17 days of this short ceremony and, the entrance into the street for that purpose and not to interfere by way of attempting to stop it, but would confine its claims in respect of that to a right to have it postponed to a more convenient time. Then follows, beginning at line 28, a statement of what the U temple undertakes to do. It first of all gives complete liberty, so far as U temple is concerned to the Y temple to conduct processions and festivals of any kind at any time in favour of any deity throughout the year. In other words, the trustee of the U temple for himself and his successors undertakes not to interfere with whatever the Y temple may choose to do, whereas the trustees of the Y temple had by their agreement undertaken not to interfere by applications for injunction or otherwise, with whatever the U temple may choose to do in respect of the specified days. Then follows the term providing what is to happen in the event of the processions of the two temples clashing and in effect U gives a right of precedence to Y.

It is argued that you must imply into that contract a term that the U temple will not hold any procession for its then installed deity or any other deity installed thereafter, on any days except the 23 by procession, I mean long procession, through the streets and I presume also that except on the 17 days it will not hold its short processions though the latter point has not been argued. Now, the law on the subject of the implication of terms in a contract has frequently been misunderstood and frequently misapplied; but it was definitely laid down in a case called *The Moorcock* (1), by Bowen, L. J., and the words used by him in that case were again cited with approval and the principle rather more clearly enunciated in *Hamlyn v. Wood* (2) and the passage which is usually quoted on this point is from the judgment of Kay, L. J.

"The Court ought not to imply a term in a contract, unless there arises from the language of the contract itself, and the cir-

cumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied."

In this case, there is no express term limiting the U temple to 23 days for its processions, and the question for consideration is, whether the Court is necessarily driven to the conclusion that the parties must have intended that stipulation. In my judgment, the Court is not so driven because it seems to me that, there was at the time of the contract no necessity for the existence of such a stipulation. It was thought that at that time, the contract provided for all that the Y temple required and they gave the U temple license for 23 days and the law could be taken to provide for the rest. When we find the parties contracting on the basis of what was then supposed to be the law, there could be no necessity for implying a term which if put in would merely be stating what it was supposed the law was. In my judgment there is ample consideration for this contract without any such term. No doubt it would have been a sensible arrangement if the contract had said "if you do not interfere with my 23 days and short procession, I will not interfere with you at all," and that, in my judgment, is what the contract did and was intended to do. I do not think that it is open to the Court, when the law has been differently interpreted or possibly altered, to imply as a term what the parties would have stipulated for at that time, if they had thought about it, or if the law had then been otherwise.

On these grounds, I think that this judgment is wrong. When I say that, I do not mean that I am to be taken to have approved of the rest of the judgment, because the other points have not been argued. But the learned Judge throughout his judgment assumed that what the contract meant was that the processions were to take place only on 23 days, and it appears that he did not consider the question whether or not that was the true meaning of the contract and, I rather gather that it was not his fault that he did not so consider it because the point was not taken or, at any rate, brought particularly to his notice in the Court below, and, indeed, in the grounds of appeal

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the point finds no place until a late date when the amended grounds of appeal were put in. On this ground, I think that the injunction granted must be dissolved and that this appeal must be allowed with costs throughout. The memorandum of objections must be dismissed with costs.

I should add that I find nothing in the agreement to limit the U temple in installing new idols or taking them in procession. Nothing that I have said must be taken in any way to express a view as to whether the contract is or is not a binding contract. I appreciate that this judgment must leave open many matters between the two temples, because it seems to me that unless some arrangement is to come between them, there are bound to be difficulties and I urge upon the parties in the light of this judgment to see if they cannot arrive at some suitable way of carrying on their respective rites in future without interfering with each other.

Wallace, J.—I agree that the decision in this case must rest on the interpretation of the contract Exhibit A. The first part recites what the Y temple allowed the U temple to do, *i. e.*, the Y temple agreed to refrain from objecting to the U's processions on 23 specific days, and the second part of Exhibit A recites that the U temple agreed to do, *i. e.*, it would refrain from objecting to Y's procession on any day, and particularly, it would give precedence to the Y temple on the 23 specific days, and also at any time when their Vasantha Ootsavam or Vadaithi processions clashed with those of the Y temple. Beyond that the contract does not go. It is a contract as regards what was to be permitted by each side, *i. e.*, what each side agreed to allow the other to do as regards definite festivals which were then taking place or which might take place in the future: and it was not a contract as regards what was to be prohibited to each side for the future. While admitting that, the Y trustees came to the making of the contract claiming that all processions of the U temple were contrary to the then law, I agree that a prohibition, to be fastened on the U temple by the Y temple, of all future processions by the former not mentioned by the contract was not in the contemplation of the parties as part of that contract, because the Sudder

Court Law as then in force, would deal with that, and it was not, therefore, necessary for the parties themselves to provide for it. I agree that this Court cannot hold that the parties must have intended the contract to imply such a prohibition, or that this Court, is, therefore, driven to imply it. The contract is perfectly consistent and intelligible without implying that. In my interpretation the obligations undertaken by the U trustees under Exhibit A were (1) to refrain from interfering with any of Y's processions and (2) to give precedence to its processions on the occasions specifically laid down in the contract. It is not Y's case that, on this interpretation of the contract, there has been any breach thereof. Issue No. 2 in this case, which is 'whether the defendants committed any breach of the said agreement,' must, therefore, be decided against the plaintiffs. The plaintiff's suit as framed cannot, therefore, stand and they are not entitled to an injunction in the terms prayed for. It is not necessary for the purpose of deciding this suit to record a finding on Issue No. 1, which is "whether the agreement is true, valid and binding on the defendants" or to say how for Exhibit A itself as I interpret it, in reference to the obligations which it imposed on the then trustees, was a valid and legal contract, or whether it is now binding on the present defendants, the successors of those trustees. I agree in the order proposed by the learned Chief Justice.

V. N. V.

Z. K.

Appeal allowed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO.
30 OF 1922.

December 4, 1922.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

MULLER MACLEAN & CO.

PLAINTIFF—APPELLANT

versus

KADERBHOY MULLA ESMAILJI

—DEFENDANT—RESPONDENT.

*Construction of document—Bill of exchange
drawn in foreign currency—Amount payable in*

HER KESHI V. MEWA RAM.

rupees at exchange rate "on date of payment"—Exchange rate, calculation of.

In a suit upon a bill of exchange drawn in a foreign currency and payable in rupees, "at the current rate for Bank Drafts at the date of payment," the rate of exchange to be applied is the one prevailing on the due date and not the one prevailing on the date when the bill is actually paid.

Appeal.

Sir Thomas Strangman and Mr. Collman, for the Appellant.

Mr. Kanga, Advocate General, with him Mr. Desai, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiffs brought this suit against the defendants as acceptors of two Bills of Exchange drawn by the plaintiffs in New York upon the defendants and payable thirty days after sight. One of the Bills of Exchange was for 1568.51 dollars, dated July 2, 1920, and was accepted by the defendants on August 4, 1920. The other was for £ 261-19-3, dated September 8, 1920, and was accepted by the defendants on October 12, 1920.

The defendants raised various defences with which we are not concerned in this appeal. The only question in appeal is, at what rate of exchange should the amount due to the plaintiffs by the defendants on their acceptances be calculated. According to the terms of the bills they were to be paid at the current rate for Bank Demand Drafts at date of payment. It was contended by the plaintiffs that these words meant that the rate of exchange should be calculated when the Bill was actually paid. It was contended by the defendants that the rate of exchange should be calculated at the due date. The learned Judge was of opinion that the defendant's contention was right and from that decision the plaintiffs have appealed.

It seems to me that the question can be answered by considering what was the plain meaning of the contract entered into by the defendants when they accepted these Bills. They agreed to pay the amount appearing on the face of the bills thirty days after sight. These amounts were stated in the one in dollars and in the other in sterling, and it was agreed that defendants should not pay these amounts in foreign currency, or by foreign bills, but that they should pay to the plaintiffs such an

amount in rupees as would enable the plaintiffs to buy foreign Bills themselves, for the respective amounts. Then as it was stated in the Bills that they must be paid at the current rate for Bank Demand Drafts at date of payment, that date could only mean the day on which the acceptors agreed to pay and not some other date at which, if the contract had been broken, the defendants might either choose to tender the money, or might be forced to pay by an order of the Court. It was argued that the same result would follow if nothing had been stated in the Bills with regard to the current rate for Bank Demand Drafts and, therefore, these words on the defendants' contention would be mere surplusage, so that some other meaning should be attached to them in order to avoid that result. It appears to me clear that these words have been inserted as a matter of common form in these Bills so as to make it certain how the amount in rupees was to be calculated at the due date. There is no necessity to speculate what would have happened if the words had not been there, or how the acceptors would have met their obligations at the due dates. Nor is it necessary to consider the cases which were cited in the Court below, as Counsel for the appellants did not rely on any authorities before us. It seems to me that the question can be decided on the terms of the contract, and on the terms of the contract, I think, the decision of the learned Judge is right. The appeal is dismissed with costs.

Crump, J.—I agree.

N. H.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1300 OF 1921.

February 9, 1923.

Present.—Mr. Justice Rafique and Mr. Justice Lindsay.

HER KESHI—PLAINTIFF—APPELLANT
versus

MEWA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Suit by co-sharer—Sale by vendee to co-sharer after institution of suit—Pre-emption, right of, whether lost—Appeal, second—New plea.

HER KESHI V. MEWA RAM.

A plaintiff in a suit for pre-emption must show that he is entitled to pre-empt not only on the date of the suit but also on the date of the decree.

Where, therefore, the vendee, who is a stranger, sells the property sought to be pre-empted to a co-sharer after the institution of the suit but before the decree, the plaintiff's right to pre-empt is lost.

Behari Lal v. Mohan Singh, 55 Ind. Cas. 71; 18 A. L. J. 220; 2 U. P. L. R. (A.) 48; 42 A. 268 and *Shib Lal v. Bidha Singh*, 72 Ind. Cas. 140; 21 A. L. J. 329, followed.

A plea cannot be considered in second appeal, if it is neither taken in the first two Courts nor in the memorandum of appeal to the High Court.

Second appeal against a decree of the District Judge, Budaun, dated the 17th June, 1921.

Mr. S. Raza Ali, for the Appellant.

Mr. M. A. Aziz, for Mr. Iqbal Ahmad, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption brought by the plaintiff-appellant in the Court of the Munsif of Sahaswan in the Budaun District. Gopi and Musammatt Dipa, it appears, executed a deed of sale of certain landed property on the 16th January, 1920 in favour of one Dip Chand. On the 19th of November, 1920, Her Keshi, the plaintiff-appellant before us, filed his suit for the revocery of the said property on the allegation that under a custom of pre-emption which obtained in the village, where the property is situate he being the co-sharer of the vendors was entitled to purchase the property in preference to Dip Chand who was a stranger. The claim was brought against the vendors and the vendee. One Mewa Ram was also impleaded as a defendant, on the allegation that there was a fictitious mortgage in his favour in respect of the property in suit. On the 3rd December, 1920, before the case came to trial Dip Chand, the vendee, sold the property in suit to Mewa Ram who is also a co-sharer in the village and of the same status as Her Keshi the pre-emptor. The custom of pre-emption stated in the plaint was denied by the contesting defendants, and in addition Mewa Ram pleaded that he being a co-sharer in the village and a transfer of the disputed property having been made in his favour prior to the trial of the case, the suit of Her Keshi, the pre-emptor, must fail. The Court of first instance rejected the pleas in defence,

holding that the right of pre-emption arose on the execution of the sale deed of the 16th of January, 1920. and no subsequent transaction even in favour of a co-sharer of equal degree with the pre-emptor could defeat the latter's right. On appeal by Mewa Ram, the learned Judge of the lower Appellate Court disagreed with the first Court. He held that on the case-law of this Court the defence of Mewa Ram was a good and valid defence and defeated the claim of Her Keshi. The case of *Behari Lal v. Mohan Singh* (1) was referred to by the learned Judge as authority in favour of his view. The claim of Her Keshi was accordingly dismissed.

In his appeal before this Court, Her Keshi contends that his right of preferential purchase arose on the transfer in favour of Dip Chand on the 16th of January, 1920, and any subsequent transfer by the vendee Dip Chand would not affect his (Her Keshi's) right. In support of this view the learned Counsel for the pre-emptor has relied upon some of the older cases of this Court. We think we are bound to follow the case of *Bihari Lal* mentioned above. That case was also followed by this Bench in the case of *Shib Lal v. Bidha Singh* (2) disposed of on the 26th of January of this year. The claim of Her Keshi, therefore, fails. It is however contended that there is some difference in the amount of the property conveyed by the two sale deeds of the 16th January, 1920, and the 3rd December, 1920. The latter sale-deed refers to property less than that conveyed by the deed of 16th January, 1920. The claim of Her Keshi, therefore, ought to prevail in respect of that portion of the property which is not included in the sale of the 3rd December, 1920. No such plea seems to have been taken in the Court of first instance, or in the lower Appellate Court, or in the memorandum of appeal to this Court. The learned Counsel for the respondents argues that he is not in a position to meet this objection at this stage, not having his client or the latter's agent with him and having no information on the subject. As the objection was not taken

(1) 55 Ind. Cas. 71; 18 A. L. J. 220; 2 U. P. L. R. (A.) 48; 42 A. 268.

(2) 72 Ind. Cas. 140; 21 A. L. J. 329.

GANESH NARHAR JOSHI v. DATTATRAYA PANDURANG JOSHI.

in the memorandum of appeal before this Court, we need not consider it. The result is that the appeal fails and is dismissed with costs including fees in this Court on the higher scale, if any.

M. A. A.

*Appeal dismissed.***BOMBAY HIGH COURT.**

SECOND CIVIL APPEAL, No. 111 OF 1922.

November 15, 1922.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

GANESH NARHAR JOSHI—

PLAINTIFF—APPELLANT

versus

DATTATRAYA PANDURANG JOSHI—

DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment of liability—Payment of portion of debt under pro-note—Endorsement on pro-note by promisor—Endorsement, whether admission of liability as to balance.

An endorsement on a promissory-note by which the promisor records that he has paid a certain sum against the liability which stands against his name on the note, amounts to an admission of his liability to pay the balance, and will start a fresh period of limitation from the date on which it was made. The fact that the endorsement is below an account showing what has already been paid on the note, would make no difference. [p. 250, col. 1.]

Venkatakrishniah v. Subbarayudu, 36 Ind. Cas. 240; 40 M. 698; 3 L. W. 576; (1916) 2 M. W. N. 256, followed.

Appeal from the decision of the District Judge, Satara, in Appeal No. 216 of 1921, reversing the decree passed by the Subordinate Judge at Karad, in Civil Suit No. 618 of 1919.

Mr. A. G. Desai, for the Appellant.

Mr. K. H. Kelkar, for the Respondent.

JUDGMENT.—The plaintiff sued to recover Rs. 1,445-11-0 from the defendant, being the balance on two promissory-notes with future interest and costs. The lower Court passed a decree for Rs. 580-6-6 from the second defendant and the estate of defendants Nos. 1, 3 and 4 on the one note, and Rs. 865-4-6 from the second defendant on the other note. The chief contest was with regard to the liability on the note of November 12, 1913, on which it was said the balance due

was Rs. 865-4-6. An issue was raised whether the claim on the promissory-note of 1913, was in time. The learned Judge held that the claim was in time as against the second defendant and not against defendants Nos. 1, 3 and 4. In appeal the claim on this note as against the second defendant was also rejected. Now it is admitted that the second defendant signed this promissory note on November 12, 1913, for Rs. 1,500 with interest at six per cent. Payments were made of Rs. 90 on February 2, 1913, Rs. 200 on January 11, 1916, and Rs. 381-12-0 on April 21, 1916. On November 6, 1916, the second defendant endorsed on the note the three payments which had been made on the previous dates, added up the total, and signed underneath.

It is contended by the plaintiff that this was an acknowledgment of liability within the meaning of section 19 of the Indian Limitation Act. On the part of the second defendant, it is contended that there was no sufficient acknowledgment. It may be admitted that the second defendant had not written in so many words that he admitted his liability for the balance due. But we must read the whole endorsement made by him, taken in conjunction with the words on the face of the note. It is difficult to say that that endorsement can mean anything else than this "I have paid so much on account of my liability on the note, and in consequence I am only liable for the balance remaining due."

We have been referred to the case of *Venkatakrishniah v. Subbarayudu* (1) where it was held that where a payment was made by a mortgagor who was able to write and was recorded on the back of the mortgage bond by a servant of the creditor and signed by the debtor, the endorsement amounted to an acknowledgment of liability within the meaning of section 19 of the Indian Limitation Act, though the payment was not good as a part payment within the meaning of section 20 of the Act. Mr. Justice Napier said:—

"I adhere to the opinion expressed by me in *Jaganadha Sahu v. Rama Sahu* (2) on the same words as are in this document, I have no doubt that there is in

(1) 36 Ind. Cas. 240; 40 M. 698; 3 L. W. 576 (1916) 2 M. W. N. 256.

(2) 27 Ind. Cas. 747; 17 M. L. T. 80.

RAJESWARA SETHUPATHI v. TIRUNEELAKANTAM.

this endorsement an acknowledgment".

And Mr. Justice Srinivasa Aiyangar, said (page 700*) :—

"I have no doubt that the terms of the endorsement in this case, amount to an acknowledgment of liability. The debtor states in terms that he pays Rs. 378 towards the amount due on the bond and on the same day made another payment of Rs. 22 and made another endorsement. I construe the endorsement as meaning that the debtor made a part payment of the amount due (on the bond on that day over Rs. 1,500 was due as shown on the face of the bond) which is certainly an acknowledgment that more money was due."

Following that decision, I think this is an endorsement by which the promisor recorded that he had paid Rs. 671-12-0 against the liability which stood against his name on the promissory-note, and consequently he admitted his liability to pay the balance. It seems to me that as a matter of Common Law an endorsement on a promissory-note by the promisor is an acknowledgment of liability, which will start a fresh period of limitation from the date on which it was made, and it makes no difference that such endorsement is below an account showing what has already been paid on the promissory-note. I think, therefore, that this appeal must be allowed, the decree of the lower Appellate Court set aside, and that of the Subordinate Judge restored with costs in this Court and the Court below.

W. C. A.

Appeal allowed.

*Page of 40 M.—[Ed.]

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS NOS. 1740

AND 1741 OF 1922.

November 8, 1922.

Present :—Sir Walter Schwabe, Kt., Chief Justice, Mr. Justice Coutts-Trotter and Mr. Justice Kumaraswami Sastri.

B. RAJA. RAJESWARA SETHUPATHI
alias MUTHU RAMALINGA
SETHUPATHI AVERGAL, RAJAH OF
RAMNAD—PETITIONER

versus

TIRUNEELAKANTAM AND ANOTHER—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109 (c), scope of—Issue of general importance—Leave to appeal—"Private importance," meaning of—Value of subject-matter, determination of.

Section 109 (c), Civil Procedure Code, contemplates a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance. [p. 252, col. 1.]

Banarsi Prasad v. Kashi Krishna Narain, 23 A. 227 at p. 231; 3 Bom. L. R. 154; 5 C. W. N. 193; 11 M. L. J. 56; 28 I. A. 11; 8 Sar. P. C. J. 447 (P. C.), *Hirjibhai v. Jamshedji*, 21 Ind. Cas. 783; 15 Bom. L. R. 1021 at p. 1022, and *Chinna v. Markanda Kothan*, (1921) W. N. 353, followed.

Where in a case the point in issue appears to be one of general importance, but not of sufficient importance to the proposed respondent to warrant putting him to the expense of an appeal to the Privy Council, leave to appeal should be refused. [p. 253, col. 1.]

Per *Coutts-Trotter, J.*—The expression "private importance" means, private importance to both parties to the litigation, and not only to one of them. [p. 253, col. 2.]

Per *Kumaraswami Sastri, J.*—For the purpose of determining the amount or value of the subject-matter of the suit and in the appeal, the question is not what the indirect consequences of the decree may be to the petitioner but what the value of the subject-matter is as between the parties when an application is made for leave on the ground that the pecuniary value is over the sum of Rs. 10,000. [p. 254, col. 1.]

In granting leave to appeal to the Privy Council, the High Courts in India have no power to impose a condition upon the appellant that, whatever may be the result of the appeal, he should pay the costs of the other party. The Privy Council alone have such a power. [p. 252, col. 2.]

Clarke v. Brajendra Kishore Roy Chowdhuri, 3 Ind. Cas. 786; 13 C. W. N. 1127, referred to.

Sibnarain Ghose, In re, 5 M. I. A. 322; 8 Moo. P. C. 276; 1 Sar. P. C. J. 448; 18 E. R. 918; 14 E. R. 106; 105 R. R. 51, *Clarke v. Brajendra Kishore Roy Chowdhuri*, 3 Ind. Cas. 786; 13 C. W. N. 1127, relied on.

Petitions praying that, in the circumstances

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stated therein and in the affidavit filed in Civil Miscellaneous Petition No. 1740 of 1922, the High Court will be pleased to grant a certificate enabling the petitioner herein to appeal to His Majesty in Council against the judgment of the High Court in Letters Patent Appeals Nos. 21 and 22 of 1920, preferred against the decrees of the High Court in Appeal No. 159 of 1919 and in Appeal No. 315 of 1919, respectively, preferred against the decrees of the Court of the Subordinate Judge, Ramnad at Madura in Original Suits Nos. 24 and 59 of 1917 respectively.

Mr. A. Krishnaswami Iyer (with him Mr. S. Soundara Raja Iyengar), for the Petitioner:—These are applications for leave to appeal to Privy Council against the decision of your Lordships. The question relates to the construction of a "Covle" and two of your Lordships have held against the landlord's right to collect certain *Swanthanthrams*. This decision affects his right to collect such *Swanthanthrams* in the whole of the Ramnad Zemindari which involves an amount over Rs. 10,000. Also I ask for leave under section 109 (c) as involving a matter of great importance, since a large number of other people are holding under the landlord under terms more or less similar and will be governed by the present decision. The matter is one of such great importance that your Lordships can certify it to be a fit one for appeal.

Mr. C. V. Anantakrishna Iyer, for the Respondent.—The matter may have great indirect consequences to the landlord but to the tenant the value is very small and, he must not be compelled to fight for other people before the Privy Council. It would be of very great hardship.

[SCHWABE, C. J. to the Appellant.—You must be put on terms, are you prepared to pay the costs of the appeal to the Privy Council in any event.]

Mr. A. Krishnaswami Iyer, for the Appellant expressed his inability. I, however, doubt if such conditional leave could be granted. It may be interfering with the discretion of their Lordships of the Judicial Committee in the matter of costs. (The matter was adjourned for further arguments).

Mr. C. V. A. Anantakrishna Iyer, for the Respondents.—The Privy Council alone have

power to make a conditional order in granting leave to appeal. A conditional order by your Lordship will affect the discretion of Privy Council. See *Richard Spooner v. Juddow* (1), *Sibnarain Ghose, In re* (2), *Indian Immigration Trust Board of Natal v. Vencategin Govindasamy* (3). In one Indian case, the right has been negatived, *Clarke v. Brajendra Kissors Roy Chowdhuri* (4), *Beni Ram v. Kundan Lal* (5).

Further, there is no question of great public importance. If at all, it is of great importance only to one party. That is insufficient.

Banarsi Prasad v. Kashi Krishna Narain (6), *Hirjibhai v. Jamshedji* (7), *Chinna v. Markanda Kothan* (8).

Further, as your Lordships have indicated in the judgment under appeal, the landlord is not without remedy. He can apply for an order of rent in the Revenue Courts.

Mr. A. Krishnaswami Iyer stated his client was unwilling to submit to a conditional leave to appeal. The matter is one of great importance having regard to the interests of the landlord that will be affected by the decision in the whole of the *zemindari*.

Further, the decision directly and indirectly affects the landlord's rights to collect *manibham* from others and to the extent of over Rs. 25, 000 and hence the case comes under section 110 also.

JUDGMENT.

Schwabe, C. J.—These are two applications for leave to appeal to His Majesty in Council against the decision of this Court constituted as at present.

(1) 4 M. J. A. 353; 6 Moo. P. C. 257; Perry O. C. 392; 1 Sar. P. C. J. 363; 18 E. R. 734; 13 E. R. 682.

(2) 5 M. I. A. 322; 8 Moo. P. C. 276; 1 Sar. P. C. J. 448; 18 E. R. 918; 14 E. R. 106; 105 R. R. 51.

(3) (1921) 1 A. C. 433; 90 L. J. P. C. 38; 124 L. T. 643; 37 T. L. R. 128.

(4) 3 Ind. Cas. 785; 13 C. W. N. 1127.

(5) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

(6) 23 A. 227 at p. 231; 3 Bom. L. R. 154; 5 C. W. N. 193; 11 M. L. J. 56; 28 I. A. 11; 8 Sar. P. C. J. 447 (P. C.).

(7) 21 Ind. Cas. 783; 15 Bom. L. R. 1021 at p. 1022.

(8) (1921) W. N. 353.

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The actual pecuniary amounts involved in the two appeals are Rs. 400 and Rs. 600 respectively. Under sections 109 and 110 of the Code of Civil Procedure of 1908, leave to appeal has to be granted where the amount or the value of the subject-matter of the suit is Rs. 10,000 or upwards and, the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is the same sum or upwards or, property of like amount or value is involved directly or indirectly, provided where the decree affirms the decision of the Court immediately below and some substantial question of law is involved. In this case by reason of the value of the subject-matter, the above provisions do not apply. There is, however, a further power under section 109 (c) of the Code of Civil Procedure in this Court to give leave to appeal by certifying that the case is a fit one for appeal to His Majesty in Council. What is contemplated is a class of cases in which there may be involved questions of public importance, or which may be important precedence governing numerous other cases or, in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance. See *Banarsi Prasad v. Kashi Krishna Narain* (6), *Hirjibhai v. Jamshedji* (7) and *Chinna v. Markanda Kothan* (8). We are informed that there are many other persons in the *zemindari* in question holding under the *zemindar* whose rights are governed by documents in the same or similar terms to those construed by the Courts in these cases. The result of these decisions is that the plaintiff *zemindar* cannot recover the arrears for the last few years alleged to be due to him in respect of certain *swathanthrams*. According to our judgment, there are other means open to the plaintiff to recover such payments or their equivalent for the future. The plaintiff contends that this is a case of great public or private importance because, if our decision is wrong, he would be entitled to recover from many persons for the past amounts aggregating to a large sum. It is obviously unjust that the defendants in these two cases should be put to the expense of fighting this matter in the Privy Council, so that if our judgment is wrong, the plaintiff may recover these small amounts from them, and thereafter in the aggregate

a large amount from other persons. In similar cases, on applications for special leave to appeal, made to their Lordships of the Privy Council, a condition has been imposed upon the appellant that, whatever be the result of the appeal, he should pay the costs of the other party as between Solicitor and client. See *Richard Spooner v. Juddow* (1) and *Sibnarain Ghose, In re* (2) and *Indian Immigration Trust Board of Natal v. Vencategin Govindasamy* (3). I think that this is a proper case for such an order, if it is a matter upon which I am entitled to express an opinion. The question has been raised before us whether we have power to impose such a condition. In *Clarke v. Brajendra Kishore Roy Chowdhury* (4) Jenkins, C. J., and Casperz, J. held that no such power existed in the Indian Courts, but was confined to the Privy Council. The result of such finding is curious. According to the direction of the Privy Council in *Moti Chand v. Gangi Prasad Singh* (9) quoted in the judgment in *Clarke v. Brajendra Kishore Roy Chowdhuri* (4) in all cases where leave to appeal is desired, although the subject-matter is under Rs. 10,000, such applications must in the first instance, be made to the Indian Court as that Court, if it thinks that it is a case fit for appeal to His Majesty in Council can certify to that effect under section 109 (c). What is the duty of the Court, if it thinks that the case is a fit one for consideration by His Majesty in Council, but that it would not be right to call upon one party whose financial interest in the matter is small, to incur the risk of the costs of the appeal? Assuming the decision in *Clarke v. Brajendra Kishore Roy Chowdhuri* (4) is right, and in my judgment, in view of the fact that, that case went before the Privy Council and special leave to appeal was granted and it was not then suggested that the Calcutta High Court could have itself imposed any condition, it is not possible for this Court to hold otherwise, the only course open to us is to refuse leave and to leave the appellant, if so advised to apply to the Privy Council for special leave.

(9) 29 J. A. 40; 6 C. W. N. 362; 24 A. 174; 4 Bcm. L. R. 159; 8 Sar. P. C. J. 247. (P. C.)

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During the hearing of these applications we asked the appellant, whether he would be prepared to agree to a condition that, he should be liable for the costs of the defendants as between Solicitor and client in any event. This by his Counsel he definitely refused. It is possible that it would not have been right for us to give leave with such a condition even if agreed to, as if the decision in *Clarke v. Brajendra Kishore Roy Chowdhury* (4) is correct, it might be said that to hold so would be usurping a power reserved to the Privy Council. I venture to express the hope that some day this matter will be discussed in the Privy Council and that a definite pronouncement may be made on the subject. But meanwhile, I think in such cases the only safe course is to refuse leave stating if it be the case, that the point in issue appears to be one of general importance, but not of sufficient importance to the proposed respondent to warrant this Court in putting him to the expense of an appeal to the highest Tribunal.

These applications must accordingly be dismissed with costs.

Coutts Trotter, J.—These cases have given me very great difficulty, and I do not know now whether I have solved that difficulty aright; but I desire to formulate it in my own words as it presents itself to my mind.

We can only grant leave to appeal, if at all, under section 109 (c) of the Code of Civil Procedure, because the amounts at stake in the cases are in themselves small. But the *zemindar* who wishes to appeal, asserts that the cases will govern a very great number of other cases, in which he seeks to recover *swathanthrams* from other *raiyats* and that, therefore, it is for him "a matter of great private importance," to quote the language of the leading case. The reply of the *raiyats* is that to them individually it is a matter of a few hundred rupees, and that they could not possibly afford to contest such an appeal. Obviously, the most satisfactory order would be to allow the *zemindar* to appeal and get his principle settled for him on terms of paying all the other side's costs in any event; but it is said that this Court has no power to make such an order. After a careful consideration of the section, and the cases referred to, I have come to the conclusion

that this contention is well-founded. We have in a sense a discretion as to granting leave to appeal; but it is strictly circumscribed by the section. I do not think we can impose a condition as to costs, unless it is to be found in so many words in the Code, it would be, in my opinion, an invasion and usurpation of the powers of the Privy Council to do so, and an unwarranted attempt to fetter their Lordships' discretion as to costs.

This being the position, what is our duty? To grant leave because the matter is of great importance to the one party, or to refuse it because it is of trifling importance to the other? If we take the former view, the respondent will probably either pay at once or at any rate fail to appear to argue the case; and the *raiyats* of this country have not for the most part reached the stage of realizing that they could advantageously combine to fight a test case. I think on the whole that it is best to regard their Lordships of the Judicial Committee when they speak of "private importance" as meaning private importance to both parties to the litigation, and not only to one of them. I, therefore, concur in the order proposed that we should refuse leave. The *zemindar* can apply to their Lordships for special leave to appeal, when if their Lordships see fit, they can impose the terms that we should have desired to impose, had we felt ourselves able to do so, or such other terms as may commend themselves.

Kumaraswami Sastri, J.—These are applications by the Rajah of Ramnad for leave to appeal to the Privy Council against the decision of the majority of the Full Bench. The question turns on the construction of two *cowles* executed by the respondents. The Rajah claimed that he was under the *cowles* entitled to recover from the respondent the *manibha swathanthram* paid by the *raiyats* to the respondents. The appeals by the Rajah first came on before Wallis, C. J., and Sadasiva Aiyar, J., who differed. In consequence of this difference, the above Letters Patent Appeals were filed. The Chief Justice and Coutts Trotter, J., were of opinion that the *zamindar* was not entitled to the *swathanthrams* while I agree with Sadasiva Iyer, J., that he was entitled

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The present applications are for leave to appeal to the Privy Council against the decision of the majority of the Full Bench. It is alleged by the Rajah that though the value of the *manibha swathanthrams* in dispute is only Rs. 409-2-4 and Rs. 159-3-0 respectively in *Tiruneelakantam Servai v. Raja of Ramnad* (10), the judgment and decrees of the High Court will have far reaching consequences in the Ramnad *zemindari* and that the judgment which will be binding authority on the question of law decided by the Courts will affect his right to collect the *manibha swathanthrams* from other *raiya*ts and would entail on him a loss of Rs. 20,000 a year. It is contended that the judgment and decree of the High Court involve directly and indirectly a sum of over Rs. 10,000.

As regards the value of the appeal it is clear that so far as the petitioner and respondents are concerned it is far below Rs. 10,000. Even taking into account the amounts which will become payable on the unexpired term of the leases the amount will not be over Rs. 4,000 in both the Letters Patent Appeals. For the purposes of section 110 of the Code of Civil Procedure, the amount or value of the subject-matter of the suit and in the appeal in the Court of first instance and the Appellate Court must be Rs. 10,000 or upwards, in order to render an appeal under clauses (a) and (b) of section 109 competent. The question is, therefore, not what the indirect consequences of the decree may be to the petitioner, but what the value of the subject-matter is as between the parties; when an application is made for leave on the ground that the pecuniary value is over the sum of Rs. 10,000 required by clauses (a) and (b) of section 110. I am of opinion that, the subject-matter of the suits and appeals is far below the sum of Rs. 10,000 even if we consolidate the appeals.

It is argued that even if clauses (a) and (b) of section 109 do not apply, leave should be granted under clause (c) which enables the High Court to grant leave in cases not falling under clauses (a) and (b) if the Judges consider that the case is a fit one for appeal to His Majesty in Council. It is pointed

out that special leave has been given in cases where though the amount in dispute in individual cases was small leave was granted when the question related to tenures or the construction of leases and grants which applied to tenants generally. It does not however appear that the questions raised affect other *zemindaris* in the Presidency.

There is no doubt that the questions raised in these Letters Patent Appeals are of great importance to the *Zemindar* of Ramnad and that he will lose a large sum should the matter stand where it is. This, however, is not the only consideration. We have to view the case from the standpoint of the respondents who are tenants without means at their disposal to incur the heavy costs and charges which the granting of leave will entail on them. The case is one which while of great importance to one party is so far as the other is concerned of small pecuniary interest. In fact the respondents state that if leave to appeal is granted it would be more profitable for them to pay the *manibha swathanthrams* disallowed rather than incur the expenses involved in defending the appeals to the Privy Council.

The consideration which ought to weigh with Courts in such cases were stated by Lord Langdale, while granting leave to appeal in *Richard Spooner v. Juddow* (1), where he observed as follows: "The question appears to be of very considerable importance; but you observe the amount at issue is only a sum of Rs. 250 and for the purpose of deciding that, you put the respondent to the expense of this appeal. The question is, whether this prosecution being by the East India Company, and no doubt important to have decided, for the benefit of the whole country, the whole expense of this appeal should not be borne by them. However important it may be to establish the law, upon a question of this kind, it would be very wrong to put the party to so great expense in a case where so small a amount is at issue." Leave to appeal was granted on the appellant's undertaking to pay all costs, charges and expenses, which might be incurred on behalf of the respondent as well as the appellants. In *Beni Ram v. Kundan Lal* (5) where the suit was between landlord and tenant

(10) 70 Ind. Cas. 469; 15 L. W. 556; 30 M. L. T. 317; 43 M. L. J. 158; (1922) A. I. R. (M.) 253.

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and the question was, whether it was a good ground of defence in a suit for ejectment that the predecessors in tenancies had created permanent buildings on the land, without the landlord having interfered to prevent the building, which was within their knowledge. Special leave was granted by their Lordships of the Privy Council in terms that the appellant should be liable to pay the respondents costs in any event if directed to do so.

We asked the petitioner if he will undertake to pay all the costs, charges and expenses, likely to be incurred by the respondent in any event, should leave be granted under section 109 clause (c), but he declined to be liable and we do not think leave should be granted on any other terms.

We have however no power to impose any terms on the petitioner as a condition precedent to granting leave to appeal to His Majesty in Council. Sections 109 to 112 and O. XLV of the Code of Civil Procedure which deal with appeals to the King in Council do not give us any such power. Costs of the appeal, once leave is granted, is a matter entirely within the discretion of their Lordships of the Privy Council and, except by consent of the parties I do not see how we can make any order fettering the discretion of their Lordships, when they ultimately deal with the appeal. I do not think section 151 of the Code of Civil Procedure can be invoked for the purpose.

The provisions of the Code of Civil Procedure as to costs are contained in section 35 and so far as suits are concerned there is no power to direct a plaintiff to pay in advance the costs charges and expenses likely to be incurred. Order XXXV or XLII, r. 10, provides for security for costs in certain cases. Section 107, clause (2), dealing with appeals enacts that the Appellate Court shall subject to the provisions of clause (1) have the same power and perform as nearly as may be the same duties as are conferred or imposed by the Code or Courts of Original Jurisdiction in respect of suits. Treating the High Court as a Court acting in its appellate jurisdiction when granting the certificate under section 109 clause (c) it cannot have any higher powers simply because it has to consider whether it should grant the certificate required by the section.

It is no doubt true that Courts in India have power to direct the petitioner in divorce cases to pay in advance, costs charges and expenses likely to be incurred by the wife, but this power is given by section 7 of the Divorce Act, which confers on Indian Courts the same power which Courts for Divorce and Matrimonial cases in England have. As regards security for costs r. 7 of O. XLV requires the appellant to give security and all that the respondent in appeals is entitled to is to require that security be furnished. I can find no case in India where the High Court has imposed terms such as those imposed in *Richard Spooner v. Juddow* (1). The powers of their Lordships of the Privy Council to grant special leave are not fettered by any enactments and it is, therefore, open to them to impose such terms as they think just and equitable when special leave is granted. In cases when the High Court refused leave on the ground that it had no such power, special leave was obtained before the Privy Council and their Lordships when granting leave have not suggested that the High Court had power. I agree with the view taken by Jenkins, C. J., and Casperz, J., in *Clarke v. Brajendra Kishore Roy Chowdhuri* (4). The learned Chief Justice after referring to the remarks of Lord Langdale in *Richard Spooner v. Juddow* (1) observes, "It is true that ultimately their Lordships admitted that appeal, but that was upon terms, which we cannot impose, and, indeed, it is a part of the applicant's argument here before us, that we have no power to impose any condition upon the applicant or upon the Government, at whose instance and costs this application is being preferred. Without giving any further ground, I think, this affords a sufficient reason for us to hold that we cannot, with our limited powers, certify this to be a fit case for appeal to His Majesty in Council." Special leave was afterwards obtained and appeals were disposed of on the merits by their Lordships, [see *Clarke v. Brojendra Kishore Roy Chowdhury* (11).] It was nowhere suggested that the refusal by the High Court to grant

(11) 16 Ind. Cas. 501; 39 C. 953; (1912) M. W. N. 760; 12 M. L. T. 171; 10 A. L. J. 193; 16 C. L. J. 231; 16 C. W. N. 865; 23 M. L. J. 32; 14 Bom. L. R. 717; 13 Cr. L. J. 593; 39 I. A. 163 (P. C.).

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leave was erroneous owing to the High Court having power to impose terms.

I would dismiss these applications for leave to appeal to the Privy Council with costs.

V. N. V.

Petition dismissed.

W. C. A.

BOMBAY HIGH COURT.

APPEAL FROM ORDER NO. 69 OF 1921.

November 16, 1922.

Present :—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

BAI MANI—APPLICANT.

versus.

RANCHODLAL AMRITLAL—

OPPONENT.

Civil Procedure Code (Act V of 1908), s. 47—Auction-purchaser, whether representative of any party to suit—Court sale, objection to—Real dispute between judgment-debtor and decree-holder—Auction-purchaser interested—Suit to attack sale, maintainability of.

An auction-purchaser is a stranger to the proceeding and is not a representative of any of the parties to the suit so that any question arising between him and the parties to the suit or their representatives can be determined by a separate suit. But where a question raised by a judgment-debtor as to the legality of a Court-sale is virtually one between the parties to the suit, *i.e.*, between the decree-holder and the judgment-debtor and the auction-purchaser is interested in the decision and result of that question, the judgment-debtor ought not to be allowed to attack the sale in a suit. [p. 257, col. 2.]

Gokulsing Bhikaram v. Kisansing, 7 Ind. Cas. 457; 34 B. 546; 12 Bom. L. R. 539, referred to.

Appeal against an order, passed by the Judge, Small Causes Court, with Additional Powers at Ahmadabad, in Appeal No. 439 of 1919, reversing an order passed by, and remanding the Darkast to, First Class, Subordinate Judge at Ahmadabad, in Miscellaneous Application No. 42 of 1919.

Mr. G. N. Thakor, with (him Mr. M. B. Dave), for the Appellant.

Mr. H. V. Divatia, for the Respondent.

JUDGMENT.—This was an application by Bai Mani, daughter of one Keshavlal Ranchod, under O. XXI, r. 100, Civil Procedure Code, complaining that she had been wrongfully dispossessed of certain property, and claiming that possession should be restored to her. The facts leading up to this application are set out in the judgment of the Trial Court. The house belonged to one Mulchand Haribhai. It was mortgaged

with possession for more than Rs. 3,500 to one Amritlal. A money decree was passed against Mulchand, and in execution of that money-decree this house was sold subject to the mortgage right of Amritlal, and was purchased by the opponent Ranchodlal Amritlal. Bai Mani claimed either to be mortgagee or to have a mortgage lien to the extent of Rs. 500, and she applied to the Court to have her mortgage lien for Rs. 500 notified in the sale-proclamation, but her application was not granted, so she appealed to the District Court. Pending that appeal the house was sold and purchased by the opponent. After the sale the District Court held that the Executing Court ought to have notified the mortgage claim of Bai Mani in the sale-proclamation and reversed the previous order of the Executing Court. Then the opponent as an auction-purchaser applied to the Court for delivery of possession of the house purchased by him. That application would be made under O. XXI, r. 95. The house was at that time closed by the lock of Bai Mani. Consequently an application had to be made under O. XXI, r. 97. That question came up for decision under r. 97. Bai Mani was present, but the opponent was absent, consequently his application was dismissed, and Bai Mani remained in possession, and as she was present she must have informed the Court of her claim. Although the opponent was absent it cannot be said that the application was dismissed for default of appearance of both parties, because from the nature of the proceedings, it must be taken that it was a decision of the Court maintaining the obstruction by Bai Mani.

The opponent then made a fresh application, which purported to be made under r. 95 for possession. The previous application, which had been made for possession and dismissed for default, was recited, but no mention whatever was made of his previous application to remove the obstruction by Bai Mani having been dismissed. If mention had been made of that application, then we do not think the Court would have entertained the second application for possession. However, an order was made for possession which necessitated Bai Mani applying for its discharge.

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The Trial Judge said :

"I think the conduct of the opponent in obtaining a warrant for delivery of possession of the house described in this application, by suppressing the fact that his application for removal of obstruction was dismissed amounts to a distinct fraud upon the Court. He clearly abused the process of the Court. If the fact of the dismissal of opponent's application for removal of obstruction made by the applicant were known to the Court no warrant for delivery of possession would have been issued. After the dismissal of opponent's application the only remedy open to him was a suit. I, therefore, order that *status quo ante* should be restored by placing applicant in possession of the house leaving it open to opponent to take whatever steps he may be advised to take to enforce his rights as a purchaser and to have possession of the suit house from the applicant."

That, therefore, was an order under O. XXI, r. 101. However, the opponent filed an appeal. The learned Small Cause Court Judge, before whom the appeal was heard, seemed to think that the question whether an appeal lay was of a trivial nature, while on the facts it seems to us that the Judge failed to appreciate what actually occurred. He did not think that the opponent had suppressed any facts in his last application for possession which he ought to have disclosed. We cannot agree with him. We think the Trial Court was perfectly correct in stating that the opponent had suppressed the most important fact in his last application for possession. It seems to us, therefore, that the order of the Subordinate Judge should be restored on the ground that no appeal lay to the District Court.

The respondent has taken a point that no appeal would lie from the order of the Small Cause Court Judge. It merely makes no difference if that order was made without jurisdiction. We can deal with it under section 115, Civil Procedure Code. It will not be necessary, therefore, to deal with the somewhat complicated question whether the proceedings should continue in execution under section 47, instead of the right of the parties being determined in the future by a separate suit.

It may be pertinent to observe that this Court has always consistently held that an auction-purchaser is a stranger to the proceeding, and is not a representative of any of the parties to the suit, so that any questions which might arise between him and the parties to the suit, or the suit or their representatives must be determined by a separate suit, unless the test laid down in *Gokul Singh Bhikram v. Kisansing* (1) could be made applicable. There it was held that "though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of section 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, i.e., between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit."

In this particular case, the question with regard to Mulchand's mortgage was not a question between the parties to the suit, that is to say, between the decree-holder and the original judgment-debtor, Mulchand. The only question in the suit was whether the plaintiff owed a simple debt to Mulchand, and the question which now arises between Bai Mani and the auction-purchaser is whether the auction-purchaser obtained title to the property free of Bai Mani's charge or subject to it. Therefore the decision in *Gokulsing Bhikaram v. Kisansing* (1) does not assist the present respondent. We set aside the order of the lower Appellate Court and restore that of the Subordinate Judge with costs throughout.

N. H.

Order set aside.

(1) 7 Ind. Cas. 457; 34 B. 546; 12 Bom. L. R. 539.

RAJAGOPALA PANDURATHAR V. THIRUPATHIA PILLAI.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 345 OF 1921.

December 5, 1922.

Present:—Mr. Justice Spencer and

Mr. Justice Venkatasubba Rao.

RAJAGOPALA PANDURATHAR—

APPELLANT—RESPONDENT

versus

K. THIRUPATHIA PILLAI AND ANOTHER
—RESPONDENTS—PETITIONERS.

Construction of document—Mortgage-deed—Mortgage of village—Residential house, inclusion of.

In a mortgage document, an entire village, with stated boundaries, was declared to be the subject of the mortgage. At the foot of the document a description of the mortgaged property was given, which included "lands, waste lands, poyamboke, tanks, fruit trees, timber trees, etc." The residential buildings of the mortgagor within the village were not specifically mentioned:

Held, (1) that the document must be read subject to the more precise description at its foot which must be taken as controlling the general words in the earlier portion; [p. 259, col. 2.]

(2) that the word "etc." should be restricted to things of the same nature as those immediately preceding and that the residential buildings were not *ejusdem generis* with the things enumerated; [p. 259, col. 2.]

(3) that the residential buildings were excluded from the mortgage. [p. 260, col. 1.]

The theory that an alienation of a *zemindari* includes also the buildings situate within it is applicable only in the absence of evidence indicating an intention to exclude them from the transaction. [p. 260, col. 2.]

Rooke v. Kensington, (1856) 25 L. J. Ch. 795; 2 K. & J. 753; 69 E. R. 986; 2 Jur. (N. S.) 755; 4 W. R. 829; 110 R. R. 456, *Abu Hasan v. Ramzan Ali*, 4 A. 381; A. W. N. (1882) 73; 2 Ind. Dec. (N. S.) 997, *Banke Lal v. Jagat Narain*, 22 A. 168; A. W. N. (1900) 31; 9 Ind. Dec. (N. S.) 1143 and *Asghar Reza Khan v. Mahomed Mehdi Hossein Khan*, 30 C. 556; 30 I. A. 71; 7 C. W. N. 482; 8 Sar. P. C. J. 439 (P. C.), referred to.

Abu Hasan v. Ramzan Ali, 4 A. 381; A. W. N. (1882) 73; 2 Ind. Dec. (N. S.) 997, *Sakhawat Ali v. Muhammad Abdul Karim Khan*, 31 Ind. Cas. 809; 38 A. 59; 13 A. L. J. 1098, distinguished.

Appeal against an order of the Court of the Subordinate Judge, Tanjore, dated the 25th July 1921, in Execution Petition No. 149 of 1919, in Original Suit No. 43 of 1911.

Mr. N. S. Sivaramakrishnan, for the Appellant:—The only question in the case is whether the mortgage included the palace buildings. The mortgage was of the village

stated to be within certain boundaries. Where all lands within specified boundaries are conveyed, everything included therein is conveyed. The buildings are admittedly comprised therein and must be held to pass in the absence of any intention to the contrary indicated in the document.

Abu Hasan v. Ramzan Ali (1), *Banke Lal v. Jagat Narain* (2), *Asghar Reza Khan v. Mahomed Mehdi Hossein Khan* (3), *Sakhawat Ali v. Muhammad Abdul Karim Khan* (4).

In such a case, the mention of one is not the exclusion of another. The maxim *expressio unius personarum exclusio alterius* has no application, where the intention of the parties is discoverable on the face of the instrument.

The legal effect of what passes under a conveyance of the lands in an area cannot be detracted merely by reference in the body of the document to only some of the items and not to others. In any case the "etc." must refer to such items in the area as are not expressly mentioned.

Mr. G. Krishnaswamy Aiyar, for the Respondent:—The question is one of intention in each case. The general words in the body of the document are limited by the detailed enumeration of what was intended to be conveyed. Where words of conveyance are only general and not specific, they will be controlled by a specific recital. *Rooke v. Kensington* (5).

The cases reported as *Abu Hasan v. Ramzan Ali* (1), *Banke Lal v. Jagat Narain* (2), *Asghar Reza Khan v. Mahomed Mehdi Hossein Khan* (3), are irrelevant. The decision in *Sakhawat Ali v. Muhammad Abdul Karim Khan* (4) clearly lays down that the general presumption that a conveyance of a *zemindari* includes building's and everything situated within its ambit cannot apply where there is evidence to the contrary. The word "etc." cannot include

(1) 4 A. 381; A. W. N. (1882) 73; 2 Ind. Dec. (N. S.) 997.

(2) 22 A. 168; A. W. N. 1900) 31; 9 Ind. Dec. (N. S.) 1143.

(3) 30 C. 556; 30 I. A. 71; 7 C. W. N. 482; 8 Sar. P. C. J. 439 (P. C.).

(4) 31 Ind. Cas. 809; 38 A. 59; 13 A. L. J. 1098.

(5) (1856) 25 L. J. Ch. 795; 2 K. & J. 753; 69 E. R. 986; 2 Jur. (N. S.) 755; 4 W. R. 829; 110 R. R. 456.

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buildings. It can only be *ejusdem generis* with the other things immediately preceding. These words are trees; and buildings are obviously outside that genus.

Mr. N. S. Sivaramakrishnier in reply:—The case in *Rooke v. Kensington* (5) is that of a manor and the decision proceeded upon the English rule of construction that "manors" must be specifically mentioned.

JUDGMENT.

Venkatasubba Rao, J.—The dispute turns upon the construction of the mortgage-deed on which the suit was based. It has been conceded before us that the decree directs the sale of the property described in the mortgage-deed. The first defendant contends that his residence or the buildings constituting the palace are not included in the description contained in the decree, and cannot, therefore, be sold under it. On the other hand, the plaintiff argues that these buildings should not be excluded from the sale. To deal with the respective contentions it is necessary to have an accurate rendering of certain portions of the document which is in Tamil.

In the body of the document there is the following passage:—"We have mortgaged to you for Rs. 15,000 the village of Kovilur which is included in the four boundaries given below and which is attached to our *zemindari*, and which ancestrally belongs to us and is in our enjoyment, . . . and which is capable of yielding an annual *Melwaram* *kist* of Rs. 3,000." So far the description is general and no portion of the *zemindari* is excluded.

At the foot of the document is given a complete description of the mortgaged property. I give below a translation of what occurs at the close of the document:

Description of property.

"The four boundaries of the village of Kovilur attached to Ghandharvakota

West of

North of

East of

South of

The village of Kovilur situate within these four boundaries is inclusive of poramboke, Nanja 52 Velis 5 Mahs, and 32 Kulis; Punja 204 Velis 2 Mahs and 98 Kulis. The

total of Nanja and Punja is 256 Velis 8 Mahs and 30 Kulis.

Excluding the lands sold by auction up to date in respect of the maintenance of my mother, the remaining lands and all the rights and privileges I possess in the waste lands, *poramboke* and other lands attached thereto, all kinds of trees, topes, wells, ponds, tank *bunds*, fruit trees, wood trees, foot paths, elevated and low portions etc., be they a little more or a little less have been given as security."

It is admitted that the palace buildings are in the village of Kovilur and are within the four boundaries mentioned above. But the general words in the body of the document are qualified by the description given at the foot of it. There is a clear enumeration of what the village of Kovilur within the aforesaid four boundaries consists of. There is no mention of the palace buildings. Although no doubt the village of Kovilur was stated in the document to be the subject of the mortgage, the parties went further and described what according to them was the village of Kovilur which was intended to be mortgaged and it seems to me that the words in the body of the document must be read subject to the more precise description given, which must be taken as controlling the general words occurring in the earlier portion.

I may state that it has not been argued on behalf of the plaintiff that the building is comprised within the total area mentioned of the *nanjah* and *punjah* lands, namely, 256 *Velies* 8 *Mahs* and 30 *Kulies*. But the only argument advanced is that the palace buildings must be regarded as included in the expression 'the remaining lands' or '*poramboke* and other lands' or the words 'etc'. I find it impossible to hold that the words "the remaining lands" or "*poramboke* and other lands attached thereto (remaining lands)" can be regarded as including the residential building of the *zemindar*.

Turning to the words 'etc.' they follow an enumeration of specific things beginning with "all kinds of trees" having some common characteristic, and the words should be restricted to things of the same nature as those which have been already mentioned. In such a case the rule of *ejusdem generis* will apply and the residential building

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cannot be said to be *ejusdem generis* with the things already enumerated.

A being seized of a manor and other real estate in the county of M, mortgaged the last mentioned real estate to B., by a subsequent deed he mortgaged to C, "all the hereditaments and premises comprised in the previous mortgage, all the other lands tenements and hereditaments (if any) in the county of M" of which he was seized. It was held that the manor did not pass, Vice-Chancellor Wood observing as follows:—"I think the clear intent and purport must be held to be simply a sweeping in of other property *ejusdem generis* with the property which had been so conveyed, if any there should be; certainly not to include a copyhold property or manorial rights in property of a totally different character from anything attempted to be conveyed or specified throughout the deed." *Rooke v. Kensington* (5). In *Abu Hasan v. Ramzan Ali* (1) it was held that in the absence of proof that a building belonging to the *zemindar* was excluded from sale, the sale of his "rights and interests" in the village passed such building to the auction-purchaser. Similarly in *Banke Lal v. Jagat Narain* (2) it was held that a *kothi* or other building situate within a *zemindari* area would be included in and pass with the *zemindari* unless the contrary is shown by evidence of the circumstances from which it may properly be inferred that the building is not an appurtenance of the *zemindari*. In *Asghar Raza Khan v. Mahomad Mehdi Hossein Khan* (3) their Lordships of the Judicial Committee held that the deed which contained no words of exception or reservation and was ample in point of language to pass the land on which the Bazar was situated, did pass the same in the absence of words showing an intention to exclude it.

These cases are of little assistance to the plaintiff. It is no doubt true that the palace building is an appurtenance to the *zemindari* but the rule laid down in these cases is that there is a presumption in favour of the inclusion of such a building unless there is anything to show that it was excluded expressly or by implication. [See *Abu Hasan v. Ramzan Ali* (1) already referred to]. In *Sakhawat Ali v. Muhammad Abaul Karim Khan* (4) it was clearly laid

down that the doctrine that the sale of a *zemindari* included also buildings situated within the *zemindari* is applicable only in the absence of evidence indicating an intention to exclude them from the sale.

The determination of the question solely depends upon the right construction of the deed of mortgage and, in my opinion, there is an indication of an intention to exclude the residence of the *zemindar* from the security.

There was a subsidiary argument advanced before us on behalf of the first defendant, which related to certain objections to the terms of the proclamation of sale. It has not been shown that the portion to which exception has been taken is likely to cause any prejudice to the first defendant; and even apart from this he has not satisfied us that at this stage we can interfere with the portion of the order relating to the terms of the proclamation.

In the result we allow the appeal to the extent of permitting the proclamation to be amended by excluding the palace building of the *zemindar*, and in other respects the appeals fails. Each party will bear his own costs of this appeal.

Spencer, J.—I agree. The specification of the mortgaged property at the foot of the mortgage-deed obviously controls the words in the body of the deed "the village of Kovilur which is included within the undermentioned boundaries, which is attached to our *zemin*, which belongs to us ancestrally and is, in our enjoyment, and which is made liable under Nagappa Chettiar's decree and is capable of yielding an annual *melwaram kist* of Rs. 3,000.

If what was mortgaged was expressed as "all that lies within the four boundaries" given I should hold that the family residence of the *zemindar*, or palace as it is called, was included; but it cannot be part of the 256 *Velies* 8 *Mahs* and 30 *Kulis* of wet and dry fields, and as there is a sweeping clause following the specification of cultivable lands, the other items should be taken to be *ejusdem generis* with those that are specified. I do not think such an important item as a family residence can have been intended to be covered by the description given in these words:—"the rest of the lands, be they a little more or a little less, together with the waste lands,

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poramboke and other lands, all sorts of trees, topes, wells, ponds, tanks, embankments, fruit trees, timber trees, foot paths, hills and dales, etc." In this detailed description the omission of housesites, houses and other superstructures is conspicuous. As for the cases quoted, none of them is on all fours with this. In *Abu Hasan v. Ramzan Ali* (1) it was held that the *Killa* or Fort was part and parcel of the *zemindari* rights and interests in the village of Hajipur. There was no specification of what was meant by the village of Hajipur, as there is here of the village of Kovilur. In *Banke Lal v. Jagat Nardin* (2) the determination of the question whether the *Kothi* (or house) passed by the sale turned principally on a consideration of what was attached in the warrant of attachment. In *Asghar Reza Khan v. Mahomed Mehdi Hossein Khan* (3) "bazzars" were included in the operative part of the mortgage-deed. So the Judicial Committee held that the interests of the defendant *zemindar* in the *Kutugunge* bazar passed by the sale.

Ground No. 4 in the memorandum of appeal raises a question as to the terms of the sale-proclamation. On this point no appeal lies. I agree with the order proposed.

V. N. V.

Appeal partly allowed.

BOMBAY HIGH COURT.

ORIGINAL, CIVIL, JURISDICTION APPEAL

No. 65 OF 1922.

SUIT No. 676 OF 1922.

December 5, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

PANACHAND NARSEY

—CREDITOR—APPELLANT

versus

STANLEY DOBSON—

JUDGMENT-DEBTOR—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 106—Order for summary adjudication—Appeal—Leave of Court—Refusal of leave—Appellate Court, power of.

An order under section 106 of the Presidency Towns Insolvency Act, directing an estate to be administered in a summary manner is not appealable except with the leave of the Court, and where such leave is refused, the proper course is to apply to the Appellate Court for special leave. Where in such a case a question of principle is involved, the Appellate Court has inherent jurisdiction to hear the appeal, but it will not interfere with a finding on a question of fact.

Mr. Jinnah, for the Appellant.

JUDGMENT.—This is an appeal which is, on the face of it, not competent. The facts are that one Stanley Dobson filed a petition on September 12, 1921, in this Court praying that he might be adjudged insolvent. On that petition an order for adjudication was made on the same day. On September 19, 1921, the Official Assignee reported that the property of the insolvent was not likely to exceed in value Rs. 3,000, and applied that the Court might order the estate to be administered in a summary manner, pursuant to section 106 of the Presidency Towns Insolvency Act. The order which, I presume, was made on that application does not appear on the record. On April 4, 1922, a creditor of the insolvent obtained a Rule calling upon the insolvent to show cause why the order of adjudication made on September 12, 1921, on his petition should not be annulled for want of jurisdiction, or in the alternative, why he should not be ordered to pay Rs. 175 per month to the Official Assignee for the benefit of his creditors. The insolvent filed an affidavit against the rule in which he stated that he, as well as all persons working on the Rutlam section of the Bombay, Baroda and Central India Railway were engaged and dismissed from Bombay by that Railway which had its

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head-quarters at Bombay, their pay-sheets were submitted to and sanctioned in Bombay and they received orders from Bombay. He further stated that leave was sanctioned at Bombay and occasionally he was booked to run from Rutlam to Bombay and also from Bombay to Rutlam. The Rule was discharged by the learned Judge. He was of opinion that the work which the insolvents did came within section 11 (c) of the Act, that, in other words, they worked within the limits of the Ordinary Original Civil Jurisdiction of this Court, and that they did that work personally, and they did it for gain.

Now, under section 106 (a) of the Presidency Towns Insolvency Act (III of 1909) in a summary insolvency, no appeal is allowed from any order of the Court, except by leave of the Court. The creditor applied for leave and this was refused by the learned Judge. He said:—

“I confess that the question does not seem to me to be of that importance to the petitioning creditor or to anybody else which would justify me in prolonging this litigation. Mr. Daver says that somewhere about 1904, the position of Engine-drivers was considered with reference to this point and certain conclusions were arrived at; but these authorities, if any, are not produced before me, and although this is a third time this case has come before me, I am still without any definite authority in insolvency to support the petitioning creditor's application.”

As leave to appeal was refused, no appeal to this Court was competent. The only course open to the creditor was to apply to this Court by petition for special leave to appeal. If this appeal were dismissed summarily on the ground that it was not competent, it might still be open to the creditor to file such a petition, and so we think it desirable to look upon this appeal as a petition praying for special leave. Then we can consider the question whether an appeal should be admitted from the original order of the lower Court. It might be said that, at first sight, the wording of the section 106 (a) excludes entirely the jurisdiction of this Court to question the decision of the lower

Court. But I should not like to go so far as to hold that our inherent powers are altogether ousted and, if authority were necessary, a reference can be made to the decision in *Ex parte Gilchrist*; *In re Armstrong* (1). That was a case under the English Bankruptcy Act of 1882. An order had been made by the County Court Judge. It was reversed by the order of the Divisional Court. Under section 104 of the Act of 1882 leave would have to be granted by the Divisional Court before an appeal could be filed to the Court of Appeal. Leave was refused and special leave was granted by the Court of Appeal. Lord Esher said at page 527:—

“The Divisional Court refused an application for leave to appeal from their decision, but leave to appeal was given by this Court. The jurisdiction which the Judges of the Divisional Court have to give or to refuse leave to appeal from their own decisions is a very delicate one. Merely to say that they are satisfied that their decision is right; is not; I venture to suggest, a sufficient reason for refusing leave to appeal, when the question involved is one of principle and they have decided it for the first time. If that was carried to its legitimate conclusion, they ought to refuse leave to appeal in every case.”

In most cases where an order has been made that the estate should be administered in a summary manner, it would be unlikely that any important question of principle would arise in the course of the administration. But if such a question did arise, the Judge in all probability would not refuse leave to appeal.

However, in this case the only question was whether the petitioner did work personally and did it for gain within the limits of the Ordinary Original Civil Jurisdiction of the Court and that was a question which was to be decided on the evidence before the Court. Though it might be a mixed question of law and fact, it was mainly a question of fact. Therefore, we see no reason why we should hold in this case that the Judge was wrong in refusing leave

(1) (1886) 17 Q. B. D. 521 at p. 527; 55 L. J. Q. B. 578; 55 L. T. 538.

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to appeal. The appeal is, therefore, dismissed with costs.

W. C. A.

Appeal dismissed.

476; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) A. I. R. P. C.) 17; 44 A. 185; (1922) M. W. N. 378; 4 U. P. L. R. (P.C.) 50 (P. C.), distinguished.

A foreclosure decree always includes in itself a decree for redemption. [p. 264, col. 2.]

Appeal from the decree of the Subordinate Judge, Rae Bareilly, dated the 31st August, 1920.

Messrs. A. P. Sen and Rajeshwari Prasad, for the Appellant.

Mr. Ali Mohammad, for the Respondent.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 5 OF 1921.

October 3, 1922.

Present :—Mr. Ashworth, J. C. and

Mr. Simpson, A. J. C.

SANGAT BAKHSH SINGH—DEFENDANT
—APPELLANT

versus

RAWAT DIJDEO BAKHSH SINGH—
PLAINTIFF—RESPONDENT.

Mortgage, usufructuary—Further charge—Stipulation to convert mortgage into sale—Clog on redemption—Foreclosure decree—Redemption decree, whether included—Transfer of Property Act (IV of 1882), ss. 58, 67.

Where a deed creates a further charge on a property usufructually mortgaged and provides, among other things, that if, after the expiry of a certain period, the principal amount together with interest and compound interest due under it is not paid, the original deed shall, by virtue of the deed of further charge, be deemed to be an absolute sale-deed and the case provided for actually occurs, that is, the debt as stipulated is not paid, the original deed becomes, not indeed an absolute sale-deed, for "once a mortgage, is always a mortgage," but a deed in which the right of foreclosure is added to the rights already possessed by the usufructuary mortgagee. [p. 264, col. 1.]

An agreement in a deed of further charge that, as long as the debt due under the deed is not paid off, the mortgagor shall not be entitled to redeem the property mortgaged under the original deed, is binding and not to be regarded as coming under the doctrine forbidding a clog on redemption. The doctrine of clog relates only to dealings, which take place between the parties at the time when the original contract of mortgage is entered into. Parties are at liberty to deal subsequently with each other, so as to vary the terms upon which redemption of the original mortgage can be had. [p. 264, col. 2.]

Harihar Bakhsh Singh v. Bhawani Singh, 39 Ind. Cas. 593; 20 O. C. 97, relied on.

Mohammad Sher Khan v. Raja Seth Swami Dayal, 66 Ind. Cas. 853; 9 O. L. J. 81; 30 M. L. T. 220; 42 M. L. J. 584; 25 O. C. 8; 20 A. L. J.

JUDGMENT.—This is a first appeal by a defendant. The suit was one for foreclosure and was brought on foot of four deeds. These four deeds are in pairs. Two of them were executed by the present appellant Sangat Bakhsh Singh and the other two by his brother Gur Narain.

In the present appeal we are concerned with the deeds executed by Sangat Bakhsh Singh only. Gur Narain is dead and the suit has been dismissed as regards his sons defendants Nos 2 and 3, but a decree for foreclosure has been granted in respect of the two deeds executed by Sangat Bakhsh Singh defendant No. 1 appellant.

The first of these deeds is dated 11th September 1901. It is to secure a debt of Rs. 5,500. The interest is fixed at 8-annas per cent. per mensem. The property given in security is an 8-annas share in certain property extending over several villages. That mortgage is usufructuary. The deed conveys no right of foreclosure, or of sale and there is no period. Accounts were to be taken annually and the mortgage could be redeemed in any year in the month of *Jeth*.

The second deed (plaintiff's Exhibit No. 3) is dated 17th September 1901, only six days later. It will be found on page 12 of Part III. It is described as a deed of further charge and, there is a detail of property added with this description "Details of mortgaged property amounting to 8 annas in the villages detailed below in *Pargana Inhauna*, District Rae Bareilly, mentioned in the mortgaged-deed dated 11th September 1901, on which further loan is taken." It is plain from these words, and it is not

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now disputed by the appellant, that this deed creates a charge on the same property, which was usufructuarly mortgaged. The debt secured was a fresh advance of Rs. 2,000. The rate of interest was the same 8-annas per cent. per mensem. There were three covenants :—

The first clause is as follows:—

"That as long as I do not pay off the principal and interest due on this deed of further charge, I shall not be entitled to redeem the shares mortgaged under the deed of 11th September 1901."

The second clause provides for compound interest with six-monthly rests. The provision in the usufructuary mortgage was different. We shall have to discuss it lower down. The third clause, which is erroneously numbered 4 in Exhibit 3, is as follows:—

"That in case I do not pay the six-monthly instalment of interest I shall pay the principal along with the interest and compound interest in a lump sum in 6 years. If on the stipulated period I do not pay the principal amount together with interest and compound interest thereon, then on the expiry of the said period the original deed, dated 11th September 1901, shall, by virtue of this deed of further charge, be deemed an absolute sale-deed. I have, therefore, executed this deed of further charge so that it may serve as an authority and be of use in time of need."

The first question is one of construction. The case provided for in the clause is what has actually occurred. The 6 years expired on 17th September 1907, and the deed of usufructuary mortgage dated 11th September 1901, became by virtue of this covenant, not indeed an absolute sale-deed for "once a mortgage always a mortgage," but a deed in which the right of foreclosure was added to the rights already possessed by the usufructuary mortgagee.

As regards the effect of the first clause it must be remembered that when a decree is made for foreclosure the form the decree takes is this (Civil Procedure Code App. D. Form No. 6). First there is a declaration of the amount due under the mortgage. It is then decreed that if the mortgagor pays this amount by a certain date he will get back his property. It is then decreed

that if he fails to pay by that date he shall be debarred of all right to redeem.

A foreclosure decree, therefore always includes in itself a decree for redemption. In this case the first clause takes effect and the decree will be to redeem on payment of the money due under both mortgages. This is the decree that has been given.

It is probable that the parties inadvertently omitted one clause from Exhibit 3. As I have said the third clause is numbered 4. In the corresponding deed which was executed on the same day by Gur Narain brother of Sangat Bakhsh there are four clauses. The first is the same as the first here, the second is that "I shall pay the original sum together with principal and interest due hereunder." That is a clause for consolidation of the mortgages. But the construction of the two deeds is identical. The insertion of this clause makes the construction easier, but it adds nothing. Even without that clause, the mortgages in suit are consolidated by the effect of the first clause of Exhibit 3.

The next question is, whether the agreement entered into between the parties is in contravention of the law. As regards the first clause there is a current of decisions in this Court that such a covenant as this is binding and is not to be regarded as coming under the doctrine forbidding a clog on redemption: *Harihar Bakhsh Singh v. Bhawani Singh* (1), in which it was said on page 101 "The doctrine of clog relates only to dealings which take place between the parties at the time when the original contract of mortgage is entered into. Parties are at liberty to deal subsequently with each other so as to vary the terms upon which redemption of the original mortgage can be had;" *Abhai Narain Tiwari v. Mata Prasad Singh* (2), in which the authorities are referred to; *Naunidh Lal v. Mahadeo Singh* (3).

The only case cited to us on the other side was *Mohammad Sher Khan v. Raja Seth*

(1) 39 Ind. Cas. 593; 20 O. C. 97.

(2) 64 Ind. Cas. 83; 24 O. C. 240; 8 O. L. J. 489.

(3) 65 Ind. Cas. 401; 25 O. C. 134; 8 O. L. J. 640; (1922) A. I. R. (O.) 58.

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Swami Dayal (4). In that case the facts were that the mortgage itself provided a period of 5 years. It was stipulated that if the entire amount of the money is not paid at the end of this period the mortgagee would have the option of taking possession of the mortgaged property for a period of 12 years, and that during these 12 years the mortgagor would not have the right of redemption. The money was not repaid and the mortgagee brought a suit for possession and obtained possession. Then the mortgagor filed a suit for redemption and was resisted under the clause in the mortgage-deed. This Court dismissed his suit but the Privy Council reversed this decision and decreed it on the ground that he could not be deprived of his right conferred by section 60 to redeem the property. That case can be distinguished from the case before us on the ground that the clog on redemption was contained in the mortgage-deed itself, whereas in the present case we have a subsequent contract in consideration of a further advance. That distinction was emphasised in *Harthar Bakhsh Singh v. Bhawan Singh* (1) See also *Salt v. Northampton (Marquess)*, (5); *Noakes v. Rice* (6). It would appear, therefore, that the agreement stands good in law.

This disposes of the first three grounds of appeal. The second ground which is that the deed dated 17th September 1901, did not create any charge on the property in suit has been abandoned. The first three grounds, as I have said, fail.

The fourth ground relates to *post diem* interest on the second deed dated 17th September 1901. The argument is that, according to the third covenant if the amount is not paid at the end of 6 years, the earlier deed is to become a deed of absolute sale. It is argued that when this happens the payment of interest on this deed, would also cease. It is difficult to follow the argument. As a rule a man who

lends money on interest expects to get interest until the money is repaid. There seems no reason to attribute to the parties an intention that interest was to cease at the end of the stipulated period. There are certainly no words to that effect in plaintiffs's Exhibit 3 at page 12. This ground of appeal also fails.

Issues Nos. 5 to 9 impugn the accounts filed by the mortgagee on the basis of which the decree was passed. In order to see on what basis accounts ought to be taken we have to look to the deed itself (plaintiff's Exhibit 1 on page 4 of Part III), and to section 76 of the Transfer of Property Act. In the deed it is provided that the mortgagee was to realise the rental from the tenants. He was to pay the Government revenue, the village expenses and Rs. 50 as pay to the servant making the collections, and appropriate the balance towards the interest. Accounts in this form have been submitted. The appellant claims that the decree ought to have been passed upon the gross rental and not upon the actual receipts. He appeals to clause 4 of the deed which is as follows:—

"That if I, the mortgagor, do in any year interfere in the matter of specified collections or disturb the mortgagee in making collections, or the amount is not realised from the tenants through Court, all that loss shall be borne by me, the mortgagor, the mortgagee having no concern with the same." He wishes to interpret this clause to mean that accounts shall be based not on collections but on the rent-roll, the mortgagee being entitled to make deductions only if the mortgagor interferes or if he himself brings his suit against a tenant and then fails to realise the money on the decree. But in face of clause (h) of section 76 (which contains as saving of contract between the parties as clauses (c) and (d) do) such an agreement would not be lawful. The point, however, is of no importance for the respondent's Counsel has satisfied us that the Subordinate Judge was right in holding that the mortgagor would be a loser if he were given a decree based on the rent-roll as stated by him. The mortgagee's accounts are detailed and there seems no reason to doubt that they are accurate. They represent

(4) 66 Ind. Cas. 853; 9 O. L. J. 81; 30 M. L. T. 220; 42 M. L. J. 584; 25 O. C. 8; 20 A. L. J. 476; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) A. I. R. (P. C.) 17; 44 A. 185; (1922) M. W.N. 378; 4 U. P. L. R. (P. C.) 50 (P. C.).

(5) (1892) A. C. 1 at p. 19; 61 L. J. Ch. 49; 65 L. T. 765; 40 W. R. 529.

(6) (1902) A. C. 24 at pp. 32; 34, 71 L. J. Ch. 139; 86 L. T. 62; 50 W. R. 305; 66 J. P. 147; 18 T. L. R. 196.

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full and good collections and they form a proper basis for the decree.

A point is made of *sewai* items such as grass, fish, timber, etc. It is true that these are mentioned in the deed and that some evidence was offered that there were some small actual receipts of *sewai*. But that evidence does not amount to proof that the mortgagee did, in fact, actually receive any income from this source, and in the deed itself, although in the preamble to the deed there is a long enumeration of *sewai* items, clause 3, which provides that the collections are to be appropriated towards the interest, speaks only of the rent of tenants and omits all mention of *sewai*. There are no materials before the Court to justify an alteration in the amount found due under the mortgage under this head.

The tenth ground relates to limitation. It was abandoned. The suit was brought within 12 years of the expiry of the period given in the deed.

The eleventh ground which impugned the adoption of the plaintiff as son of the original mortgagee was abandoned.

The appellants were allowed to add two other grounds of appeal but one of these was abandoned. The remaining ground is that the plaintiff-respondent is not entitled to interest upon interest in the deed dated 11th September 1901. The clause on this point is clause 7 which is as follows:—

"That every year in the month of *Jeth*, the mortgagee shall on rendering accounts, pay the surplus money after payment of the Government revenue, village-expenses, etc., and the interest, to me, the mortgagor under a receipt and shall realise the deficiency, if any, in the amount of interest from the other property of me, the mortgagor by suit. If the mortgagee does not choose to file a suit, I, the mortgagor, shall be liable to pay the deficit amount, principal with interest at the time of redemption."

Now the words "the deficit amount, principal with interest" do not mean the principal money due under the mortgage. The deficit amount is itself a deficiency in interest. This clause, therefore, does provide for the payment of interest upon interest. The calculation is correctly set forth in the accounts submitted along with the plaint on pages 6 to 8

of Part I. Each annual deficit in the receipts from the property is set forth and simple interest is added from the date when the balance accrued to the date of institution. This is an entirely correct way of framing the account.

Thus all the grounds of appeal fail. The appeal is dismissed with costs.

N. K.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
NO. 79 OF 1922.

ORIGINAL CIVIL JURISDICTION SUIT
NO. 639 OF 1922.

December 4, 1922.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

THE EAGLE STAR AND BRITISH
DOMINIONS INSURANCE COMPANY—
PLAINTIFF—APPELLANT

versus

DINANATH & HEMRAJ—DEFENDANT
—RESPONDENT.

Construction of document—Policy of Fire Insurance—Provision to refer dispute as to amount due to arbitration—Rejection of claim—Cause of action.

A Fire Insurance Policy provided, *inter alia*, that if a claim made by the insured was rejected, and an action or suit not commenced within three months after such rejection all benefit under the policy would be forfeited, and, further, that if any difference arose as to the amount of any loss or damage, such difference should be referred to arbitration, and that it should be a condition precedent to any right of action or suit upon the policy, that the award of the arbitrator should be first obtained. In a suit to recover the amount of loss suffered in consequence of the destruction of plaintiff's goods by fire, it appeared that, after some correspondence between the parties, the Insurance Company informed the plaintiff that it was their considered opinion that, under the conditions of the policy, they could not admit liability on the policy, and the question was, whether there had been a rejection of plaintiff's claim by the Company, and whether such rejection gave to the plaintiff a right of action, or whether no cause of action could accrue to the plaintiff until the amount of loss had been ascertained by arbitration:

Held, that there had been a rejection of the plaintiff's claim by the Company, and that such rejection gave him a cause of action in order that

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it might be decided by the Court whether such rejection was right or wrong, and it was only in the event of that question being decided in his favour that it would become necessary that the amount of loss or damage should be ascertained. [p. 269, col. 2.]

Appeal from the decision of Mr. Justice Kajiji.

Mr. Binning (with him Mr. Jimnah), for the Appellant.

Mr. Taraporewala (with him Messrs. Kanga, Advocate General, and Inverarity), for the Respondents.

JUDGMENT.—The plaintiffs filed this suit to recover from the defendant Insurance Company the amount of loss or damage, which, they said, they suffered in consequence of the fire, which had occurred to the godown at Bapty Road, in which there were goods, belonging to the plaintiffs, which had been insured with the defendant Company for Rs. 2,50,000.

The relevant clauses in the policy for the purpose of this appeal are clauses 13 and 18.

Clause 13 says:—

"If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this policy, or if the loss or damage be occasioned by the wilful act, or with the connivance of the insured, or if the insured, or any one acting on his behalf shall hinder or obstruct the Company in doing any of the acts referred to in condition 12, or if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited."

"Clause 18 is set out as follows:—

"If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the

parties within two calendar months after having been required so to do in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months, after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator and, in case of disagreement between the arbitrators the difference shall be referred to the decision of an umpire, who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator, or arbitrators or umpire respectively, and in the event of the death of an arbitrator or umpire, another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed. The costs of the reference and of the award shall be in the discretion of the arbitrators, arbitrators or umpire making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

The fire occurred on March 21, 1921, and notice was given by the plaintiffs on the 22nd. Correspondence ensued, but I need not refer to it beyond pointing out that it continued from March 1921 until January 1922. Clearly, it was the defendants' case that there were disputes between the parties other than disputes with regard to the amount of loss or damage which the plaintiffs had suffered owing to the fire. On January 6, the plaintiffs wrote as follows:—

"We beg to draw your attention to condition 18 of the policy which provides that in case of difference as to the amount of loss or damage suffered by our clients such difference should be referred to arbitration. Our clients are prepared to go to arbitration if you intimate to our clients that the difference has arisen between our respective clients as to the amount of loss or damage suffered by our clients. If we do not receive any information from

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you within three days, from the receipt hereof by you that, the difference is as to the amount of loss or damage our clients will have no alternative but to file a suit against your clients at their risk as to costs."

In reply to that the defendants wrote on January 7, 1922, as follows:—

"If you will again refer to the condition you will see that each party must appoint an arbitrator within two calendar months having been required to do so in writing by the other party and, in case either party shall refuse or fail to appoint an arbitrator within two calendar months after the receipt of the notice in writing requiring an appointment the other party shall be at liberty to appoint a sole arbitrator. It appears that under the above condition our clients are entitled to a period of two calendar months from the time when they are called upon to appoint an arbitrator within which to consider such appointment. We agree that there is a difference as to the amount of any loss or damage but we think there may also be other questions involved."

On January 10, 1922, the plaintiffs wrote:—

"We shall thank you to let us know what other questions your clients say are involved in the matter in addition to the dispute as to the amount of loss or damage."

The defendants replied on January 12th, 1922:—

"We are in receipt of your letter of the 10th instant and in reply we have to say that our clients do not agree upon the amount claimed and further that it is their carefully considered opinion that, under the conditions of the policy they cannot yet admit liability on the policy and they also point out that under condition 18 of the policy the ascertainment of the amount of loss by arbitration is precedent to any suit being filed against them."

The defendants filed a very contentious written statement. Their main defence, was that under the terms of the policy it was a condition precedent to suit that there should be an award. Then the plaintiffs took out a summons on July 17, 1922, asking for reliefs of so varied a nature that the greatest care was necessary in passing orders upon it. The plaintiffs asked (1) that the defendant Company should disclose and produce for inspection of the plaintiffs the report made by the Surveyors

appointed by the defendant Company, (2) that the suit might be set down on board for trial of preliminary issues whether the defendant Company by their solicitors' letter of January 12, 1922, did not reject the plaintiffs' claim, and whether in the events that had happened the plaintiffs were not entitled to file the suit without obtaining the award as to the amount of loss or damage sustained by them, and (3) that the defendant Company should give particulars for the other questions which they alleged were involved in addition to the dispute as to the amount of loss or damage. As I have so often pointed out, when it is necessary before an order for discovery can be made, that certain questions in the suit should be first decided, the proper order to make is that the suit should be set down for the settlement of the issues. The Judge will then be in a position to decide which of the issues are necessary to be determined before the question of inspection or discovery can be decided. The same procedure should be followed when one party suggests that the suit can be decided on the hearing of a preliminary issue. On the summons an order was made that the suit should be set down for trial of the preliminary issues (1) whether the defendant Company by their solicitors' letter of January 12 1922, rejected the plaintiffs' claim under the policy, and (2) whether in the events that had happened the plaintiffs were entitled to file the suit without obtaining an award as to the amount of loss or damage sustained by them, and, on the defendants stating through their Counsel that there were no other questions involved except as to the amount of loss or damage sustained by the plaintiffs, no directions were considered necessary as to the particulars asked for with reference to the allegation in paragraph 8. of the written statement. On the trial of these issues the Judge came to the conclusion (1) that the defendant Company did reject the claim of the plaintiffs by their letter of January 12, 1922, and (2) that the suit was maintainable.

On reading the correspondence which lasted from March 21, 1921, to January 12, 1922, it is obvious that the defendants were extremely unwilling to go to arbitration, so that the amount of loss or damage which

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had been suffered by the plaintiffs might be ascertained, and had been all along endeavouring to find out some ground on which they might dispute their liability on the policy. Even when they were asked to go to arbitration on the question of loss, they pointed out that they had two months under the policy to appoint an arbitrator. Then they said that besides the question as to the amount of loss or damage other questions were involved which could not be tried by arbitration. Then, finally, when they were asked what those questions were they could only say that it was their carefully considered opinion that under the conditions of the policy they could not admit liability on the policy. The defendants then clearly stated that there were questions involved in the case which had to be decided before they would admit that they were liable to pay the amount of loss which would be ascertained by arbitration. And, in my opinion, the defendants by that letter of January 12, 1922, rejected the plaintiffs' claim.

The next question is, whether such rejection gave to the plaintiffs a right of action, or whether as now claimed by the defendants no right of action could accrue to the plaintiffs until the amount of loss had been ascertained by arbitration. The appellants relied on *Woodall v. Pearl Assurance Company* (1) in that case condition II was :—

"If any question shall arise touching this policy or the liability of the Company thereunder or the extent or nature of such liability or otherwise howsoever in connection herewith then the assured... may refer and shall be bound... to refer the same to arbitration, and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

It was there held that the making of an award was a condition precedent to a right of action. But the terms of the policy in this case are entirely different and are almost identical with the terms of the policy in *Jureidini v. National British and Irish Millers Insurance Company,*

Limited (2) in which it was held that the repudiation of the claim on a ground going to the root of the contract precluded the Company from pleading the arbitration clause as a bar to an action to enforce the claim. The words in clause 12 of the policy in that case were, as far as I can see, the same as the words in clause 13 in the suit policy. It is true that the defendants there resisted the claim on the ground of fraud. But in clause 13 there are various contingencies set out, which if established entitled the insured to bring an action without an award having been made by arbitrators. One of these contingencies is "if the claim be made and rejected" which if established give a right of action, the period of limitation provided for the suit being fixed at three months from the date of the rejection. While it is also provided that where arbitration takes place in pursuance of condition 18 of the policy, three months' time should be allowed for a suit to be brought after the award has been made. Therefore, it is quite obvious that a right of action accrued after the Company rejected the claim. Naturally that question would have first to be decided by suit as under clause 18 that question could never have been referred to arbitration. Therefore, when the defendants had rejected the claim, the plaintiffs had a right of action in order that it might be decided by the Court whether such rejection was right or wrong, and it was only in the event of that question being decided in favour of the plaintiffs that it would become necessary that the amount of loss or damage should be ascertained. The only question that might then arise would be, whether, after the Court had decided that the rejection of the plaintiffs' claim by the defendant Company was wrong, the amount of loss or damage would have to be ascertained by the Court or by means of arbitration or whether the arbitration clause had gone with the repudiation as Lord Haldane thought it would: see *Jureidini v. National British and Irish Insurance Company, Limited* (2). That is not a question before us now. The

(1) (1919) 1 K. B. 593; 88 L. J. K. B. 706; (1919) W. C. & L. Rep. 181; 120 L. T. 556; 26 Com. Cas. 237; 83 J. P. 125; 63 S. J. 352.

(2) (1915) A. C. 499; 84 L. J. K. B. 640; (1915) W. C. & L. Rep. 239; 112 L. T. 531; 59 S. J. 205; 31 T. L. R. 132.

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suit was only set down for hearing, for trial of the two issues which were contained in the summons, and as a result of the findings on those issues the hearing of the suit would continue in the ordinary course. We do not quite understand how the learned Judge came to make an order that the suit should be stayed, the parties being referred to arbitration as provided in clause 18 of the policy, because it was not competent for the Judge to deal with the question of arbitration on the summons. No doubt, when the order was made on the summons, the defendants stated through their Counsel that there were no other questions involved except as to the amount of loss or damage sustained by the plaintiffs, but that was on the question whether an order should be made for particulars. Whether the defendants could raise any other questions now in the face of that statement need not be considered. The appeal with regard to the decision on the issues set down for trial must be dismissed, but we set aside the order of the Court below that the suit should be stayed.

Appellants to pay the costs of the appeal.
Proceedings must continue in the ordinary course.

W. C. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 263
OF 1920.

August 18, 1922.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Chotzner.

F. T. KINGSLEY—PLAINTIFF—

APPELLANT

versus

THE SECRETARY OF STATE FOR
INDIA IN COUNCIL—DEFENDANT.

—RESPONDENT:

*License—Obligation of licensor—Breach of
duty—Revocation of license—Damages—Pre-
sumption—Nominal damages—Exclusive possession
—Licensee, right of.*

The grantor of a license is under an obligation

to place the licensee in a position to enjoy the license. [p. 271, col. 2.]

An appropriation by the licensor of the land licensed, to any use inconsistent with the enjoyment of the license, works a revocation, and the licensee may maintain an action for damages against the licensor for breach of contract in unlawfully revoking it. [p. 274, cols. 1 & 2.]

A license for valuable consideration and accompanied by the grant of a *profit à prendre*, is a license coupled with an interest and is not revocable. [p. 274, col. 2.]

Though every breach of duty arising out of contract gives rise to an action for damages, without proof of actual damage, the amount of damages recoverable is, as a general rule, governed by the extent of the actual damage sustained, in consequence of the defendant's act. In cases admitting of proof of such damage, the amount must be established with reasonable certainty. But this does not mean that absolute certainty is required; nor, in all cases, is there a necessity for direct evidence as to the amount. [p. 271, col. 2; p. 272, col. 1.]

Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement. Certainty to reasonable extent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. [p. 272, col. 1.]

Where the defendant has, by his own wrong, put it out of the plaintiff's power to prove the quantum of damages exactly, the presumption is against the defendant, and the burden is upon him to reduce the amount from the highest possible estimate. [p. 273, col. 1.]

In actions for breach of contract, where there has undoubtedly been an infringement of a right, nominal damages are recoverable, even though no actual damage can be proved. [p. 273, col. 2.]

Where the grant of a license entitles the licensee to the exclusive right to catch elephants within certain defined tracts for a specified period, it does not follow as a matter of course that the licensee would be entitled to exclusive occupation of the entire territory during such time. [p. 274, col. 2.]

Appeal against the decree of the Subordinate Judge, Assam Valley Districts, dated the 18th August, 1920.

Mr. R. C. Bannerjee, Babus Apurba Charan Mukherjee and Sures Chandra Basu, for the Appellant.

Mr. W. Gregory, Babus Dwarka Nath Chuckerbutty and Surendra Nath Guha, for the Respondent.

JUDGMENT.

Mookerjee, J.—This is an appeal by the plaintiff in a suit, instituted against the

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Secretary of State for India, for damages in respect of a license for catching elephants in Assam. On the 16th June, 1915, the plaintiff, Frederick Thomas Kingsley, a European British subject, obtained from the Deputy Commissioner, Goalpara, a license to catch elephants in Goalpara Mahals Nos. I and II and Bhutan Mahals Nos. I and II, for the period from 1st October, 1915 to 31st March, 1916 and from 1st October, 1916 to 31st March, 1917. The plaintiff paid a consideration of Rs. 66,000 for the license. The plaintiff captured 279 elephants in the first year and 342 elephants in the second year. The case for the plaintiff was that he could not catch as many elephants as he would have done, but for the wrongful acts of the officers of the defendant. His grievance was three-fold; *first*, the operations were delayed by reason of the failure of the defendant to provide him with the requisite pass-port; *secondly*, the removal of captured elephants was hindered by reason of wrongful refusal of the officers of the Forest Department to accept the prescribed royalty and to issue the transit passes; and *thirdly*, that the depot at Hail River and the whole of the Goalpara Mahals were wrongfully burnt out under the orders of the officers of the Forest Department. The damages under these three heads were claimed as follows:—

(i) Delay in commencement of operations ..	Rs. 5,800
(ii) Hindrance in the removal of elephants ..	Rs. 5,000
(iii) Loss due to fire—	
(a) Hail Depot ..	Rs. 951
(b) Goalpara Mahal 1915-16 ..	Rs. 1,21,500
(c) Goalpara Mahal 1916-17 ..	Rs. 23,400

The Subordinate Judge has assessed Rs. 1,537-8-0 under the first head and has refused the claim in respect of the other two heads. The plaintiff has appealed against this decree, and a memorandum of cross-objections has been filed on behalf of the defendant. The matters in controversy have thus been re-opened in their entirety.

As regards the first point, we are of opinion that the plaintiff had a cause of action

against the defendant. The plaintiff, who acquired the right to the license as the highest bidder at a public auction, was a European British subject. He could not cross the inner line into the Bhutan Mahals without the special sanction of the Government of India. The officer of the defendant should consequently have been ready to provide the plaintiff with the requisite inner line pass. It is an elementary rule that the grantor of license is under an obligation to place the licensee in a position to enjoy the license. The result was that the reference to the Government of India took some time, and the plaintiff was not enabled to enter the Bhutan territory till about the 15th October at the earliest. It cannot be reasonably urged that the plaintiff might have managed the business through his agents. The answer is that he was entitled to be present and to start the operations personally. There is thus no escape from the position that the operations were delayed for two weeks, by reason of default on the part of the officers of the defendant. The plaintiff is consequently entitled to damages. The Subordinate Judge has held that the damage should be assessed on the basis of what he calls the "actual loss" sustained by the plaintiff rather than the "profit" the plaintiff would have made during this period. On this basis, which ignores the fundamental principle of the law of compensation, formulated by the Roman jurist, *lucrum cessans, damnum emergens*—loss suffered, gain prevented—the Subordinate Judge has allowed the plaintiff a refund of the license-fee during this period and the expenses incurred in connection with the stockades. This he has assessed at Rs. 1,537-8-0. The plaintiff, on the other hand, urged in the Court below, and the argument has been repeated here, that the damages should be assessed on the basis of the probable number of elephants which might have been captured during the period. The Subordinate Judge describes the assessment of damages on this basis as purely speculative, because there is no certainty as to the number or value of the elephants which might have been captured. We are not prepared to agree with the Subordinate Judge on this point. It may be conceded that though every breach of duty arising out of contract gives rise to an action for damages, without

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proof of actual damage, *Marzetti v. Williams* (1), *Embrey v. Owen* (2), the amount of damages recoverable is, as a general rule, governed by the extent of the actual damage sustained in consequence of the defendant's act: *Hiori v. L. & N. W. Ry. Co.* (3). In cases admitting of proof of such damage, the amount must be established with reasonable certainty: *The Commerce* (4). But this does not mean that absolute certainty is required; nor, in all cases, is there a necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration, or is to some extent contingent and incapable of precise measurement. As Harlan, J., observed in delivering the judgment of the Supreme Court of the United States in *Hetzel v. Baltimore & O. R. Co.* (5), certainty to reasonable extent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. To the same effect is the decision in *Morris v. United States* (6), that where absolute certainty is impossible, judgment of fair men as to damages directly resulting governs. The true doctrine lies between the two opposing extreme views which are well set out in the following judicial pronouncements, made in jurisdictions where damages are left to be assessed by juries:

Dupue, J.—Observed as follows in *Wolcott v. Mount* (7):

"It must not be supposed that...mere speculative profits, such as might be conjectured to have been the probable results of an adventure which was defeated by the breach of the contract sued on, the gains

from which are entirely conjectural, with respect to which no means exist of ascertaining, even approximately, the probable results, can, under any circumstances, be brought within the range of damages recoverable. The cardinal principle in relation to the damages to be compensated for on the breach of a contract is, that, the plaintiff must establish the quantum of his loss by evidence from which the Jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty."

Christiancy, J.—Observed as follows in *Allison v. Chandler* (8):

"Shall the injured party be allowed to recover no damages (or merely nominal) because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the Jury, that he has suffered large damages by the injury? Certainty, it is true, would be thus attained; but it would be the certainty of injustice. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the Jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

In the case before us, the plaintiff has proved that he has on an average captured one elephant per stockade per week, which would make six elephants in two weeks in the three stockades concerned; on this basis, he urges that the damage should be calculated on the aggregate price of six possible captures. The Subordinate Judge has rejected this contention on the ground that there is no certainty that, during the period in question, any elephant at all would have been captured. If this view were well-founded, no damages could be assessed

(1) (1830) 1 B. & Ad. 415; 35 R. R. 329; 9 L. J. (O. S.) K. B. 42; 109 E. R. 842.

(2) (1851) 16 Ex. 353; 86 R. R. 331; 20 L. J. Ex. 212; 15 Jur. 633; 17 L. T. (O. S.) 79.

(3) (1879) 4 Ex. D. 188 48 L. J. Ex. 545; 40 L. T. 674; 27 W. R. 778.

(4) (1850) 3 W. Rob. 287.

(5) (1897) 169 U.S. 26 at p. 38; 42 Law. Ed. 648.

(6) (1898) 174 U. S. 196 at p. 291; 43 Law. Ed. 946.

(7) (1873) 36 New Jersey 262 at p. 271; 13 Am. Rep. 438.

(8) (1863) 11 Mich. 542 at p. 555.

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where a person had been dispossessed from a fishery or even a tract of land. It might well be argued that there was no certainty that if the owner had continued in occupation, he would have been able to catch fish or grow crops. Yet, when a person has been forcibly prevented from fishing in public waters, he may give evidence of the average quantity of fish caught in the waters from which he has been excluded by the defendants and the probable value thereof; this is taken as a fair measure of the damage which he has suffered from being deprived of the opportunity to make a catch of fish. Similarly, in the case of dispossession of land, the mesne profits are based on an estimate of the average outturn of crops, though there is no guarantee that in a particular year the entire crop might not have been destroyed by drought or flood, even if the land had remained in the occupation of the rightful owner. It must further be remembered that in the extreme case where the defendant has, by his own wrong, put it out of the plaintiff's power to prove the quantum of damage exactly, the presumption is against the defendant, and the burden is upon him to reduce the amount from the highest possible estimate. Mr. Bonnerjee has urged, in the words used by Lord Macnaghten in *Williams v. Giddy* (9), that if any more exact standard were set up, "plain folk would call it a mockery, a sham, a pretence." This is emphatic language; but the substance of the matter is, that only such approximation to certainty is required as would satisfy the mind of a prudent and impartial person; see the decision of the House of Lords in *Gracie v. Argentino* (10). Besides, if the method adopted by the Subordinate Judge were approved, the plaintiff would be entitled to nothing beyond a return of the purchase-money and refund of the expense actually incurred, even if he were deprived of all enjoyment of the right granted to him. We are of opinion that in the present case the damage under the first head should have been assessed on the basis claimed by the plaintiff and Rs. 5,800 should have been awarded instead of Rs. 1,537-8-0.

(9) (1911) A. C. 381; 80 L. J. P. C. 102; 104 L. T. 51; 27 T. L. R. 443.

(10) (1889) 14 App. Cas. 519; 59 L. J. Adm. 17; 61 L. T. 706; 6 Asp. M. C. 433.

As regards the second point, the Subordinate Judge has correctly held that the plaintiff has a cause of action against the defendant. The Deputy Commissioner directed that royalty be received from the plaintiff at the Haltugaon Forest Office and the transit passes issued therefrom. The Deputy Conservator of Forests did not, however, carry out the instructions. The result was that the Range Officer at Haltugaon declined to receive from the plaintiff Rs. 4,100 on the 2nd January, 1916 and to issue transit passes. The Deputy Commissioner gave the direction in exercise of his lawful authority and his subordinate officers should have carried it out. The plaintiff was thereafter entitled to tender the royalty dues at the Haltugaon Forest Office, and the wrongful refusal on the part of the officer concerned gave the plaintiff a cause of action for damages for breach of contract. But, although the Subordinate Judge has taken this view he has dismissed the claim on the ground that the plaintiff has failed to prove actual damage. The evidence, however, leaves no room for doubt that the plaintiff was seriously inconvenienced, as the elephants were held up, by reason of the refusal of the Forest Officer to receive the royalty tendered and to issue the transit passes. It is no answer to say, that elephants are auctioned off immediately on arrival at the depot; that is the general rule. But it is not proved that this happened with each of the elephants held up on the 2nd January, 1916. Besides, even if the elephants found buyers, the plaintiff would be bound to provide them with transit passes, and if the animals were likely to be detained, the fact would, in the normal course of events, be taken into account in the settlement of the prices offered. We must further remember that in actions for breach of contract, where there has undoubtedly been an infringement of a right, nominal damages are recoverable, even though no actual damage can be proved: *Marzetti v. Williams* (1), *Warre v. Calvert* (11), *Embrey v. Owen* (2), *Twyman v. Knowles* (12). But we are of opinion that the evidence makes out that the plaintiff did suffer

(11) (1837) 7 A. & E. 143; 45 R. R. 694; 2 N. & P. 126; W. W. & D. 528; 6 L. J. (O. S.) K. B. 219; 1 Jur. 450; 11 2 E. R. 425.

(12) (1853) 13 C. B. 222; 93 R. R. 510; 22 L. J. C. P. 143; 17 Jur. 238; 130 E. R. 1183.

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actual damage from the non-receipt of the transit passes, specially as the trained elephants would have to be maintained during the period. In view of the number of elephants (100) detained, and the period of detention (2 weeks), Rs. 1,000 may fairly be assessed as damages under this head.

As regards the third point, the plaintiff has, according to the Subordinate Judge failed to establish that the fires which hampered his operations were due to the action of the forest authorities; in other words, the plaintiff has not shown with reasonable certainty that loss resulted to him from the alleged wrongful act of the defendant. The evidence, which is accurately summarised by the Subordinate Judge, makes it clear that there were accidental fires as also departmental fires. The departmental fires, which are apparently periodical and systematic operations, are considered necessary for purposes of *sal* timber reproduction. They are as a rule carried out reasonably and properly, and the burnings are conducted under such control and supervision as is practicable in the circumstances. There is little doubt that the elephant-catching operations were, to a large extent, hampered by reason of the fires, whether accidental or departmental. On the one hand, the evidence does not indicate which fires were accidental and which were departmental. On the other hand, it is not made out with certainty that departmental fires, could not have extended beyond the original limits designed, and regarded, outside those areas, as accidental fires of unknown origin. We are, however, not prepared to disagree with the Subordinate Judge that there were extensive accidental fires in addition to the departmental fires, and that the evidence does not establish that the elephants, and if so, how many, were in fact scared away by the departmental fires or that the fodder was destroyed thereby, and if so, to what extent.

But the plaintiff has urged that the defendant could not derogate from his grant and could not, as grantor, interfere with the lawful enjoyment of the right conferred on the licensee. It need not be disputed that an appropriation of the land licensed to any use inconsistent with the enjoyment of the license, works a revocation, and the licensee may maintain an action for damages

against the licensor for breach of contract in unlawfully revoking it. It may also be assumed that the license, in the present case, was not revocable; the license was for valuable consideration, was accompanied by the grant of a *profit a prendre*, and was consequently a license coupled with an interest: *Wickham v. Hawker* (13), *Wood v. Leadbitter* (14), *Smart v. Jones* (15), *Hooper v. Clark* (16), *Kerrison v. Smith* (17). It may further be conceded that, *prima facie*, the grant entitled the plaintiff to the exclusive right to catch elephants within the defined tracts and for the specified period. But it does not follow as a matter of course that the plaintiff would be entitled to exclusive occupation of the entire territory during such time. He has no right, for instance, to hunt animals other than elephants in the reserved forests, nor to fell timber therein. Such rights may, under authority from the Crown, be presumably exercised by other persons, without interfering with the enjoyment of the right created in favour of the plaintiff. We observe there is no express reservation in favour of the Crown as to forest operation by recourse to departmental fires or other methods, and whether such a reservation is implied by usage or custom in the case of grants of this description, has not been investigated. The question might have been of importance, if there were any possibility of proof that the plaintiff did in fact suffer damage from the departmental fires.

But we are by no means satisfied that any useful purpose would be served by a further enquiry into this matter, though the impression is left on our minds, from a perusal of the official correspondence on the record, that the undoubted rights of the plaintiff were not as scrupulously safeguarded as might have been expected. On the record as it stands, it is impossible for us, however, to award the plaintiff damages

(13) (1840) 7 M. & W. 63; 56 R. R. 623; 10 L. J. Ex. 163; 151 E. R. 679.

(14) (1845) 13 M. & W. 838; 67 R. R. 831; 14 L. J. Ex. 161; 9 Jur. 187; 153 E. R. 351.

(15) (1864) 15 C. B. (N. S.) 717; 137 R. R. 733; 33 L. J. C. P. 154; 10 Jur. (N. S.) 678; 10 L. T. 271; 12 W. R. 430; 143 E. R. 966.

(16) (1867) 2 Q. B. 200; 8 B. & S. 150; 36 L. J. Q. B. 79; 16 L. T. 152; 15 W. R. 347.

(17) (1897) 2 Q. B. 445; 65 L. J. Q. B. 762; 77 L. T. 314.

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under the third head; the plaintiff fails here, as well from uncertainty of cause of damage, as from uncertainty of extent of damage.

The result is that the appeal is allowed in part, and the cross-objections disallowed. The decree of the Subordinate Judge is modified, and the amount of damages raised from Rs. 1,537-8-0 to Rs. 6,800. The plaintiff will have his costs in both Courts on this amount where the cost is allowed *ad valorem*; other costs will be allowed in full. The hearing fee in this Court will be assessed at Rs. 300. The defendant will bear his own costs in both Courts.

B. H.

*Appeal allowed in part.
Cross-objections disallowed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 490 OF 1922.
November 27, 1922.

Present:—Sir Norman Macleod, Kt.,
Chief Justice and Mr. Justice Crump.

HANSRAJ GODHAJI MARWADI
AND ANOTHER—PLAINTIFFS—APPELLANTS
versus

BAPU KRISHNASAWAMI PILLAI AND
OTHERS—DEFENDANTS—RESPONDENTS.

Execution of decree—Instalment decree—Entire sum payable on default—Acceptance of instalment after default—Waiver—Limitation, operation of.

Plaintiff obtained a decree on 29th February, 1916, for Rs. 6,562-8-0 payable by monthly instalments of Rs. 50. It was provided that in case of failure to pay any six instalments the whole amount due under the decree would become payable. No payments were made till 9th April 1917 when defendant paid Rs. 5,500; he made a further payment of Rs. 400 on 19th January, 1918. On 27th September, 1919 plaintiff applied to execute the decree for the balance remaining due, but it was objected that, as the whole sum due under the decree became payable in August 1916, by which date there had been a failure to pay six consecutive instalments, the application was barred by limitation. P. however contended that, on account of the payments of 1917 and 1918 a waiver should be inferred by the Court:

Held, that the application was barred by time and that from the mere fact of the payments it could not be inferred that the parties had come to an arrangement that there should be an agreement for a new period of limitation.

Amrit Khanderao v. Govind Ramchandra, 58 Ind. Cas. 65; 22 Bom. L. R. 919; 44 B. 840, distinguished.

First appeal from the decision of the First

Class Subordinate Judge, Poona, in Darkhast No. 628 of 1919.

Mr. Coyaje: (with him Mr. J. R. Gharpure), for the Appellants.

Mr. Thakor (with him Mr. P. B. Shingne), for Respondents Nos. 1 and 3.

JUDGMENT.—On February 29th, 1916, an award decree was made whereby the defendants were bound to pay to the plaintiffs Rs. 6,562-8-0 with interest thereon by instalments of Rs. 50 every month. It was provided that in case of default in payment of any six instalments, the whole amount should become due, by sale of the mortgaged property specified in the decree. On September 27th, 1919, the decree-holder put in a *Darkhast*, and it was objected that his *Darkhast* was time-barred because by August 1916 there had been a failure to pay six consecutive instalments. Therefore at that date the whole amount of the decree became due. *Prima facie* the *Darkhast* being given three years after the date on which the whole amount was recoverable would be time-barred.

It has been suggested that by reason of a payment made on April 9th, 1917, limitation is saved by virtue of section 20 of the Indian Limitation Act. But it is clear that section 20 could have no application, as the payment in question did not appear in the handwriting of the person making the same.

It was further argued that, in the circumstances of this case, the Court should infer a waiver. The only facts pointed out are that, on April 9th, 1917, a payment of Rs. 5,500 was made, and that, on January 19th, 1918, that is to say, eight months afterwards, a payment of Rs. 400 was made, *i. e.*, eight times the instalments due under the decree. But it is impossible from these circumstances alone to infer that the parties came to an arrangement that there should be an agreement for a new period of limitation.

The appellant relies upon *Amrit Khanderao v. Govind Ramchandra* (1) in which case it was held that, upon the facts there established, a waiver might be inferred. But a perusal of the judgment in that case shows at once that there is no analogy between the facts there found and the facts

(1) 58 Ind. Cas. 65; 22 Bom. L. R. 919; 44 B. 840.

SHADEIR HUSAIN v. GHULAM HUSAIN.

in the present case. There execution proceedings were taken out from time to time without any objection being taken; and there were other circumstances also from which the Court inferred that, as a matter of fact, there had been a waiver. There is nothing of the kind here, and we are unable to hold that any waiver can be inferred. It follows that the order is correct, and that the appeal must be dismissed with costs.

W. C. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1208 OF 1921.

January 16, 1923.

Present.— Mr. Justice Gokul Prasad.

Syed SHABBIR HUSAIN AND ANOTHER

—DEFENDANTS—APPELLANTS

versus

Syed GHULAM HUSAIN—PLAINTIFF

—RESPONDENT.

Jurisdiction.—*Jurisdiction of Civil Court to declare Revenue Court's decree invalid—Pre-emption decree—Decree-holder obtaining possession privately—Vendee's name not omitted from khewat—Vendee obtaining decree for profits from Revenue Court—Jurisdiction of Civil Court to declare decree inoperative.*

When a decree has been passed by a competent Court of exclusive jurisdiction, a Civil Court cannot declare it to be invalid and incapable of execution.

A pre-emptor decree-holder deposited the pre-emption money in Court, but instead of taking possession of the pre-empted property through the Court, took it privately and did not care to have a mutation effected in his favour, with the result that, after a few years, the vendee, whose name continued to appear in the *khewat*, sued the pre-emptor in a Revenue Court for profits. Upon this the pre-emptor filed a suit in a Civil Court for a declaration that he was the owner of the property and that the vendee had no right to get a decree for profits. The vendee's suit for profits was decreed and about a week later the pre-emptor's claim was also decreed. Again, when the vendee put his decree in execution the pre-emptor filed another suit for a declaration that the vendee had no right to realize profits under the decree of the Revenue Court and that his (pre-emptor's) rights had become absolute under the Civil Court decree. *Held*, that the pre-emptor's suit did not lie.

Mahabir Prasad v. Basant Lal 70 Ind. Cas. 444; 17 A. L. J. 1028 and *Mollo v. Ramlal*, 58 Ind. Cas. 772; 43 A. 191; 18 A. L. J. 1030 (F. B.), relied upon.

Second appeal against a decree of the Subordinate Judge, Aligarh, dated the 4th May 1921.

Mr. S. A. Haidar, for the Appellants.

JUDGMENT.—The facts are briefly as follows:—The plaintiff-respondent Syed Ghulam Husain obtained a decree for pre-emption against the defendants in 1908. He deposited the pre-emption money in Court, but did not proceed further to have mutation of names effected in his favour and to take delivery of possession. It appears, however, that he took possession privately and in the year 1913 the defendants-appellants sued him for profits as their names appeared in the *khewat*. That suit was withdrawn and then the defendants-appellants filed another suit for profits. The plaintiff then filed a suit for declaration of his title and for a declaration that the defendants had no right to get a decree for profits. This suit was decreed on the 2nd of September, 1916, but in the meanwhile the defendants had obtained a decree for profits on the 26th of August, 1916. The defendants have now put this decree in execution and the plaintiff has filed this suit for a declaration that the defendants have no right to realise profits under the decree of the Revenue Court and the plaintiff's rights have become absolute under the Civil Court decree. The only plea in defence with which I am concerned is that such a suit does not lie. The First Court decreed the claim. On appeal the learned Judge of the lower Appellate Court has modified the decree of the First Court by declaring that the plaintiff is the owner of the property and entitled to profits in question and has further issued an injunction restraining the defendants from executing their decree for profits. The defendants come here in second appeal and the contention pressed before me by their learned Counsel is that such a suit does not lie. In my opinion this contention must prevail. This case is very similar to the case of *Mahabir Prasad v. Basant Lal* (1) which held that such a suit would not lie inasmuch as the decree was

(1) 70 Ind. Cas. 444; 17 A. L. J. 1028.

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a good decree the defendant being a recorded co-sharer at the date of the decree. Moreover, I think that the principle of the Full Bench case of *Mollo v. Ramlal* (2) applies to this case with full force. The decree for profits was one solely within the cognizance of a Revenue Court and the remedy open to the plaintiff in this case was either to bring to the notice of the First Court that a civil suit was actually pending in the Civil Court relating to the title of this property, or to have gone up in appeal and brought the fact to the notice of the Appellate Court. He did not do so and it was due to his own laches that all this trouble had arisen. The decree for profits being one passed by the competent Court of exclusive jurisdiction the Civil Court could not declare it to be invalid and incapable of execution. I, therefore, accept the appeal so far that in substitution of the decrees of the two Courts below I confine the decree in the suit for a declaration of the plaintiff's title to the property the right to get profit only. The parties will bear their own costs of this litigation.

S. D.

Appeal accepted.

(2) 58 Ind. Cas. 772; 43 A. 191; 18 A. L. J. 1030 (F. B.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 210 OF 1922.

December 1, 1922.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

BHAGUBAI TUKARAM JOGDUNDE—
PLAINTIFF—APPELLANT

versus

APPAJI SITARAM CHARATHE

—DEFENDANT—RESPONDENT.

Will—"Kindred Roll and Names of Heirs" maintained by the Military, whether Will.

The "Kindred Roll and Names of Heirs" maintained by the Military Authorities in respect of a soldier can only be used for the limited purpose of ascertaining who are the next-of-kin in case the soldier dies, and cannot be treated as a Will.

Second appeal from the decision of the District Judge, Ahmednagar, in Appeal No. 238 of 1920, reversing a decree passed by the Subordinate Judge at Ahmednagar, in Civil Suit No. 929 of 1919.

Mr. Y. V. Bhandarkar, for the Appellant
Mr. J. G. Rale, for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff is the sister of one Bala Narayan who died while serving with the regiment of 121st Pioneers. He left a widow called Sogundha. Purporting to exercise her widow's rights she sold the plaintiff property to the second defendant. The plaintiff's suit is to recover this property. The plaintiff mainly relies on the "Kindred Roll and the Names of Heirs" appertaining to the deceased. A true copy has been produced signed by the Officer Commanding of the Depot, and we are entitled to accept that as evidence of the Kindred Roll of the deceased. But the question really is whether by virtue of that document, or any other evidence, in the case, the suit property has passed to the plaintiff. The Trial Court held that the Kindred Roll was a Will embodying the legal declaration of the intentions of the testator with respect to his property, which he desired to be carried into effect after his death. The District Judge held that the document was not proved. I think there he was wrong. But he was right in refusing to accept the view of the Subordinate Judge that Exhibit 23 was a Will. He then considered whether there was any evidence which proved an oral Will of the deceased, and considered that the evidence of Hussein Khan, the only witness on behalf of the plaintiff, was not sufficient to prove an oral Will. Accordingly, the decree of the Trial Court was reversed and the suit was dismissed. It is quite clear that the Kindred Roll, whatever other effect it might have, cannot be treated as a Will. At the most it is evidence that Bala made a declaration before the Military Authorities that Bhagu was his heir or was the person to whom his estate should be made over on behalf of the heir. It is not very clear for what purpose the Kindred Roll is prepared except that the Military Authorities wish to know who are the next-of-kin in case the soldier dies. They want to know to whom the family pension should be paid, and to whom any of the effects of the deceased which may remain in their hands after his death should be handed over. The Military Authorities have nothing whatever to do with the

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landed property which a soldier may have, and I do not think that, even supposing a soldier informed the Military Authorities that he considered a certain person to be his heir, that statement would be taken as meaning that the soldier intended to make an oral Will disposing of property which would not come into the hands of the Military Authorities after his death. The Kindred Roll, therefore, in my opinion, could only be used for a limited purpose. I do not think there is any evidence in this case that Bala made an oral Will disposing of the suit property in favour of his heirs. The decree, therefore, of the District Judge dismissing the suit was correct and the appeal must be dismissed with costs.

Decree affirmed.

W. C. A.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1568 OF 1920.

December 20, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Wallace.

ZADAVALLI TRIPURAMBA (DEAD) AND
ANOTHER—DEFENDANTS—APPELLANTS
versus.

ZADAVALLI VENKATARATNAM (DEAD)
AND ANOTHER—PLAINTIFFS AND LEGAL
REPRESENTATIVES OF PLAINTIFF—
RESPONDENTS.

Hindu law—Madras Presidency—Adoption by widow—Precedents—Obiter dicta of Privy Council, value of.

A Hindu widow in the Madras Presidency can adopt a son in order to carry on the line and provide for the due performance of the obsequies of her husband, either with the authority of the husband or with the consent of the husband's *sapindas*. This power of adoption can be exercised on the death of a son or adopted son as often as occasion arises. [p. 278, col. 2; p. 279, col. 1.]

Where, however, the son dies leaving a natural born or adopted son, or a widow to continue the line by means of adoption, the power of the mother to make an adoption is extinguished and can never afterwards be revived. [p. 279, col. 1.]

Tarachurn Chatterji v. Surshchunder Mukherji, 17 C. 122; 16 I. A. 166; 13 Ind. Jur. 289; 5 Sar. P. C. J. 379; 8 Ind. Dec. (N. S.) 619 (P. C.), *Madana Mohana Ananga Bheema Deo v. Purushothama Ananga Bheema Deo*, 46 Ind. Cas. 481; 41 M. 855; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 725; (1918) M. W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 20 Bom. L. R. 1041; 23 C. W. N. 177; 45 I. A. 156 (P. C.), *Bhoobun Moyee Debia v. Ram Kishore Acharji Chowdhry*, 10 M. I. A. 279 at p. 297; 3 W. R. P. C. 15; 1 Suth. P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 978, *Padmakumari Deli v. Court of Wards*, 8 I. A. 229; 8 C. 302; 4 Sar. P. C. J. 285; 6 Ind. Jur. 148; 4 Ind. Dec. (N. S.) 193 (P. C.), *Thayammal v. Venkatarama*, 14 I. A. 67; 10 M. 205; 11 Ind. Jur. 271; 5 Sar. P. C. J. 10; 3 Ind. Dec. (N. S.) 895 (P. C.) and *Ramkrishna v. Shamrao*, 26 B. 526 at p. 531; 4 Bom. L. R. 315, relied on.

Venkappa v. Jivaji Krishna, 25 B. 306; 2 Bom. L. R. 1101, *Sangapa v. Vysapa*, (1896) P. J. 528, followed.

An *obiter dictum* even of their Lordships of the Judicial Committee of the Privy Council on a point which was not before them and did not arise in the case cannot be treated as an authority. When the point directly arises for decision, it is the duty of the Court to consider the point for itself giving due weight to any words which fell, although *obiter*, from their Lordships. [p. 280, col. 1.]

Second appeal against a decree of the District Court, Guntur, in Appeal Suit No. 481 of 1916, preferred against a decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Original Suit No. 11 of 1916 (Original Suit No. 91 of 1915 on the file of the Court of the Temporary Subordinate Judge, Guntur).

Mr. P. Narayanamurti, for the Appellant.

Mr. P. Siwasundaram, for the Respondents.

JUDGMENT.

Schwabe, C. J.—The facts of this case are, one Venkatasomayajulu died leaving a widow and a son, Subbanna Sastri. The son died 26 years ago unmarried at the age of 25. In 1913, the widow adopted the second defendant with the consent of the *sapindas* as the son of her late husband. The question to be decided is whether this adoption is good or bad.

That a Hindu widow can adopt a son in order to carry on the line and provide for the due performance of the obsequies

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of her husband either with the authority of the husband or with consent of the husband's *sapinda*, is well-established in this Presidency. It is also well-established that this power of adoption can be exercised on the death of a son or adopted son, as often as occasion arises, but it is also established that there is some limit to the exercise of this power and that it can become exhausted. It is argued in this case that the limit is reached as soon as a son, natural or adopted, either marries or attains an age, which is put alternatively as that of attaining majority, that is 18, or that of attaining full legal capacity to himself adopt a son, which was held in *Tarachurn Chatterji v. Surashchunder Mukerji* (1) to be sixteen. No direct authority for this proposition can be found in any of the Indian Reports, but it is based on a dictum of the Privy Council in *Madana Mohana Ananga Bheema Deo v. Purushothama Ananga Bheema Deo* (2) which I will deal with more fully hereafter. The limit to the authority to adopt is stated in the judgment of the Privy Council in *Bhoobun Moyee Debia v. Ram Kishore Acharji Chowdhry* (3) which judgment was explained and the principle re-affirmed in *Padmakumari Debi v. Court of Wards* (4) and *Thayammal v. Venkatarama* (5). The principle to be deduced from these three cases is stated in the judgment of Chandavarkar, J., in the Full Bench case of *Ramkrishna v. Shamrao* (6) thus: "where a Hindu dies, leaving a widow and a son and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is

extinguished and can never afterwards be revived." This principle so laid down has the approval of the Privy Council in *Madana Mohana Ananga Bheema Deo v. Purushothama Ananga Bheema Deo* (2). No subsequent adoption will be allowed, which will divest a right vested by inheritance in some person other than the son or the mother herself as representing the son, so if a son dies leaving either a son or a widow the mother can no longer adopt as the estate is vested in son's son or if there be no son, in his widow, she having a right to adopt a son to her husband. There is direct authority that the limit is not reached when the son dies though of age without leaving a son or widow in *Venkappa v. Jivaji Krishna* (7), where a son had attained the age of 30 before his death and had married but left no widow, and *Sangapa v. Vysapa* (8) when he attained the age of 30 and died unmarried. This very point was also mentioned in *Bhoobun Moyee Debia v. Ram Kishore Acharji Chowdhry* (3) in the judgment of Lord Kingsdown, where he stated: "If Bhowanee Kishore, (that is the son) had died unmarried, his mother would have been his heir and the question of adoption would have stood on quite different grounds. By exercising the power of adoption she would have divested no estate but her own, and this would have brought the case within the ordinary rule." The ordinary rule referred to there is, as I understand it, the rule subsequently so clearly stated in the judgment of Chandavarkar, J. This statement was *obiter* but that is a clear indication of the view of their Lordships of the Privy Council.

Turning now to *Madana Mohana Ananga Bheema Deo v. Purushothama Ananga Bheema Deo* (2), in that case a widow adopted a son who died leaving a widow; and it was held following the cases quoted above that the right of adoption by the first widow had been exhausted. But after approving the principle laid down in the judgment in *Ramkrishna v. Shamrao* (6), their Lordships stated that they were of opinion that "the principle must be taken

(1) 17 C. 122; 16 I. A. 166; 13 Ind. Jur. 289; 5 Sar. P. C. J. 379; 8 Ind. Dec. (N. S.) 619 (P. C.).

(2) 46 Ind. Cas. 481; 41 M. 855; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 725; (1918) M. W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 20 Bom. L. R. 1041; 23 C. W. N. 177; 45 I. A. 156 (P. C.).

(3) 10 M. I. A. 279 at p. 297; 3 W. R. P. C. 15; 1 Suth P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 978.

(4) 8 I. A. 229; 8 C. 302; 4 Sar. P. C. J. 285; 6 Ind. Jur. 148; 4 Ind. Dec. (N. S.) 193 (P. C.).

(5) 14 I. A. 67; 10 M. 205; 11 Ind. Jur. 271; 5 Sar. P. C. J. 10; 3 Ind. Dec. (N. S.) 895 (P. C.).

(6) 26 B. 526 at p. 531; 4 Bom. L. R. 315.

(7) 25 B. 306; 2 Bom. L. R. 1101.

(8) (1896) P. J. 528.

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as applying, so as to have brought the authority to adopt conferred on the first widow to an end when the son, whom she had originally adopted, died after attaining full legal capacity to continue the line, either by the birth of a natural born son or by the adoption to him of a son by his own widow." It is to be observed that it does not say, "after himself attaining full age or the right to adopt a son." Their Lordships, however, went on to say that "they do not desire to be understood to say that, even in the absence of authority in the son's widow to adopt, the succession of the son and his dying after attaining full legal capacity to continue the line would not in themselves have been sufficient to bring the limiting principle into operation and so to have determined the authority of the first widow, who was not the widow of the last owner and could not adopt a son to him." I understand this to mean that their Lordships wish it to be understood that they do not give any decision on the point, which is the point in this case, and perhaps indicate that the inclination of their minds was against the contention that such adoption was permissible. But the point was not before the Council and did not arise in that case, and it would be most dangerous to treat a *dictum* of that kind as an authority.

When a point directly arises for decision, it is the duty of the Court to consider the point for itself, giving, of course, due weight to any words which fell, although *obiter* from their Lordships. I can find no authority in any decided case and the respondents have been unable to call our attention to any authority from the usual sources for ascertaining Hindu Law, in support of the proposition. If there is any such limit, it is not, in my judgment, open to us to find it on the material before us. It is to be observed that in *Verabhai v. Bai Hiraba* (9) Lord Lindley in delivering the judgment of the Privy Council remarked, referring to this point, that no authority had been produced before the Privy Council in support of it. I wish to refer to two cases which give some appearance of support to the suggestion

of the existence of this limit, viz., *Jagannadha Gajapati v. Kunja Bihari Deo* (10). The head-note* of which runs as follows: "The power of a widow to adopt is not limited in point of time by the fact that a line of her husband's heirs have in succession come into possession of the estate. The limit to such power is when the husband's adopted son attains full age and so full capacity to continue the line by naturally born sons or by adoption." That head-note is in my judgment incorrect, for the case does not decide anything of the kind. It is true that Wallis, C. J., in his judgment states that the Privy Council in *Bhoobun Moyes Debia v. Ram Kishore Acharji Chowdhry* (3) so decided; but that observation does not appear to be borne out by a study of the judgment of the Privy Council in the case. It was unnecessary for the decision of the case in *Jagannadha Gajapati v. Kunja Bihari Deo* (10) and must be treated as *obiter*. In *Venkataramier v. Gopalan* (11) the decision in which case appears to be right, both the Judges explained what they understood to have been decided by the Privy Council in *Madana Mohana Ananga Bheema Deo v. Purushothama Ananga Bheema Deo* (2). They took the *dictum* which I have discussed above and read it as though it were a judgment. I do not agree with the observations of either Judge on the true meaning to be attached to the judgment of the Privy Council in that case.

The District Judge in this case took the interpretation put upon the words in *Madana Mohana Ananga Bheema Deo v. Purushothama Ananga Bheema Deo* (2) by this Court in *Venkataramier v. Gopalan* (11), and therefore held that this adoption is bad. For the reasons stated above I think his conclusion is wrong.

The appeal will be adjourned for a fortnight for further consideration and for enquiries to be made as to what took place in the Court below, so that we can decide whether to enter judgment or to send the case back to the District Judge. The respondent must pay the costs throughout.

(10) 49 Ind. Cas. 929; 25 M. L. T. 204; (1919) M. W. N. 52; 9 L. W. 385.

(11) 49 Ind. Cas. 48; 35 M. L. J. 698; (1918) M. W. N. 79; 24 M. L. T. 440; 9 L. W. 43.

*Head-note of 25 M. L. T.—[Ed.]

(9) 30 I. A. 234; 27 B. 492; 5 Bom. L. R. 534; 7 C. W. N. 716 (P. C.).

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Wallace, J.—The respondent relied, as the District Judge has relied, on the phraseology in certain passages in the Privy Council judgment in *Madana Mohana Ananga Bheema Deo v. Purushothama Ananga Bheema Deo* (2) and on the interpretation of those passages by a Bench of this Court in *Venkataramier v. Gopalan* (11).

The first passage is that the mother's authority to adopt must have come to an end when the son she originally adopted died, after attaining full legal capacity to continue the line either by the birth of a natural born son, (as distinguished from an adopted son) or by the adoption to him of a son by his own widow. The events which put an end to the mother's power to adopt to her husband in that view are either that her son or adopted son should have a legitimate son or should leave a widow, that is, the essential pre-requisite is not the attainment of his majority or even his succession to the estate, but that he has or has had a wife with the result that he leaves either a son to her or that she survives him as his widow. The common result in either event is that the deceased son's estate is on his death vested not in his mother but in his son or widow. Therefore, their Lordships, I consider, are not propounding any new principle but are taking their stand on the old principle enunciated by the Privy Council in *Aichama v. Ramanatha Baboo* (12) and *Bhubun Moyee Debia v. Ram Kishore Acharji Chowdhry* (3), namely, that when the estate is vested in some heir succeeding to, but directly from the deceased son, his mother will not be allowed to adopt to her husband so as to divest that heir.

The second passage in their Lordships' judgment relied on does not seem to me to carry the case any further. It is to the effect "that their Lordships do not desire to be understood as saying that even in the absence of any power in the son's widow to adopt, the succession to Brojo Kishore (that is the son) and his dying after attaining full legal capacity to continue the line would not in themselves have been sufficient to bring the limiting principle into operation, and so to have determined

the authority of Adikonda's widow, who was not the widow of the last male owner, and could not adopt a son to him." Here again the phrase "succession to Brojo Kishore" does not to my mind mean anything more than that he has come into the estate. Had it meant attainment of his majority, that simpler phrase would have been used. I note further that that succession in itself is not sufficient to have determined the authority of Adikonda's widow, but that it must be coupled with the capacity to continue the line as previously explained, that is, coupled with a legal marriage. It is only from such a marriage that there will emerge an heir to continue the line in legitimate descent and, therefore, until such marriage, the full legal capacity to continue the line is not consummated. That marriage itself is not the whole test, but such a marriage as leaves an heir, a son or a widow, to the deceased has been laid down in *Venkaappa v. Jivaji Krishna* (7).

That I think is the meaning of *Madana Mohana Ananga Bheema Deo v. Purushothama Ananga Bheema Deo* (2), in which their Lordships were dealing with a case, where the adoption pleaded before them would have divested the adopted son's widow of the estate, it not having been shown that the son's widow herself had no power to adopt to her husband, and the Board purported to follow and were even in full agreement with the decision in *Ramkrishna v. Shamrao* (6) based on *Bhubun Moyee Debia v. Ram Kishore Acharji Chowdhry* (3) and *Padmakumari Debi v. Court of Wards* (4) and *Thayammal v. Venkatarama* (5) and held that the principle laid down in this case determined that case also. I find nothing, in *Madana Mohana Ananga Bheema Deo v. Purushothama Ananga Bheema Deo* (2) on which to find on principle that the mere attainment of majority by the son or the adopted son divested his mother of the power to adopt to her husband in the event of that son's death without heir. Under the Hindu Law a minor can marry to get legitimate sons and his widow can adopt to him, so that even a minor may fulfil the tests laid down in *Madana Mohana Ananga Bheema Deo v. Purushothama Ananga Bheema Deo* (2) though he

(12) 4 M. J. A. 1; 7 W. R. P. C. 57; 1 Suth. P. C. J. 197; 1 Sar. P. C. J. 313; 18 E. R. 690.

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has not yet come into full disposing possession of his estate.

There is, therefore, nothing in that case to support the District Judge's interpretation of it, as meaning that the full legal capacity to continue the line is equivalent to attaining majority, in a case where the son has attained age but dies unmarried. In this matter there appears to be no virtue in law in the attainment of majority and hence, when that is the only bar pleaded, there seems no reason for distinguishing between a mother's power to adopt to her husband when the minor son or adopted son has died, from the power to adopt to him when the major son or adopted son has died leaving no heir to himself who will be ousted from the estate by such adoption. See again *Venkappa v. Jivaji Krishna* (7).

Hence the mere attainment of majority introduces into the problem no new factor on which the respondent can rely for its solution. The purpose of adoption is to perpetuate the line; and if the only son dies without leaving any one to perpetuate the line, there seems no good reason for restricting the power of his mother to perpetuate it in the only way she can, by adopting a son to her own husband. No direct authority to the contrary has been produced by the respondent while there is much authority in its favour.

I therefore agree with the view of the learned Chief Justice.

This second appeal having been posted this day for further consideration the Court delivered the following

JUDGMENT.—This matter having come up for further consideration, we think that judgment should be entered for the defendants in the suit.

The question was raised before the Subordinate Judge as to whether the *sapindas* have in fact consented to the adoption or whether they or some of them must be taken to have consented. The Subordinate Judge decided that issue in favour of the defendants and the question formed part of the grounds of appeal before the District Judge. The District Judge's notes show that it was argued before him that these *sapindas* had no power to authorise the adoption. It also appears from his notes

that the question covered by the first namely, whether the relations or who were described as remoter reve could authorise adoption, was argued before him, for we find his notes on contain reference to the question the reversigners were invited and refer the defendant's witnesses Nos. 1, 3 and a suggestion that witnesses Nos. 4 and interested witnesses. I can see no why this matter has been gone into before him, unless it was on the question whether or not the *sapindas* had authorised this adoption. Further, in the judgment itself of the District (paragraph 2) a passage in which cusses whether the consent of two or reversigners was in fact given, and in he finds that, in respect of one of them he had been adopted himself into the family, his consent was unnecessary as to the other one, after examining exhibits, he finds that he had power authority to adopt. This is enough in my judgment, to show that the Judge did dispose of the question before him; of course, on that question fact, no second appeal lies.

I, therefore, think that the whole has been disposed of and judgment be entered for the defendants respondents must pay the costs thereof.

V. N. V.

Order accorded.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 587 OF
November 15, 1922.

Present:—Sir Norman Macleod,
Chief Justice, and Mr. Justice C.
MULCHAND JEKISONDAS—PLA
—APPELLANT

versus

BAI RUKSHMANI—DEFENDANT
—RESPONDENT.

Construction of document—Hindu Will made full owner—Son to succeed on her Estate taken by widow—Death of son sioners, right of.

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A Hindu testator by his Will appointed his wife to be the owner of his property which she was to take into her possession after his death, and consume, enjoy or do what she liked with what remained out of the property after performing his funeral and obsequious ceremonies, and declared that after her death his son, who was a lunatic, would be the owner of the estate and could do what he liked with the property. The testator's son died before the widow, and a suit was brought by the reversioners to restrain the widow from wasting the estate. The question was whether the widow took an absolute estate:

Held, that having regard to the ordinary notions of Hindus, it was obvious that the testator did not intend that the widow should have absolute powers of disposition during the lifetime of the son; that the son took a vested interest in his lifetime which on his death, went to his mother who, under the Hindu Law took only a limited interest, and, that if the disposition in her favour did not give her an absolute interest in the first instance, the fact that she succeeded as heir of her son would not enlarge that estate.

Appeal from the decision of the Extra Assistant Judge at Ahmedabad, in Appeal No. 471 of 1920, confirming the decree passed by the Joint Subordinate Judge at Ahmedabad, in Civil Suit No. 822 of 1919.

Mr. G. N. Thakor (with him Mr. R. J. Thakor), for the Appellants.

Mr. G. S. Rao, for the Respondent.

JUDGMENT.—One Ranchhoddas died seven years back leaving a lunatic son by name Chimanlal and a widow. He left a Will in which he stated, after setting out his property:

"So long as I am living I am heir and owner of the said property, the same I may consume, enjoy, use or do what I like. But if by the will of God I die, on my death I appoint my wife Bai Rukhi *alias* Juma to be the owner of my property. Therefore, after my death my wife is to take my property into her possession with full authority, and is to perform the funeral and obsequious ceremonies with respect to my death. And after doing the same my wife Bai Rukhi *alias* Juma is to consume enjoy or do what she likes with respect to what remains out of my property. And after the death of my wife, my son Chimanlal is the owner of my estate, the said Chimanlal may do what he likes with respect to my property. Therein none of my relatives, friends or other persons have a right or claim.

Chimanlal died before the widow, and the present suit has been brought by persons asserting their rights as reversioners to restrain the widow from wasting

the estate. The suit has been dismissed in both the lower Courts on the ground that under the terms of the Will the widow took an absolute estate.

The principles of construction to be applied to a Will of this kind have been quite clearly laid down by various decisions of the Privy Council. At one time it was considered by the Indian Courts that the husband did not confer an absolute estate by his Will on his wife, unless he gave express powers of disposition, that it was not sufficient for him to say that the wife was the owner of the property, he must also say that she had the power of alienation. But in *Surajmani v. Rabi Nath Ojha* (1) it was held that if words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without there being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended.

The decision was referred to with approval in *Bhaidas Shivdas v. Bai Gulab* (2). In that case the testator by his Will appointed his wife executrix, and by clause 3 constituted her owner (*malik*) of his property, and provided that she should leave whatever property might remain after her death to two named daughters as she liked. It was argued that later clauses in the Will in their terms were inconsistent with the view that the provisions of the earlier clause 3 constituted the wife an absolute owner, but it was eventually held by their Lordships that the subsequent clauses in the Will were not sufficient to displace the language of clause 3.

In the present case, we have to see whether the words which purport to give an absolute estate to the widow have been displaced by the later disposition of the property to Chimanlal as *malik* after the death of the widow. In *Lallu v. Jagmohan* (3) the testator provided as follows:

(1) 35 I. A. 17; 10 Bom. L. R. 59; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 7 C. L. J. 131; 3 M. L. T. 144; 30 A. 84 (P. C.)

(2) 65 Ind. Cas. 974; 49 I. A. 1; 24 Bom. L. R. 551; 26 C. W. N. 129; 15 L. W. 412; 20 A. L. J. 289; 42 M. L. J. 385; 35 C. L. J. 314; 46 B. 153; (1922) A. I. R. (P. C.) 193 (P. C.)

(3) 22 B. 409; 11 Ind. Dec. (N. S.) 855.

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"When I die, my wife named Suraj is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present, and in case of my wife's death my daughter Mahaluxmi is owner of the said property after that (death)." It was held that Suraj took only a life-estate under the Will, with remainder over to Mahaluxmi after her death. That decision was before the decision in *Surajmani's case* (1). It may be that the Court might not have considered the words in that Will sufficient to give the widow an absolute estate apart from the gift over to the daughter. It seems obvious in this case that the testator did not intend that the widow should have absolute powers of disposition during the lifetime of the son; considering the ideas a Hindu testator ordinarily has with regard to what will happen to his property on his death, he would not be anxious if he had a son alive to give an absolute estate to the widow; especially as in this case he only gave powers to the widow because the son was incapable of managing his own affairs. Nor we do think that it was intended that the son should only have a contingent interest as the learned Judge thinks. That would be contrary to the usual ideas of a Hindu testator, nor was there anything in the Will to show that Chimanlal's interest was merely a contingent one, as the case would have been if such words had been used as "if my son Chimanlal survives my wife then he will be *malik* of my property." We think Chimanlal took a vested interest in his life-time, and on his death that would go to his mother, who would under Hindu Law take only a limited interest and if the disposition in her favour did not give her an absolute interest in the first instance, the fact that she succeeded as heir of her son would not enlarge that estate.

We think, therefore, that the widow has not an absolute estate with powers of disposal over the property. The appeal must be allowed and the suit must be remanded for decision on the remaining issues. The appellants to have costs here and in the Court below. Costs in the First Court will be costs in the cause.

W. C. A. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 113 OF 1922.

December 12, 1922.

Present.—Mr. Justice Spencer and

Mr. Justice Venkatasubba Rao.

SWAMINATHA MUDALIAR—DEFENDANT

•—APPELLANT

versus

KUMARASWAMI CHETTIAR AND

OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I. rr. 8, 10—Representative suit—Fresh plaintiffs, addition of, after decree.

It may be unusual to bring fresh plaintiffs on the record after a decree has been passed but there is authority for doing so in O. I. r. 8 of the Civil Procedure Code. [p. 285, col. 1.]

In a representative suit, all members of the class on whose behalf the suit is brought are in effect parties to the suit and O. I. r. 8 of the Civil Procedure Code expressly permits any person on whose behalf a representative suit is instituted to apply to the Court to be brought on the record, and the words of the rule are not limited as they are by O. I. r. 10 by the purpose being expressed as that of adjudication on the questions arising in the suit. [p. 285, cols. 1 & 2.]

Where certain decree-holders who have obtained a decree in a representative capacity neglect to enforce it for a number of years, the Court can allow other persons interested to be added as party plaintiffs and to take out execution of the decree. [p. 285, col. 1.]

Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar, 6 Ind. Cas. 229; 33 M. L. J. 483; 8 M. L. T. 33; 20 M. L. J. 546; (1910) M. W. N. 479, *Prayag Doss Ji Varu Mahant v. Srirangachari Varu*, 28 M. L. J. 133, *Krishnamachariar v. Chinnammal*, 18 Ind. Cas. 369; 24 M. L. J. 192; 13 M. L. T. 151; (1913) M. W. N. 194, *Vakhatchand Lakhmichand v. Advocate-General*, 8 B. H. C. R. 96, *Goodall v. Mussoorie Bank Limited*, 10 A. 97; A. W. N. (1887) 288; 6 Ind. Dec. (S. N.) 65, *Lingammal v. Chinna Venkattammal*, 6 M. 227; 7 Ind. Jur. 192; 2 Ind. Dec. (N. S.) 437, relied on. *Jotindra Mohan Tagore v. Bejoy Chand Mahatap*, 32 C. 483, distinguished.

Appeal against the order, dated 27th January 1922, of the District Court, East Tanjore, at Negapatam in E. A. No. 406 of 1920 in O. S. No. 1 of 1921.

Mr. K. Rajah Iyer, for the Appellant.

Messrs. K. Bhashyam Iyenger and K. S. Desikam, for the Respondent.

JUDGMENT.—This suit was instituted under section 14 of the Religious Endowments Act by three persons acting in a representative capacity. The decree obtained in the High Court on appeal was for the recovery of a certain sum of money as damages on behalf of the temple. Two

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our of the three plaintiffs are still alive and there has been no devolution of their interest upon the respondents. The District Judge's order does not purport to be one made under O. XXII, r. 10 and it is, therefore, not necessary for us to consider the applicability of that rule.

The District Judge has ordered the respondents to be brought on the record as decree-holders because they represent the temple in their capacity as trustees and because it is in the interests of the trust that the decree should be executed, the original decree-holder having neglected to enforce it for over five years.

It may be unusual to bring fresh plaintiffs on the record after a decree has been passed, but there is authority for doing so under O. I, r. 10 in *Vakhatchand Lakhmichand v. Advocate-General* (1) and in *Lingammal v. Chinna Venkatammal* (2), although it might be improper and inconvenient, in particular cases to add defendants after decree and to allow proceedings to be taken against them in execution [see *Goodall v. Mussoorie Bank Limited* (3)]. On the contrary, it was held in *Jotindra Mohan Tagore v. Bejoy Chand Mahatap* (4) that the power of the Court to add parties depends on whether the questions arising in the case are still *sub judice*. That may be a sound principle in suits where no other interests are involved but those of the individual plaintiffs and defendants.

In a representative suit, however, like the present, as observed in *Krishnamachariar v. Chinnammal* (5), all the members of the class are in effect parties to the suit and any one of them is entitled to bring himself on the record as an actual party [see also *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar* (6)].

Order I, r. 8 expressly permits any person on whose behalf a representative suit is instituted to apply to the Court to be brought on the record, and the words of this rule are

not limited, as they are by O. I r. 10, by the purpose being expressed as that of adjudication on the questions arising in the suit. In *Prayag Doss Ji Varu Mahant v. Tirumala Srirangachariar Varu* (7), which was a scheme suit, it was held that persons interested might enforce in execution the directions in the scheme.

The principle involved is the same here, and we, therefore, consider that the District Judge acted properly in bringing the respondents on the record.

The appeal is dismissed with costs.

V. N. V.

Appeal dismissed.

(7) 28 M. 319; 15 M. L. J. 133.

BOMBAY HIGH COURT.

CIVIL APPLICATION NO. 505 OF 1922.
December 15, 1922.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
GULABRAO MANYABA BHOITE,

DEFENDANT—APPLICANT

versus

VINAYAK BAPUSAHEB KADAM

—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908). O. XLI, r. 10—Security for costs—Discretion of Court—Poverty of appellant.

As a general rule, a Court is loath to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty. But each case must be considered on its own merits. Where an appellant has lost his case in the Trial Court, and an attempt to recover costs by the successful party has failed, security should be taken for the costs of the appeal. [p. 286, col. 1.]

Moneckji Limji Manchherji v. Goolai, 3 B. 141; 2 Ind. Dec. (N. S.) 162, distinguished.

Application.

Mr. D. C. Virkar, for the Applicant.

Mr. V. D. Limaye, for the Respondent.

JUDGMENT.—This is an application by a successful party in the Court below that this Court should demand from the appellant security for the costs of the appeal and of the original suit. The applicant proved that an attempt was made to execute the decree in his favour for costs, but without success. Undoubtedly, under O.

(1) 8 B. H. C. R. 96.

(2) 6 M. 227; 7 Ind. Jur. 192; 2 Ind. Dec. (N. S.) 437.

(3) 10 A. 97; A. W. N. (1887) 288; 6 Ind. Dec. (N. S.) 65.

(4) 32 C. 483.

(5) 18 Ind. Cas. 369; 24 M. L. J. 192; 13 M. L. T. 151; (1913) M. W. N. 194.

(6) 6 Ind. Cas. 229 33 M. 483; 8 M. L. T. 33; 20 M. L. J. 546; (1910) M. W. N. 479.

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XI/I, r. 10, the Appellate Court may in its discretion demand from the appellant security for the costs of the appeal or of the original suit, or of both. We were referred to the decision in *Maneckji Limji Mancherji v. Goolbai* (1) in which a similar application was made, under the corresponding section 549 of the then Civil Procedure Code (Act X of 1877). The Court declined to make the order, the Chief Justice saying "The poverty of the defendant is no ground for depriving him of his right to appeal." That was a decision on the facts of the case. It was reported, because, I presume, it was considered that a rule of guidance for the exercise of the Court's discretion was thereby laid down. But where the Court has been given absolute discretion to make an order for security for costs, then, in my opinion no Bench of Judges can lay down rules which purport to fetter the discretion of other Judges in any similar application which may be made thereafter. It is quite true that as a general rule a Court is loath to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty. But each case must stand on its own facts, and there may be cases in which a party should be directed to give security, at any rate for the costs of the appeal, before he is allowed to go further. In this case the appellant is a minor who filed a suit through his next friend, his natural father, asking for a declaration that he had been validly adopted. He has lost in the Trial Court, and we think that, as the costs in the Court below of the successful party could not be recovered, security should be given for the costs of the appeal. To that extent, therefore, we make the Rule absolute. One month is allowed to give the security. What the nature of that security should be is for the lower Court to decide. It does not matter where the security comes from so long as it is sufficient. Costs costs in the appeal.

W. C. A.

Rule-made absolute.

(1) 3 B. 141; 2 Ind. Dec. (N. S.) 162.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.
December 8, 1922.

Present:—Lord Phillimore, Sir John Edge, Kt., Sir Lawrence Jenkins, Kt., and Lord Salvesen.

BAIKUNTHA NATH CHATTORAJ

—APPELLANT

versus

PRASANNAMOYI DEBYA AND

ANOTHER—RESPONDENTS.

Evidence Act (I of 1872), s. 154, scope of—Hostile witness, declaration of—Court, power of—Will—Burden of proof—Forged document—Finding of Court.

There is nothing in section 154 of the Evidence Act as to declaring a witness hostile; that section merely provides that the Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. [p. 287, col. 2.]

The burden of proving a Will is on the party who sets it up, and if the Court finds that an alleged Will is not a genuine document, it ought to record a finding that the alleged Will is not proved. To record a finding that the Will is a forgery is to go beyond what the law requires. [p. 290, col. 2.]

Appeals from the decision of the Calcutta High Court, dated the 14th April 1921, reversing that of the District Judge, Bankura, dated the 20th February 1920.

Messrs. DeGruther, K. C., and K. Brown, for the Appellant.

Messrs. Lowndes, K. C., and Parikh, for the Respondent.

JUDGMENT.—These are consolidated appeals from two decrees of the High Court of Judicature in Bengal, dated the 14th April 1921, reversing two decrees of the Court of the District Judge of Bankura, dated the 20th February 1920.

Madhusudan Chatteraj, a Hindu governed by the Dayabhaga School of Hindu Law, died leaving four sons, Radha Ballav, Brahmananda, Raj Ballav, and the present appellant, Baikuntha Nath.

Brahmananda died in 1913 leaving all his property by Will to his widow, Mandakini Debi.

Mandakini died on the 16th September 1918, and her sister Prasannamoyi Debya the widow of Raj Ballav, and the respondent in these appeals, propounds in this litigation a paper writing, dated the 14th September, 1918, as the last Will of Mandakini.

She is opposed by Baikuntha Nath, her husband's younger brother, and by Ashutosh Chatteraj, Radha Ballav's son,

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The interest of the objectors is not in dispute.

The District Judge pronounced against the Will and granted Letters of Administration to Baikuntha Nath. The High Court, reversing this decision, ordered and decreed that Probate of the Will should issue to Prasannamoyi, and that the application for Letters of Administration made by Baikuntha Nath be dismissed.

The outline of the story as to the preparation and execution of the alleged Will as presented on behalf of the proponent is briefly as follows. On the 13th of September Natabar Mukerji, it is said, chanced to call on Mandakini, whom he describes as his Dharam mother, and found her suffering from fever. He was told by the night of that day that she intended to execute a Will, and that he should stay there to manage its execution. On the 14th at 2 P. M. he was asked to arrange for the execution of the Will, and on his protesting that he had no experience in Will drafting he was given a draft that had been prepared for Mandakini by a Pleader named Upendra Nath. A Pleader named Babu Bhut Nath Mandal was then called in; he examined the draft, and dictated the document now propounded to Natabar, who wrote it out.

At 4 or 4-30 in the same afternoon it was read over and explained to Mandakini, but as she was illiterate Natabar signed her name for her. The paper writing was signed by seven attesting witnesses, Bhut Nath Mandal, Kandrapa Behari Ghose, Raj Narayan Biswas, Trailokya Nath Karak, Nagendra Nath Ghose, Surendra Nath Mandal, and Gosta Behari Mandal. It was then taken to Prasannamoyi, who was in an adjoining hut, but as she, too, was suffering from fever, it was taken back to Mandakini, who, helped by Natabar, took the Will to another hut and placed it in an iron safe together with the draft. Natabar stayed at the *bari* that night and then left. Mandakini died on the 16th of September.

This is the proponent's version of what happened. The objectors contest its truth.

In proof of the execution the proponent has called Natabar, the writer, and the four of the seven attesting witnesses. On Surendra Nath Mandal no reliance has been placed

by either Court, and his evidence need not be considered.

Nagendra Nath Ghose does not support the proponent's case, for in his examination-in-chief he declared that he did not know whether Mandakini executed any Will, and that it was to a blank paper that he put his signature at the request of Ram Lal Gossain.

An application was, therefore, made to the District Judge to declare the witness hostile and to allow the proponent to cross-examine him.

This is a position for which provision is made by section 154 of the Evidence Act, which says nothing as to declaring a witness hostile but provides that the Court may *in its discretion* permit the person who calls a witness, to put any questions to him which might be put in cross-examination by the adverse party.

One of the Appeal Court's adverse comments on the Trial Judge's conduct of the case is that the cross-examination of this witness was improperly disallowed. No such objection was made in the grounds of appeal to the High Court, and it would seem as though this comment must have been made without the Court's attention being drawn to that portion of the order-sheet in which the District Judge remarks as the record of the deposition indicates, that the witness was virtually cross-examined though the Judge in fact did not think he had turned hostile.

On this part of the case, therefore, it only remains to consider the evidence of the writer, Natabar Mukherji, and the two attesting witnesses Bhut Nath Mandal, and Trailokya Karak.

In a sense Natabar is the most important figure. The part he is said to have taken has already been indicated.

Though his home was in the neighbourhood of Kundu Pushkarni where Mandakini's *bari* was, he was actually employed at the date of the alleged execution at the Nakarka colliery 300 or 400 miles distant. His story is that in September 1918, hearing of his wife's illness he returned to his home, which is six miles from Mandakini's *bari*, having taken seven days' leave for that purpose. He went on the 13th of September to see Mandakini reaching her *bari* about noon. On the 14th there was the preparation

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and execution of the Will, which has already been sufficiently described for the present purpose. If this be accepted, as it was by the High Court, as a true story, there would be no difficulty in holding the Will proved. But the District Judge before whom the witness was examined, did not believe Natabar's testimony. In arriving at this conclusion he was to a considerable extent influenced by the letter and post-card, Exhibits A and A-1. Though it possibly is not a matter of any great importance, it would seem probable, from such post-marks as are available that the post-card, contrary to what has been supposed, was later than the letter.

The District Judge regarded the letter as showing in the light of the facts to which he refers that Natabar was not in Kundu Pushkarni on the date the alleged Will is said to have been executed. The High Court did not share this view, and evidently was greatly influenced by the idea that Natabar was never called upon to explain the contents of the communication. The same contention has been urged on this appeal, but it is founded on a misapprehension.

The letter was not sprung on the proponent as a surprise at the trial. In the previous arbitration proceedings the letter and the post-card were produced evidently as relevant to the issue whether the Will set up by Prasannamoyi was a genuine and valid document, and for the purpose of raising a suspicion in the minds of the arbitrators, as indeed would seem to have been its affect (see the deposition of Harish Chandra Sarkar).

When then the letter and the post-card were shown to Natabar the purpose must have been well understood, and from the record of his deposition it is manifest that, after being shown the letter, he was directly asked whether it was not a fact that he was not at Mandakini's *bari* on the alleged date of execution.

On re-examination no attempt was made to elicit any explanation and the learned Judge delivered his judgment in eight days, when the incident and the impression it created must still have been fresh in his mind. In their Lordships' opinion the materials on the record when carefully examined do not support the High Court's criticism.

But it is not by these Exhibits alone that the District Judge was influenced. Natabar, though alleged to have been in constant attendance at Mandakini's *bari* from noon of the 13th to the night of the 14th, was not seen by the Doctor, Sham Charan Barat, who was the lady's medical attendant throughout her illness and saw his patient every day. And not only did he not see Natabar, but he deposes that he did not hear of any Will by Mandakini during the time he treated her. There are other witnesses to the same effect to whom allusion will be made later.

Bhut Nath Mandal is not only an attesting witness, but is said to have dictated the Will using for that purpose the draft, Exhibit 2. Though he is a Pleader of the Burdwan Court, his persistent attempt to evade his obligation to give evidence does not inspire confidence in him as a witness. The District Judge was unable to believe him, he certainly was in the best position to judge of his credibility, and no sufficient reason has been shown for disturbing his appreciation of this witness's testimony.

Trailokhya Karak is a junior servant of Prasannamoyi on the small pay of Rs. 48 a year.

He deposes to the due exposition of the paper writing, but the Trial Judge did not think him a witness on whose testimony its genuineness could be supported. And it is significant that while Trailokhya is called his senior and superior in service, Raj Narayan Biswas, the chief *Gomasta*, though an attesting witness, was not cited.

Prasanna was examined on commission. She does not depose to the actual execution of the paper writing and her evidence does not materially strengthen her case.

This will be an appropriate place at which to allude to the evidence of Upendra Nath Das. He is not a witness to the execution of the Will, but he deposes, and no doubt truly, to having prepared the draft Exhibit 2. The Courts in India have, in their Lordships' view, attached more importance and significance to this document than it deserves. There can be no doubt that the alleged Will was based on it, and with such modifications as were necessary for the purpose in hand was in effect a reproduction of it. It might have been of distinct value if the issue had been whether

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Mandakini had understood an instrument admitted or proved to have been executed by her, or if her mental capacity had been questioned. But that is not the issue here; the only matter in contest is the fact of execution by or on behalf of Mandakini. Upendra's statement that he cannot give the month or year of the draft, and that he cannot be positive if the draft was before or after the 16th September, which is the date of the Mandakini's death, may, in view of his intimate connection with the litigation, invite a certain amount of comment, but their Lordships find nothing on the record that would justify any imputation that this Pleader of 20 years' standing was party to any conspiracy or knowingly prepared the draft to further any sinister purpose. But, at the same time, their Lordships consider that his evidence has little or no bearing on the question whether or not the alleged Will was in fact executed.

From this survey of the evidence it is apparent that this is eminently a case where the value of the proof depends upon an appreciation by the Trial Judge of the credibility of the witnesses.

In their Lordships' opinion there is no sufficient reason shown for disturbing that appreciation, and in so saying they do not overlook what has been urged as to the propriety of the dispositions in view of the close relationship and intimacy between Mandakini and Prasannamoyi.

But the proponent's difficulties do not end with the infirmity of her direct evidence as to execution. There are other factors in the case which call for especial caution in approaching the proponent's story. The document was not actually signed by Mandakini, and so there is not the assurance of genuineness that would have been afforded by the presence on it of her recognized signature. Then, again, the absence of Mandakini's relations and connections invites comment, as does Prasannamoyi's conduct and her delay in putting forward the Will after Mandakini's death.

In contradiction of the story of the execution, several witnesses have been called who declare that, notwithstanding the opportunities of observation they possessed, Natabar was not seen by them at Mandakini's *bari* and no Will was mentioned. Another witness, Kalipada Roy, described

as a Doctor, deposed that he was asked by Kandarapa Ghose and Ram Lal Gossain to become a witness to a Will alleged to have been executed by Mandakini and further to say that he "had attended Mandakini during her last illness and that she executed a Will in presence of such and such persons." This, he says, was after the death of Mandakini. The District Judge did not disbelieve him.

The High Court regarded this witness as "obviously unreliable", apparently under the impression that his evidence was that he had been asked to be an attesting witness to a Will then in the safe. But that is not the sense in which their Lordships read his evidence, for the expression used by him points to a request to be a witness to the Will at the trial, and this involves no such impossibility as the learned Judges ascribe to his words.

Ananta Lal Ghose's evidence may merit the doubt thrown on it by the High Court. No great reliance was placed on it by the District Judge, nor will their Lordships treat it as of any value. It, however, calls for this remark that it does not, in their Lordships' opinion, justify the charge founded on it in the argument before this Board that there was a conspiracy on the part of the objectors to procure false evidence in order to defeat the Will. No such suggestion was made in the grounds of appeal to the High Court, or even in the appellate judgment or the case for the appellant on these appeals. It was first advanced in the argument before the Board, and in their Lordships' opinion has no adequate foundation.

It may be that when the proponent's case was closed the precise character of the adverse evidence in disparagement of the alleged Will was not anticipated, but the strength of the opposition must have been sufficiently apparent to show the urgent necessity for calling all available evidence. And yet Raj Narayan Biswas and Kandarapa Behari Ghose, two of the attesting witnesses, were not called, nor was Ram Lal Gossain, to whom Nagendra Nath Ghose refers, though he seems to have been assisting in the conduct of Prasannamoyi's litigation.

The conclusion at which the District Judge arrived after a careful consideration

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of the evidence and all the circumstances of the case was that the Will was not a genuine document, but a forgery. In so finding he went beyond what the law requires. The burden of proving a Will is on the person who sets it up, and it would have been enough for the purpose of this case to find, as their Lordships hold to be the case, that the alleged Will was not proved. Their Lordships will, therefore, humbly advise His Majesty that these appeals be allowed, the decrees of the High Court set aside, and those of the District Judge restored, with costs throughout. The respondent Prasannamoyi must pay the appellant's costs of these appeals.

Appeals allowed.

W. C. A.

Solicitors for the Appellant.—Messrs. *Watkins and Hunter.*

Solicitor for the Respondent.—Mr. *E. Dalgado.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 480 OF 1921.
November 8, 1922.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

SHRINIVAS LAXMAN NAIK
AND OTHERS—PLAINTIFFS—APPELLANTS
versus
CHANBASAPAGOWDA BASANGOWDA
GOWDUR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Mortgage-bond—Money payable by instalments—Entire sum payable on default—Default in payment—Suit to recover instalments in default only—Subsequent suit for remaining instalments—Cause of action—Limitation Act (IX of 1908), Sch. I, Art. 132—Civil Procedure Code (Act V of 1908), O. II, r. 2.

On 22nd October 1902 A executed a mortgage-deed in favour of B, which provided for payment of the mortgage-money by twelve annual instalments, and that in case of default of any one instalment the whole amount remaining due would be paid at once. Default having been made in payment of the first two instalments, B instituted a suit in 1905 to recover the amount of these instalments and obtained a decree. No further instalment was paid, so B on 20th May 1917 instituted another suit for the remaining ten instalments:

Held, that the right of action to sue for the whole amount of the mortgage having accrued to B in 1905, the suit was barred by limitation under Article 132 of Schedule I to the Limitation Act, and, further, that as B only sued for two instalments in 1905, instead of for the whole of the relief to which he was entitled the suit was also barred under O. II, r. 2, of the Civil Procedure Code. [p. 291, col. 1.]

Gaya Din v. Jhuman Lal, 28 Ind. Cas. 916; 37 A. 400; 13 A. L. J. 510, *Nathi v. Turst*, 63 Ind. Cas. 886; 43 A. 671; 19 A. L. J. 712 and *Nanna v. Ammani Anna*, 35 Ind. Cas. 418; 39 M. 981; 4 L. W. 77; 20 M. L. T. 174; (1916) 2 M. W. N. 125; 31 M. L. J. 865, followed.

Raichand v. Dhondo, 47 Ind. Cas. 313; 20 Bom. L. R. 773; 42 B. 728, not followed.

Second Appeal from the decision of the District Judge Bijapur, in Appeal No. 33 of 1919, confirming a decree passed by the Subordinate Judge at Bagalkot, in Civil Suit No. 215 of 1917.

Mr. G. N. Thakor, (with him Mr. H. B. Gumaste), for the Appellants.

Mr. G. P. Murdeshwar, for the Respondent.

JUDGMENT.

Macleod, C. J.—This suit was filed by the plaintiffs to recover on a mortgage-bond, the balance due. The mortgage-deed was passed on October 22nd 1902. It was for Rs. 1,200, and it provided for the payment of Rs. 1,200 by 12 annual instalments of Rs. 100 each. In case of default of payment of any one instalment the mortgagors agreed to pay the whole amount remaining due at once. There was a further clause to the effect that the defendants should pay interest at fifteen per cent. on the amount accrued due from the date of default until the date of payment. The defendant only paid Rs. 44 during 1902 and 1903. In 1905 the mortgagee filed Suit No. 173 of 1905 to recover the amount of the first two instalments and obtained a decree for Rs. 180. No evidence was given to show whether anything was paid under the decree. Then the mortgagee waited until May 20th 1917, when he filed this suit for the remaining ten instalments. Two main issues were raised:—Whether the plaintiff's suit was in time; and whether the suit was barred by O. II, r. 2, of the Civil Procedure Code.

Now, under the terms of the mortgage-deed in the case of default the whole amount was payable, and consequently a suit could

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be brought by the mortgagee to enforce payment of the money charged upon the immoveable property within twelve years from the default because the money became due on such default. It seems to have been urged that, because a party to whom money is due is not bound to file a suit, therefore, time is not running against him. If that argument were to hold good, it would nullify the Statute of Limitation, for no one is obliged to bring an action. What the Statute of Limitation lays down is, that if a party has a right of action, that right can only be allowed to remain in existence for a prescribed time. If he does not choose to bring a suit within the time prescribed then his right of action is gone. Therefore, it would appear that, certainly in 1905, the plaintiffs had a right of action to sue for the whole of the mortgage amount, and as they only sued for two instalments, when they ought to have sued for the whole amount, any later suit to recover the balance was barred under O. II, r. 2. The learned Judge found it unnecessary to find on that issue as he found on the question of limitation that the suit was barred. But, as a matter of fact, the two issues are really connected with each other, because if the right of action to sue for the whole amount arose in 1905, when the first default was made, then clearly the present suit was barred by limitation. It was also barred under O. II, r. 2, because plaintiffs chose to file a suit in 1905 for two instalments when they ought to have claimed the whole of the relief to which they were then entitled.

We have been referred to various decisions. In *Gaya Din v. Jhuma Lal* (1) a Full Bench held that if in a mortgage re-payable by instalments the whole amount could be recovered in the case of default, the mortgage-money became due on such default and Art. 132 of Schedule I of the Indian Limitation Act was applicable. Again, in *Nathi v. Tursi* (2) the same point arose in a case where a mortgage-bond provided a period for re-payment, but also provided that if the borrower made default in the payment of any instalment of interest, the creditor could sue for the whole amount due. It

was held that limitation, under Art. 132 of the First Schedule to the Indian Limitation Act, 1908, began to run from the date of the first default, that being the date when, according to the terms of the bond, the whole money became due. In the judgment their Lordships say (page 672*) :—

"The terms of the bond may be compendiously stated as providing that if the borrower makes default in the payment of any instalment of interest, the lender can sue for the whole amount, although a period is provided for re-payment if the borrower re-pays regularly according to the terms of the bond. It is impossible to hold, whether you call it an option or not, that a creditor has a right to sue; and yet that the money is not due. It is merely a question of contract. The borrower has agreed that the creditor shall have the right to sue for the whole of the principal and interest 'become due'."

Further they say :

"The liability to pay, or, in other words, the test of whether money becomes due or not, is the obligation which the borrower had taken upon himself by his signature to the written document. It cannot depend on the violation of the creditor. The violation of the creditor merely decides the remedy which he chooses to seek. No mortgagee or creditor is bound to sue."

We prefer to follow those cases rather than the contrary decision in *Narna v. Ammani Amma* (3). They are also in conformity with the decision of this Court in *Raichand v. Dhondo* (4) which no doubt was a case relating to the execution of an instalment decree, but the principle applicable is the same. We have also been referred to the decision in *Amrit Khanderao Kango v. Govind Ramchandra* (5) of Mr. Justice Heaton and myself where we held that the evidence showed that the parties had agreed that no advantage should be taken of the clause in the decree which enabled the creditor to take out execution for the whole amount.

But there is no evidence in this case

(3) 35 Ind. Cas. 418; 39 M. 981; 4 L. W. 77; 20 M. L. T. 174; (1916) 2 M. W. N. 125; 31 M. L. J. 865.

(4) 47 Ind. Cas. 313; 20 Bom. L. R. 773; 42 B. 728.

(5) 58 Ind. Cas. 65; 22 Bom. L. R. 919; 44 B. 840.

(1) 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510.

(2) 63 Ind. Cas. 886; 43 A. 671; 19 A. L. J. 712.

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that there was an arrangement between the mortgagor and mortgagee that, in spite of the default, the clause in the mortgage-bond enabling the mortgagee to sue for the whole amount should be treated as a nullity. In fact, there is no evidence whatever of any communication between the plaintiffs and the defendants with regard to this mortgage after the first payment was made of Rs. 44. We do not know whether the defendant appeared in the suit which was filed in 1905, and it is impossible for us to find anything in the record from which we could infer that there was any agreement between the parties which would enable us to hold that it was arranged that the mortgage-money should not be considered as having become due when default was made in paying instalments.

The result must be that we think that the decision of the lower Court on the question of limitation was correct. It follows that the appeal must be dismissed with costs.

Crump, J.—I concur.

W. C. A.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 352 OF 1918 AND 222 OF 1919.

September 14, 1922.

Present:—Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao.

TADÉPALLI SUBBÁ RAO GARU AND OTHERS—DEFENDANTS—APPELLANTS

versus

SRI BALUSU BUCHI SARVARAYUDU AND OTHERS—PLAINTIFFS—DEFENDANTS
—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 60, 76, 83, 91—Mortgage—Mortgagee becoming owner of part of mortgaged property—Redemption by assignee of portion of equity of redemption—Tender, effect of—Account, basis of—Redemption suit—Decree—Deposit of mortgage-money—Withdrawal by mortgagee—Acquiescence—Appeal.

The assignee of a share only of the mortgagor's interest is a person entitled under section 91 of the Transfer of Property Act to redeem the whole mortgage and to deposit the whole of the mortgage-debt notwithstanding that the mortgagee has become owner of part of the mortgaged property. This statutory right is not taken away by recognition in section 60 of the Act of the right of partial redemption in certain cases. [p. 223, cols. 1 & 2.]

A tender or deposit by the assignee in such a case must be of the whole amount of the mortgage-debt without any proportionate reduction in respect of the part of the mortgaged property purchased by the mortgagee where such reduction has not been ascertained either by agreement or by Court. [p. 293, col. 2.]

Though in such a suit for redemption, the mortgagee has no right to retain possession after the tender, having regard to practical convenience and the scheme of the Transfer of Property Act, the proper course for the Court to adopt is to determine the amount of the mortgage-debt for which the properties purchased by the mortgagees are liable and to allow the redemption of the rest only, on payment of the proportionate amount and settle all the questions arising between the parties so as to obviate the necessity for a fresh suit to adjust the rights of the owners of the equity of redemption. [p. 295, col. 1.]

The effect of a lawful tender or deposit of the mortgage-money is to determine all the mortgagee's rights including his right of retaining possession and transfer them to the redeeming mortgagor and this principle is equally applicable to a case where part of the mortgaged property has been purchased by the mortgagee. [p. 293, col. 2.]

In taking account of the liability of a mortgagee remaining in possession after a lawful tender or deposit for the gross receipts of the mortgaged property under section 76 (1) of the Transfer of Property Act, the mortgagee is entitled to credit for amounts paid after tender to meet the revenue demands on the mortgaged property, for necessary repairs and collection charges. [p. 294, col. 1.]

Bank of New South Wales v. O'Connor, (1889) 14 A. C. 273; 58 L. J. P. C. 82; 60 L. T. 467; 38 W. R. 465; *Asima Bibee v. Sheikh Ahmudee*, (1854) S. D. A. N. W. P. Vol. IX p. 1, referred to.

Per Krishnan, J.—The right to deposit the mortgage-money in Court under section 83 of the Transfer of Property Act is co-extensive with the right to sue for redemption. Once a decree is passed settling the rights of parties on redemption, what is thereafter done should be referred to that decree. The payment of the mortgage-money thereafter can only be under that decree and not under section 83 of the Transfer of Property Act which no longer applies. Where the mortgagee draws out the money deposited in Court after the decree, there is no acquiescence in the decree so as to render an appeal from it incompetent. [p. 298, col. 1.]

Ram Chandra Marwari v. Rani Keshobati Kumari, 2 Ind. Cas. 935; 36 I. A. 85; 10 C. L. J. 1; 6 A. L. J. 617; 6 M. L. T. 1; 11 Bom. L. R. 765; 13 C. W. N. 1102; 36 C. 840; 19 M. L. J. 419 (P. C.), *Dal Singh v. Pitam Singh*, 25 A. 179; A. W. N. (1903) 2, distinguished.

APPEAL NO. 352 OF 1918.

Appeal against a decree of the Court of the Additional Temporary Subordinate Judge, Rajahmundry, in Original Suit No. 4 of 1917.

TADEPALLI SUBBA RAO GARU V. PALUSU BUCHI SARVARAYUDU.

APPEAL NO. 222 OF 1919.

Appeal against a decree of the Court of the Temporary Subordinate Judge, Rajahmundry, in E. A. No. 538 of 1918, in O S. No. 4 of 1917, on the file of the Court of the Additional Temporary Subordinate Judge, Rajahmundry.

These appeals and the Memoranda of Objections came on for hearing on the 7th and 8th April 1921, and having stood over for consideration till the 28th April 1921, the Court (Wallis, C. J., and Krishnan, J.) delivered the following

JUDGMENT.

Wallis, C. J.—These are appeals by the defendants from the preliminary decree and final decree in favour of the plaintiff against the defendants-mortgagees who refused to restore the mortgaged property in spite of the mortgage-debt having been deposited by the plaintiff under section 83 of the Transfer of Property Act. The plaintiff is the assignee of three-fourths of the mortgagor's interest in item one and the mortgagees are also found to have become the owners of the equity of redemption in parts of the mortgaged property which were sold for arrears of revenue which had accrued on other property not the subject of the mortgage belonging to the heirs of the deceased mortgagor. The plaintiff impugned the revenue sales and also contended that the purchases were made *benami* for the mortgagors, but the Subordinate Judge found that the plaintiff had failed to establish his case on those points and I agree with my learned brother that in the argument in the Memorandum of Objections we have not been shown any sufficient reason for differing from him on this point. The case must, therefore, be dealt with on this footing.

The first question that arises is, whether the plaintiff is entitled, as the Subordinate Judge has found, to make a deposit of the whole mortgage-debt notwithstanding that the mortgagees have become the owners of part of the mortgaged property. On this question, I think the plaintiff was entitled to do so under the provisions of the Transfer of Property Act. They were undoubtedly persons entitled under section 91 of the Transfer of Property Act to sue for redemption and consequently come within the words "or any other person entitled to

institute such suit" in section 83 so as to entitle him to make a deposit under that section. These statutory rights are not taken away by the recognition in section 60 of the right of partial redemption where the mortgagee has become the owner of part of the mortgaged property. It was no doubt held in *Marakar Akaih Kondarakayil Mamu v. Punjapatah Kutlu* (1) that where the mortgagee had acquired a part of the mortgaged property, the mortgagors could not even sue for redemption until the mortgagor had obtained a decree for partition, but this decision was before the Transfer of Property Act and even then was of very questionable authority for reasons which will appear later.

In the present case the plaintiff tendered the whole amount of the mortgage-debt without any proportionate reduction in respect of the part of the mortgaged property purchased by the mortgagee. On the principle of the greater including the less, *omne majus continet in se minus*, the tender was good even if they were entitled to tender a lesser sum, but, in my opinion, they were not, as the amount of the proportionate reduction in the mortgage-debt had not been ascertained either by agreement or by the Court, and in these circumstances it cannot be said that there was any lesser sum which the plaintiff was entitled to tender or the mortgagees were bound to accept.

The effect of a lawful tender or deposit is to determine the mortgagee's rights as distinguished from his liabilities under the mortgage including his right to retain possession, and, where one of several mortgagors redeems the mortgage, to transfer such right of possession to the redeeming mortgagor who is in turn entitled to retain it until redeemed by the other mortgagors. This is the principle embodied in section 95 which provides that, "Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession." This principle is, in my opinion, equally applicable to a case where part of the mortgaged property has been purchased by the mortgagee.

(1) 6 M 61; 2 Ind. Dec. (N. S.) 321.

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In such a case the mortgagee's right to possession as mortgagee is equally determined by the tender or deposit and transferred to the redeeming mortgagor. The question as to the proper form of decree to be passed when he refuses to accept the tender will be considered later.

Another question which arises in these appeals is as to the extent of the liability of a mortgagee remaining in possession after a lawful tender or deposit to account for the gross receipts of the mortgaged property under section 76 (1). On this clause the Subordinate Judge has held that the mortgagees are not entitled to credit for amounts which they paid after the tender to meet the revenue demands on the mortgaged property, and for necessary repairs and collection charges and the commentaries and one or two cases bear out this view, but in none of them has the clause been very fully considered. Such a rule would involve great hardship to a mortgagee who refused to accept the tender under a *bona fide* claim of right. It is often exceedingly difficult under the existing law to say whether a transaction amounts to a mortgage or a sale, and where it is ultimately found to be a mortgage, it would be very hard to refuse the mortgagee credit for all the necessary expenses incurred by him whilst contesting the right to redeem. As observed in argument, it would put him in a worse position than a trespasser, and there seems no need for so stringent a rule. There is nothing like it in England where a mortgagee who refuses to accept the tender may have to bear the costs of the suit for redemption necessitated by his refusal and also loss of interest from the date of the tender, a provision now embodied in section 84 of the Transfer of Property Act, *Bank of New South Wales v. O'Connor* (2). In the case of his being in possession such a mortgagee would also have to account for the gross profits; but there is no authority for saying that he would not be entitled to all due allowances. I do not think that clause (1) when properly understood imposes any larger liability than would be incurred by a mortgagee

in England. All that it says is, that he, that is, the mortgagee, must, notwithstanding the provisions in the other clauses of this section, account for the gross receipts from the mortgaged property from the date of the tender or the earliest occasion when he could draw the money out of Court. He does so account in legal parlance when he brings the whole gross receipts into account, but the section does not say that when he brings the whole gross receipts into account he is not to have the benefit of the same allowances as a trespasser. If the Legislature had intended to enact in this matter a novel rule of a drastic character, I think they would have used clearer language and would at least have said "notwithstanding anything" in section 72 as well as notwithstanding anything in the other provisions of section 76, because it is section 72 which deals with the credit side of a mortgagee's account and section 76 deals mainly with the debit side. Further, there is nothing in the history of the clause to suggest that they had any such intention. It is not to be found in the rules as to transfer of property appended to the Sixth Report of the Indian Law Commission, 1870, or in the Transfer of Property Bill based on these rules which was introduced in 1877, but was inserted by the Select Committee who re-drafted the Bill with express reference to the case of *Asima Bibee v. Sheikh Akmudee* (3) as cited in Macpherson on Mortgages which was then the accepted text book on mortgages in India. It was there held that after a lawful tender a mortgagee continuing in possession was not entitled in accounting for the profits accruing subsequently to the tender to the benefit of the stipulations in the mortgage-deed. The mortgage-deed had made the mortgagor responsible for any balances due from farmers and cultivators of the land and contained other stipulations as to the way in which the profits should be estimated. The Court held that the effect of the tender was to render the mortgage-deed of no effect from the date of the

(2) (1889) 14 A. C. 273; 58 L. J. P. C. 82; 60 L. T. 4671 38 W. R. 465.

(3) (1854) S. D. A. N. W. P. Vol. IX p. 1.

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tender and to put an end to the mortgagor's liability for the balances in question and observed: "Upon the same principle, the appellant is entitled to the benefit of the tender in the mode of calculating the claim, the proceeds of the estate being estimated according to the gross *jamabandi* for 1252 *Fasli* without reference to the terms stipulated in the deed."

But for the words "notwithstanding the provisions in the other clauses of this section," clause (i) might be regarded as merely giving statutory effect to this decision. These words apparently were inserted in the clause *ex abundante cautela* to meet any possible contentions that might be based on the other clauses of the section and especially on clause (h) read with section 77. However this may be, they are, not, in my opinion, sufficient, especially having regard to the omission of any reference to section 72, to put the mortgagee in accounting for the gross receipts of the property in a worse position than a trespasser, and I think the Subordinate Judge was wrong in disallowing the items claimed by mortgagees on this head.

The Subordinate Judge has held that the plaintiff was entitled on the tender to take possession of the whole of the mortgaged properties, and has left the rights of the owners of the equity of redemption including the mortgagees to be adjusted in other proceedings. It is no doubt the practice in England to pass such redemption decrees subject to the rights of other persons interested. The appellants contended in the lower Court and here that the Subordinate Judge should have left them in possession of the items of mortgaged property purchased by them and allowed the plaintiff to redeem the remaining properties at a proportionate reduction instead of driving them to a fresh suit. It is, of course, true that the appellants had no right to retain possession after the tender and should be made accountable on that basis, but having regard to practical convenience and the scheme of the Transfer of Property Act I think the proper course in a case like this would have been to determine the amount of the mortgage-debt for which the properties purchased by the appellants were liable and to have finally settled the questions arising between the parties so as to obviate the necessity for a fresh suit. I concur

with the order proposed by my learned brother.

IN APPEAL No. 352 OF 1918.

Krishnan, J.—The suit from which this and the connected appeal arise was one brought to redeem an usufructuary mortgage executed in 1896 by the late Ex-Nawab of Masulipatam in favour of one Tadeipalli Purushottam, now deceased, the then manager of the joint Hindu family of defendants Nos. 1 to 15, 18 to 34 and 38, for one lakh of rupees with the condition *inter alia* that the usufruct was to be taken in lieu of interest. The properties mortgaged consisted of 9 items. Plaintiff is the purchaser of a three-fourths share in Item No. 1 subject to the mortgage. Defendants Nos. 16, 17 and 35 to 38 are stated to be assignees of the shares in the mortgage of two of the members of the mortgagee's family and defendants Nos. 39 to 53 are the heirs, or assignees from the heirs, of the original mortgagor the Nawab who died in 1898. Defendants Nos. 54 to 61 claim to be purchasers of the equity of redemption in some of the items mortgaged. These defendants Nos. 39 to 61 were added as parties as persons interested or claiming to be interested in the equity of redemption. The plaintiff deposited in Court the whole of the mortgage-money Rs. one lakh under section 83 of the Transfer of Property Act in April 1916 but the mortgagees refused to receive it unconditionally and be redeemed. Hence this suit.

The lower Court passed a preliminary decree for redemption in plaintiff's favour directing the mortgagees to take the money deposited in Court and to deliver up possession of all the 9 items to him; and it also directed that he was to get the rents and profits of the mortgaged properties from the date of suit to date of delivery or for 3 years, whichever was the shorter period, at a rate to be determined subsequently. Appeal No. 352 is the appeal against the decree by the mortgagee; two Memoranda of Objections have also been filed against that decree one by plaintiff and the other by two of the heirs of the late Nawab, challenging the finding of the learned Subordinate Judge that the equity of redemption of Items Nos. 6 and 9 had been validly sold in a revenue sale and had passed

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from the mortgagors, but raising no other objections. A final decree was subsequently passed settling the amount of mesne profits which the defendants were to pay to the plaintiff, disallowing their claim to deduct the Government Revenue paid and the charges said to have been incurred for repairs and for collection. The connected Appeal No. 222 is by the mortgagees against that final decree and plaintiff has filed a memo. of objections in it claiming his costs which had been disallowed.

Several important questions have been raised in these appeals. It will, however, be convenient to dispose of the Memoranda of Objections in Appeal No. 352 first, as they raise the question whether the finding that the equity of redemption became vested in part in the mortgagees is correct or not, as much of the argument in the case depends on it. There is no real dispute about the facts regarding it. Arrears of Government revenue became due by the mortgagor's debts on certain properties belonging to them in the Cuddapah District. For the realisation of these arrears the equity of redemption of Items Nos. 6 and 9 was attached though they were situated in a different district and was sold in revenue sale and purchased, the latter by 54th defendant, a clerk of the mortgagees, and the former by the 55th defendant, his brother-in-law. The attempts of the mortgagor to get these sales set aside failed and the sales were confirmed. It is the mortgagor's case that these purchases were *benami* for the benefit of the mortgagor and it is contended that under section 90 of the Indian Trusts Act the mortgagees should be treated as having made the purchases and as holding the properties for the benefit of the mortgagor. The argument, however, fails as it is not shown that the mortgagees availed themselves of their position as such in getting the properties sold or in buying them, even if we assume that the purchases by 54th and 55th defendants were really *benami* for them. The sale was not for arrears of revenue due on the mortgaged properties and the mortgagees were under no obligation to pay the revenue on the mortgagor's other properties. It cannot, therefore, be said that they committed any default in allowing the equity of redemption to be sold for such arrears. It

was, however, urged that as a sum of Rs. 2,500 had been left with the mortgagees by the mortgagor and that they should have paid the arrears out of it when the mortgaged properties were attached, to save them from being sold. But the evidence is that this money was left with the mortgagees for the express purpose of effecting repairs to the mortgaged properties and it could not, therefore, be properly used by them for paying any arrears of revenue. No other objection has been urged before us regarding these sales and we must, therefore, accept the finding of the Subordinate Judge on Issue No. 3 that the revenue sales are valid and binding on the mortgagor. The further plea that the purchases were *benami* for the mortgagor is not raised now and is not supported by any evidence. The Memoranda of Objections must, therefore, both be dismissed with costs.

Turning now to the Appeal No. 352 before us the main points argued were those raised (1) in Issues Nos. 1 and 2 and (2) in Issue No. 8, namely, whether plaintiff is entitled to get possession of all the properties including Items Nos. 6 and 9 on redemption and whether the payment into Court under section 83 of the Act was a valid deposit in law. Taking the first question first, there can be no doubt that under section 60 of the Transfer of Property Act a person entitled to a share only of a mortgaged property cannot redeem his share only on payment of his proportionate share of the mortgage-money except in the only case where the mortgagee or when there are more mortgagees than one, all of them has or have acquired in whole or in part the share of a mortgagor. In fact, the rule is that a mortgage should be redeemed as a whole; the right to redeem in part is given to a mortgagor as a privilege in the exceptional case noted above to avoid multiplicity of suits and in none else. Now, in the present case the plaintiff has sued to redeem the whole mortgage. I think he was bound to do so for he could not take advantage of the exception because the equity of redemption in Items Nos. 6 and 9 is not shown to have passed to all the mortgagees as a body but only to some of them as shown by the Subordinate Judge in paragraphs 14 and 15 of his judgment. Plaintiff was, therefore, clearly entitled to redeem the whole mortgage. Nevertheless, I agree with the learned Chief

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Justice that the more convenient course here is to decide in this case itself, as all the parties are before us, the question how much of the mortgage-money should be taken as proportionately chargeable on Items Nos. 6 and 9 and to allow redemption of the rest of the items only on payment of that proportionate amount. This can be done without prejudice to plaintiff's claim to mesne profits and without deciding between the several persons entitled to the mortgagee's interest their rights *inter se*. I would, therefore, call for a finding on this question on fresh evidence.

On the next question as to the validity of the deposit in Court, I agree with the learned Chief Justice that, under section 83 the right to deposit the mortgage-money in Court is co-extensive with the right to institute a suit for redemption as is apparent from the wording of the section. A person who owns a share only of the equity of redemption is thus, in my opinion, as much entitled as a person owning the whole of it to take advantage of section 83 by depositing the amount due on the mortgage, and as in this case I have held that the plaintiff is entitled to redeem the whole mortgage he was clearly entitled to deposit the whole mortgage money in Court as he did. In my opinion, the section applies equally to cases where the mortgagee has obtained a share of the equity of redemption for there is no limitation in its language. It is not necessary in this case to consider whether, in such circumstances, the mortgagor should deposit the whole mortgage-amount due into Court, or only that portion of it which he would have to pay if he were taking advantage of the exception in the last clause of section 60; for the mortgagor in this case has paid the whole mortgage-money. The objection that the plaintiff could not make a valid deposit because he was only the owner of a share of the equity of redemption and because some of the mortgagees had also become entitled to a share in it must thus be overruled.

A further objection was raised that the deposit ceased to be a valid one when the plaintiff through his Vakil opposed the application of the defendants under Exhibit IV to be paid the amount deposited and got it dismissed. If he improperly prevented the mortgagees from drawing out the money

the tender may become bad under section 84 of the Act, but what happened here was the defendants wanted to take the money without prejudice to certain contentions they were raising and they asked for an order of Court to that effect. This appears from Exhibit IV itself. Plaintiff objected to the Court making any such order, as, I think, he was perfectly entitled to do; he did not object, so far as I can see, to the money being drawn out by them and I do not think his action affected the validity of his tender in any way. I, therefore, agree that plaintiff is entitled to the advantages flowing from such a deposit. What those advantages are in this case form the subject of the connected Appeal No. 222 and I shall consider the question there.

In this appeal one further argument raised by the respondent remains to be considered. It was contended that because the defendants drew out the money deposited in Court after the decree of the lower Court and pending the appeal to this Court, they must be taken to have acquiesced in that decree and their appeal is, therefore, incompetent. The facts bearing on this objection are not clear. Some of the money seems to have been taken away not by the defendants but by their attaching creditors and that can imply no acquiescence at all on defendants' part. Whatever they drew out themselves they seem to have drawn out in execution of the decree in this case. Execution of a decree has never been held to estop the decree-holder from appealing from it so far as it is against him.

Reliance was, however, placed by the learned Vakil for the 1st respondent for his objection, on the ruling in *Ram Chandra Marwari v. Rani Keshobati Kumari* (4). On examining that case it will be found to be entirely distinguishable. Their Lordships were considering the effect under the 2nd clause of section 83 of a withdrawal of money which had been deposited in Court in full discharge of the mortgage-debt. There was no decree in that case prior to the withdrawal. The case reported in *Dal Singh v. Pitam Singh* (5) was also relied on. In

(4) 2 Ind. Cas. 935; 35 I. A. 85; 10 C. L. J. 1; 6 A. L. J. 617; 6 M. L. T. 1; 11 Bom. L. R. 755; 2 C. W. N. 1102; 36 C. 840; 19 M. L. J. 419 (P. C.).
(5) 25 A. 179; A. W. N. (1903) 2.

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that case no doubt the money was taken out of Court after the decree of the Appellate Court and pending a second appeal. The facts of that case, however, are not very clear, for in meeting the argument that the money should be deemed to have been taken out in execution of the redemption decree, the learned Judges say that the appellants as defendants against whom the decree for redemption had been passed, were not the parties to apply for execution and that in the application they made to have the money paid out it was distinctly stated that it was lying in deposit under section 83, Transfer of Property Act. In the present case there is a clear order in the decree that the defendants were to take out the money in Court and it would, therefore, seem to be distinguishable from the Allahabad case. Otherwise, with all respect to the learned Judges, I would have been unable to follow their ruling. Once a decree is passed, settling the rights of parties on redemption, what is thereafter done should be referred to that decree. The payment of the mortgage-money can only be under that decree and not under section 83, Transfer of Property Act, which no longer applies. This objection must also be overruled.

Before disposing of this appeal it is necessary to call for a finding on the question "What are the proportionate amounts of the mortgage-debt chargeable upon Item No. 6 and Item No. 9?" The finding must be arrived at in the manner explained in *Ponnamballa Pillai v. Annamalai Chettiar* (6). Fresh evidence will be allowed. Finding in 2 months after the re-opening. Objections 10 days.

IN APPEAL NO. 222 OF 1919.

The question in this appeal turns on the meaning to be given to the expression "account for the gross receipts" in section 76 (i) of the Transfer of Property Act. The mortgagees claimed to deduct from the rents received by them certain sums of money for (1) revenue paid to Government on the mortgaged properties (2) repairs effected to them and (3) collection charges for collecting the rents and profits. The learned Subordinate Judge has dis-

allowed the whole of these three items. It is contended in appeal that all these should be allowed in favour of the mortgagees.

As found in the connected appeal, the mortgage-money was properly deposited in Court by the plaintiff under section 83 and if the mortgage was one which provided for a rate of interest, that interest would have ceased to run under section 84. But in this case we have a mortgage with possession with the condition that the usufruct was to be taken in lieu of interest; section 76 (i), therefore, applies. The Subordinate Judge construes the words "account for gross receipts" as meaning "account to the mortgagor for the total receipts from the mortgaged properties without any deductions whatsoever," and he relies on *Beni Prasad v. Narain Das* (7), *Satyabadi Behari v. Harabati* (8) and Shepherd and Brown's Commentary on the Transfer of Property Act. There is no authority cited by the commentators for their opinion; and there is nothing in *Satyabadi Behari v. Harabati* (8) which supports the Subordinate Judge's view. In the case in *Beni Prasad v. Narain Das* (7) no doubt collection charges were disallowed but there is no discussion of the meaning of the words in question, in the judgment. There is thus no real authority on the point.

To take the meaning that the Subordinate Judge has given to the words would, as pointed out by the learned Chief Justice, impose an unduly excessive burden upon a mortgagee in possession who fails to accept a valid tender or deposit. Section 84 imposes on the mortgagee, in such circumstances, only the liability of interest ceasing to run; and in the case of a mortgagee in possession who takes his interest from the usufruct, the application of that rule would only result in his having to account for the whole of the usufruct without deducting anything for interest but it would not affect in any way his right to any other deductions he may be entitled to. Should we then construe the words of section 76 (i) as imposing a much larger liability by taking away from him all rights of deduction? There is no reason why a mortgagee in possession should be treated by the Legislature

(6) 55 Ind. Cas. 666; 43 M. 372; 38 M. L. J. 239; (1920) M. W. N. 235; 11 L. W. 429 (F. B.).

(7) 5 Ind. Cas. 529.

(8) 34 C. 223; 5 C. L. J. 192.

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in a more stringent manner than any other mortgagee committing the same default. I think full effect can be given to the words "account for gross receipts" by holding that in the mortgage account to be made up for redemption, the mortgagor should be debited with the total receipts from the mortgaged property without reference to any covenants between the parties in the mortgage-deed to take any particular amount as representing such receipts or to appropriate anything for himself towards his interest or otherwise. The words will then have no bearing on the question of deductions claimed under the provisions of the Statute. The history of the provision as set out by the learned Chief Justice shows that this is the proper meaning to be attached to them. The words were introduced for the first time by the Select Committee on the Transfer of Property Bill and their report shows that the provision was taken from the case of *Asima Bibee v. Sheikh Ahmudee* (3). In that case the tender by the mortgagor was found to be valid and legal and the question was what surplus profits alleged to have been realised by the mortgagees in possession, the mortgagor was entitled to. The learned Judges held that on the tender being made the condition and stipulations in the deed in favour of the mortgagees ceased to be in force and, therefore, they were not entitled to interest thereafter and that they could not rely on an express stipulation in the deed which made the mortgagor answerable for balances due from farmers and cultivators from *Fash* 1252 and that the proceeds of the estate should be estimated according to the gross *jamabanli* without reference to the terms stipulated for in the deed. They, however, allowed the mortgagees credit for collection expenses. It would thus seem that the term "gross receipts" has no reference to statutory deductions but only to the stipulations in the deed. A mortgagee in possession who wrongly refuses to accept a tender or deposit does not thereby become a trespasser and cease to be a mortgagee. See *Satyabadi Behara v. Harabati* (8) and *Rukhminabai v. Venkatesh* (9). The duties imposed on him by section 76 continue in force against him and it will be very strange

to hold that though he is compelled by law to make certain payments such as the Government revenue, he is not to get them repaid. I think the words in section 76 (i) do not necessitate such a construction and that they only mean that the mortgagor should be debited in the account with the total receipts from the mortgaged property without reference to the stipulations in the mortgagee's favour in the deed. If the mortgagee proves that he has made payments from the income validly under clauses (c) and (d), to that extent I would hold that he has accounted for the receipts. It seems to me that the words "notwithstanding the provisions in the other clauses of this section" have been added to clause (i) out of abundant caution as the learned Chief Justice has pointed out, to make it clear that the special rule in that clause is to prevail against the general rule embodied in clause (h) which enables the mortgagee to appropriate the receipts himself towards his interest and principal. They cannot be read as extending the scope of the words "account for gross receipts."

One other question has been raised on the construction of section 76 clause (i), namely, that the mortgagees are liable only for the total receipts or in other words for the total amount of rents and profits actually collected by them and not for those left uncollected. Section 76 (i) no doubt speaks only of receipts and under that section it will be difficult to make the mortgagees liable for uncollected rents and profits as the Subordinate Judge has done. But section 76 (b) imposes on the mortgagee in possession the duty of collecting the rents and profits and the last clause of the section makes them liable for any loss resulting from their failure to perform that duty. Their liability for uncollected rents and profits extends, therefore, only to the extent to which it can be brought within those provisions and does not depend on section 76 (i). No doubt, section 77 provides that clauses (b), (d), (g) and (h) of section 76 shall not apply to cases where by the contract between the parties the mortgagees are to take the receipts from the mortgaged property towards interest as was the covenant in the contract before us. But when on deposit of the mortgage-money in Court that covenant ceased to be in force,

(9) 31 B. 5271 9 Bom. L. R. 938.

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the excepted clauses became applicable to the mortgagees.

We have now to consider what deduction the mortgagees are entitled to. As regards the Government revenue alleged to have been paid, it seems clear they were entitled to pay it under section 76 (c) and on the view I have taken they are entitled to credit for it in the mortgage account. Collection charges were also properly incurred by them under section 72 (a) and they are entitled to credit for them also. The last item is the charge for repairs. This seems to stand on much the same footing. After the deposit was made in Court and the covenant for taking the usufruct for interest ceased to be in force, section 77 ceased to apply and section 76 (d) became applicable thereafter. The mortgagees were, therefore, entitled to pay the charges for any necessary repairs from the rents and profits and claim credit in the account.

No other question has been argued in this appeal. A fresh finding must be called for from the Subordinate Judge as to the proper amount payable by the mortgagees to the plaintiff for the *Faslis* in question and subsequent *Faslis* so far as necessary in the light of the above observations. In taking the account Items Nos. 6 and 9 will also be included. Fresh evidence may be taken and the finding returned at the same time as the finding in the connected appeal and ten days will be allowed for objections as in that case.

The Memorandum of Objections as to costs will stand over for disposal with the appeal.

In pursuance of the order contained in the above judgment, the Subordinate Judge of Rajahmundry submitted the following

FINDINGS.

IN APPEAL NO. 352 OF 1918.

In this appeal I have been called upon to submit a finding on the question "what are the proportionate amounts of the mortgage debt chargeable upon Item No. 6 and Item No. 9?"

2. In the judgment in the appeal it is pointed out that the finding must be arrived at in the manner explained in *Ponnambala Pillai v. Annamalai Chettiar* (6). The principle laid down in that decision is that the proportionate amount of a mortgage-

debt chargeable upon a portion of the mortgaged property would be that which bears the same ratio to the whole mortgage debt as does the value of that portion to the value of all the mortgaged properties taken together.

* * * * *

IN APPEAL NO. 222 OF 1919.

In this matter the question which has been referred by the High Court for a finding is:—

"What is the proper amount payable by the mortgagees as mesne profits for the plaintiff for the *Faslis* in question and subsequent *Faslis* so far as is necessary?"

* * * * *

10. The result is that the mesne profits which the plaintiff is entitled to get from the several items for *Faslis* 1326 to 1330 which takes us to 3 years from the date of the preliminary decree, for which period it is that under the terms of that decree the plaintiff would be entitled to recover mesne profits are as follows:—

No. of items.	Amount.		
	Rs.	A.	P.
Item 1	15,366	0	0
Item 2	1,375	0	0
Items 3 to 5	270	0	0
Item 6	1,462	12	0
Item 7	1,525	12	10
Item 8	85	9	0
Item 9	12,168	1	9
TOTAL	31,253	3	7

11. I find accordingly upon the question which has been referred to me by the High Court. I have only to add that this finding proceeds on the basis of the statement filed by the parties in Court on 1st February 1922 subject to the modifications above mentioned with regard to item 1 and that that statement may be read as part and parcel of this finding.

IN APPEAL NO. 352 OF 1918.

Mr. S. Srinivasa Iyengar, for the Appellants.

Messrs. V. Ramadass, A. Krishnanswami Iyer, N. Rama Rao and K. G. Babu Rao, for the Respondents.

IN APPEAL NO. 222 OF 1919.

Mr. V. Ramadoss, for the Appellants,

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Messrs. P. Somasunderam, T. Ramachandra Row, P. Seva Sundaram, and Lakshmana, for the Respondents.

These appeals and the Memorandum of Objections in Appeal No. 222 of 1919 come on for hearing on the 25th July 1922 after the return of the findings of the lower Court upon the issues referred by this Court for trial, the Court (Krishnan and Venkata Subba Rao, JJ.) delivered the following

JUDGMENT.

IN APPEAL NO. 352 OF 1918.

This is an appeal against the preliminary decree in Original Suit No. 4 of 1917 on the file of the Court of the Temporary Subordinate Judge of Rajahmundry. The learned Subordinate Judge has now returned the finding that the amount of the mortgage debt proportionately chargeable on Items Nos. 6 and 9 is Rs. 17,272. Neither party has objected to this finding. The total amount of Rs. 1,00,000 paid into Court having been withdrawn by the mortgagees they must refund the above amount (Rs. 17,272) on their being allowed to retain possession of Items Nos. 6 and 9 without those items being included in the redemption decree. To avoid any further complications we direct the mortgagees, defendants Nos. 1 to 38, to pay into the lower Court the above-mentioned amount within a fortnight from this day. We make this order as the parties agree to it without prejudice to their contentions. The appeal is adjourned to 21st August 1922 for final orders.

IN APPEAL NO. 222 OF 1919.

This is an appeal against the final decree passed in Original Suit No. 4 of 1917. In that suit this Court called for a fresh finding from the Subordinate Judge as to the proper amount payable by the mortgagees to the plaintiff for the *Faslis* in question and subsequent *Faslis* from 1326 to 1330 taking into consideration the deductions to be allowed to the mortgagees. The Subordinate Judge has now returned his findings as regards the profits the mortgagees are in his opinion accountable to the mortgagor for the *Faslis* in question.

As regards Items Nos. 2, 3, 4, 5, 7 and 8 there is no dispute raised by the defendants (mortgagees) or by the mortgagor. The dispute is confined to Item No. 1 and Items Nos. 6 and 9. As regards

Item No. 1, the first objection taken is that the estimate of the Subordinate Judge of the profits payable for *Faslis* 1326 and 1327 by the mortgagees is excessive. It seems to have been argued in the lower Court that it was not open to the mortgagees to raise the question as the previous proceedings barred them from doing so, but we think it is not necessary in the circumstances to go into that question, for it is sufficient to find on the mortgagors' second contention that there was no true deficit in the collection in those *Faslis*. The Subordinate Judge has discussed the evidence bearing upon this point at some length. We entirely agree with him that the evidence is quite inadequate to establish that that was any deficiency whatever and that any tenant had failed to pay his rent for those *Faslis*. The evidence of D. W. No. 6, as the Subordinate Judge points out, is practically mere hearsay evidence. It is, strictly speaking, not admissible. The evidence of D. W. No. 7 is quite indefinite and inconclusive, and not supported by any accounts. Although it is admitted that there were *chittas* and *averjas* for those *Faslis*, none of them has been put into Court and proved. Furthermore, as we have already held in our previous judgment, the mortgagees would be liable to account even for the amount that he has failed to collect if the failure was due to his failure to use his best endeavours to collect them; and there is evidence on the record to show that, if there was any failure to collect the whole of the rent, that must have been due either to indifference or negligence on the part of the mortgagees to collect. In these circumstances we agree with the Subordinate Judge that the mortgagees were rightly debited with the total amount of rent payable upon these lands for the *Faslis* in question by the tenants in occupation.

There is a second point raised with reference to Item No. 1 and that refers to the complaint made by the plaintiff that he did not get possession of 19 acres and odd cents in Item No. 1 when he got possession thereof. The Subordinate Judge has found it proved on this point that the 19 acres and odd were not really put in possession of the mortgagor. So far we are in agreement with him, for there is no contradiction of what the witness D. W. No. 7 says on the point;

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But on the question whether the mortgagees (defendants) are liable to account for the profits for these 19 acres for the *Faslis* in question, we regret we are unable to accept the Sub-Judge's view. There is nothing on record to show that the failure to obtain possession of these 19 acres was due to any default on the part of the mortgagees. The Court directed the whole of the item to be put in possession of the mortgagor. If he had not been so put in possession, it was his duty to complain to the Court and point out that he had not been so put in possession, and ask the Court to direct the judgment-debtors (the mortgagees) to so put him in possession but he did not do any such thing. He seems according to the evidence of the mortgagees, to have been obstructed by somebody in actual possession of the land against whom it is said he had taken proceedings to clear the obstruction and has now brought a suit. There was no complaint to the Court of any short delivery, as the Subordinate Judge points out, nor was any intimation given to the defendants that there was any difficulty on account of short delivery; the evidence seems to indicate that the plaintiff had adopted the method of suing the party in possession and recovering the property from him with mesne profits. That assumes that the property is not held by the person in possession at the instance of, or under, the judgment-debtors. There is also no direct proof that the obstructors were put in possession by the judgment-debtor or that they were holding it for the benefit of the judgment-debtors. If they were either trespassers or were persons who were already in possession before the mortgage was created, the mortgagees would not be under any obligation to give vacant possession to the plaintiff. They were bound to give such possession as the mortgagor gave to them. In these circumstances, considering that the plaintiff has chosen to seek other means to get profits from the party in possession, it is not right to make the defendants liable for such profit of the 19 and odd acres included in Item No. 1, and we disallow that. In this view it is not necessary to go into the question of *quantum* of profits of these 19 acres.

These are the only objections with reference to Item No. 1. Now as regards Items

No. 6 and 9 it is contended before us that some of the mortgagees having purchased the equity of redemption of those items, they are not bound to give the profits of those lands to the plaintiff. Some question was raised whether this point was not covered by our previous judgment, but, assuming that we did not expressly decide the question though our observations would seem to indicate that we were rather inclined to think that the defendants would be liable for such profits, we have come to the same conclusion now and hold that the defendants are liable to make good to the plaintiff the profits of these lands as well. The plaintiff had paid into Court one lakh of rupees, the total of the mortgage amount and the plaintiff was entitled, therefore, as we have already held, to get possession of the whole of the lands, and of course he would have then been able to collect the profits of all the lands. It is only as a matter of convenience and concession to the defendants we have allowed them in this suit itself to retain Items Nos. 6 and 9 on the payment of the proportionate amount of the mortgage-debt chargeable on those items. Strictly they were bound to hand over possession of the mortgaged properties on payment of the lakh of rupees into the Court. If they did not draw out the money it was their own fault. In those circumstances it is clear that the plaintiff is entitled to the profits on these items up to the date when the defendants pay back into Court the Rs. 17,000 and odd the debt chargeable upon these two items.

As regards Item No. 6 there is no dispute as to the amount of profits. But as regards Item No. 9 a dispute has been raised by the defendants (mortgagees) as to the quantum of profits charged against them for *Faslis* 1328, 1329 and 1330. It is admitted the charges are correct for *Fasli* 1326 and 1327. The contention here is very much like the contention as regards Item No. 1. What the mortgagees say is that they were not able to collect the whole of the rents payable by the tenants according to their engagements, and that there was a deficiency in *Fasli* 1328 of about 16 *puttis*, in *Fasli* 1329 of about 12 *puttis* and in *Fasli* 1330 of about 7 *puttis*, the normal rent payable being 44 *puttis* and sum of Rs. 100. As regard the deficiency alleged, the Subordinate

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Judge has found that such an allegation has not been proved and, on a consideration of the whole of the evidence bearing upon it, we are not prepared to say that the evidence is such as to justify us in reversing that finding. No evidence on the point has been given by the persons who actually collected the rents. Certain books are produced which were books kept in the Head Office in Massaulipatam, but they were books written up from *chittas* and other notes which had been sent by the persons who collected rents. Such *chittas* are not produced, nor are those accounts of the actual collections proved. In those circumstances it is difficult to say that the defendants have discharged their burden of proof that there was really a deficit in collection in spite of their best endeavours. They were certainly under a duty to keep proper accounts and if they have not done so and are put to any loss in consequence, it is their own fault. We accept the Sub-Judge's finding that for these *Fasli*s also the rent collected should be taken to be the same as the rent collected for the two previous *Fasli*s.

There is, further, as we have already pointed out, in respect of Item 1 the fact that on the evidence of the defendants themselves it would seem that they did not use their best endeavour to collect the rents, that they did not effect the necessary repairs and that they somewhat neglected the collection because of the pendency of this suit. The difference in amount as expressed in rupees of the rent of these lands in the plaintiff's account is due to the fact that the price of the *paddy* was different in the different years but they all represent the value of 44 *puttis* of paddy and the Rs. 100 rent payable each year. In these circumstances, we accept the Subordinate Judge's finding that on Item No. 9 the amount of profits payable by the mortgagees to the mortgagors is what he finds it to be, namely, Rs. 12,168-1-9.

There are the objections raised by the defendants in this Court. The plaintiff has also filed objections claiming that he should be granted interest on the profits from the date of collection. We think he has not established that claim. After all, what he was entitled to under section 76, clause (2) of the Transfer of Property

Act is the gross receipts by the mortgagees from the date when he had paid the money into Court. We could not construe that as meaning that interest is also payable upon the amounts collected.

As regards the deductions made on account of Government revenue and other charges there is no dispute between the parties. Those items are accepted by them both.

Now, a further claim has arisen in favour of the plaintiff (mortgagor) on account of the lapse of time, for at the time when the Subordinate Judge estimated the amounts payable by the defendants to the plaintiff *Fasli* 1330 and come to an end and *Fasli* 1331 was beginning; now that *Fasli* has also come to an end. The plaintiff is, therefore, entitled to get added on to the figures found by the Subordinate Judge the rents and profits for *Fasli* 1331 so far as lands which were not given possession of with crops standing on them before the end of *Fasli*. That is a matter which we cannot dispose of at this moment but the parties have stated before us that, if they are given a little time, they would file statements and that possibly they could agree as to the amounts to be added and there would be no necessity to keep this suit on the file of the Court any further; for this purpose alone we shall give them a short adjournment. The plaintiff would file a statement and give a copy of it to the other side in ten days' time. The defendants will then have a week to say whether they agree to it or if they disagree, to file statement. We will defer passing final orders till the case is heard again on the 21st August.

There remains the question of costs raised in the Memorandum of Objections. The first Court gave the plaintiff costs of the preliminary decree, but as regards the final decree it made each party bear its own costs. On hearing both sides before us we are inclined to think that there is no sufficient cause for interfering with the discretion exercised by the Court in that matter except as regards the stamp-duty payable on the amount which should have been decreed to the plaintiff by the lower Court according to the views we have now expressed.

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As regards the costs of this Appeal No. 222, we direct each party to bear its own costs.

The appeal is adjourned to the same date as Appeal No. 352, namely, 21st August, for final disposal.

These appeals having been posted for orders on the 21st August 1922, in pursuance of the order contained in the judgment dated the 25th July 1922, the Court (Krishnan and Venkatasubba Rao, JJ.) delivered the following

JUDGMENT.

The money not having been paid in the lower Court as directed, the parties ask that time may be given for the money to be paid in this Court. Three weeks from this date is allowed for the payment of Rs. 17,272 to the credit of Appeal No. 352 of 1918 in the High Court. Plaintiff will have leave to draw out the money from the Court when paid in.

The appeals are adjourned for final orders to 14th September 1922.

These appeals came on this day for final orders in pursuance of the order of this Court, dated the 21st August 1922, the Court (Krishnan and Venkatasubba Rao, JJ.) delivered the following

JUDGMENT.

IN APPEAL No. 352 OF 1918.

The money Rs. 17,272 ordered to be refunded under the above order having been paid into Court and as plaintiff has leave to draw it out, the decree of the lower Court must be modified by omitting Items Nos. 6 and 9 from it. Otherwise the decree is confirmed. Appellants will pay plaintiff's costs of the appeal.

IN APPEAL No. 222 OF 1919.

The only dispute now is as to the amount of profits that the defendants are bound to account for to the plaintiff for *Fasli* 1331 with respect to Items Nos. 2, 6 and 9. The plaintiff claims in his statement Rs. 3,172 and odd; the defendants admit only Rs. 2,410 and odd. We think if we take Rs. 2,800 as the proper amount, we will not be far wrong, for each side is likely to exaggerate. It is not necessary to delay the case further by calling for a finding as the difference is small. There will be a final decree drawn up

according to our judgment. By consent of parties defendants are given two months' time from this date to pay the moneys payable by them to the plaintiff including costs in Appeal No. 352 of 1918.

V. N. V.

N. H.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 105 OF 1922.
December 1, 1922.

Present.—Sir Norman Macleod Kt., Chief Justice, and Mr. Justice Cramp.

MARUTI BALAJI PATIL—

PLAINTIFF—APPELLANT

versus

DATTU MUKUNDA SAVANT

—DEFENDANT—RESPONDENT.

Registration—Sale-deed—Endorsement by Registrar—Proof of document—Registration Act (XVI of 1908), s. 60.

In a suit on a registered sale-deed, the endorsement by the Registrar that the executant admitted execution before him is not by itself sufficient evidence to prove that document. The endorsement merely shows that a certain person admitted execution and although one is entitled to presume that the person who admitted the execution was the person who signed the deed, that does not show who signed the deed, nor that the person so signing was the person who could give title to the plaintiff. [p. 305, cols. 8 & 2.]

Second appeal from the decision of the Assistant Judge, A. P., at Sholapur in Appeal No. 62 of 1921, reversing the decree passed by the Subordinate Judge at Barsi, in Civil Suit No. 468 of 1920.

Mr. P. B. Shingne, for the Appellant.

Mr. P. V. Kane, for the Respondent.

JUDGMENT.—The only question in this appeal is whether Exhibit 29-A has been proved. The plaintiff's title to the suit property would stand or fall on that document which is a sale-deed. As the lower Appellate Court says:

"It purports to have been passed by defendant No. 1, but defendant No. 1 has not been examined, nor has the signature alleged to be his, been verified, nor has the writer of the document or any of the witnesses who purport to have attested it, been examined. In these circumstances, can it be said that the document has been proved."

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The answer at first impression to that question would certainly be in the negative. When the appeal came up for admission before me, it was urged that, under section 60 of the Indian Registration Act, the certificate of the Registering Officer was admissible for the purpose of proving not only that the document had been duly registered in the manner provided by this Act, but also that the facts mentioned in the endorsements referred to in section 59 have occurred as therein mentioned. Reference was made to *Thama v. Govind* (1). In that case the learned Judges said (page 404):

"On the document here there are endorsements made in accordance with the provisions of section 58, and in those endorsements it is stated that the executants admit execution of the document and receipt of money. We are unable, sitting here in second appeal, to say that these endorsements prove the execution and the receipt of consideration money, but we are able to say that the endorsements may be admissible for that purpose. We must, therefore, reverse the decree of the lower Appellate Court and send back the case for redetermination in the light of these remarks. At the same time, we desire to make it clear that though the certificate is admissible for the purpose of proving that the facts mentioned in the endorsement occurred as therein mentioned, we do not wish to fetter the discretion of the Court, or to suggest that by reason of those endorsements the Judge is bound to hold that there has been such execution and payment as the endorsement suggests."

The only effect of that decision is that the certificate can be considered as proving certain facts within the meaning of section 60 of the Indian Registration Act. These facts might go so far, as in this case, as to show that the person purporting to sign Exhibit 29A admitted his signature before the Registrar. In the absence of any further evidence, and no evidence was led in the Courts below, that would not be evidence of the necessary link in the chain that the person who admitted execution before the Registrar was the person who could give title to the plaintiff. The only

facts which are mentioned in the endorsement are, that a certain person admitted execution, and one is entitled to presume that the person who admitted execution was the person who signed the deed. But that, as I have tried to point out, does not of itself prove who signed the deed. It is useless, therefore, in my opinion, to send down the case for further examination by the Court below. It is unfortunate for the plaintiff that he was unable to prove his document, but as the evidence stands he was bound to fail. The appeal, therefore, will be dismissed with costs.

W. C. A.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL, NO. 1310 OF 1921.

June 26, 1922.

Present:—Mr. Justice Harrison.AMIR AND ANOTHER—DEFENDANTS—
APPELLANTS*versus*WAZIR—PLAINTIFF AND OTHERS—
DEFENDANTS—RESPONDENTS.*Custom—Adoption of brother's son—Muhammadan Bhatti Rajputs of Dasuya Tahsil, District Hoshiarpur.*

Among Muhammadan Bhatti Rajput Jats of the Dasuya Tahsil in the Hoshiarpur District a sonless proprietor is entitled by custom to adopt his brother's son. [p. 307, col. 1]

Umar Bahksh v. Sohne Khan, 53 Ind. Cas. 404; 110 P. R. 1919; 48 P. L. R. 1920, referred to.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 21st April 1921, affirming that of the Munsif, Second Class, Hoshiarpur, dated the 4th March 1921.

Lala Mool Chand, R. S., for Mr. Abdul Aziz, for the Appellants.

Mr. S. A. Razzaq, for the Respondents.

JUDGMENT.—The defendants in this case present this second appeal relying on a certificate granted by the District Judge regarding the existence of a custom amongst the Muhammadan Bhatti Rajputs of the

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Dasuya Tahsil in the Hoshiarpur District, as to whether a sonless proprietor can adopt his brother's son. Counsel also wishes to argue the question of whether in this case it has been proved that the sonless proprietor actually did adopt his nephew. On this point there is a clear finding of fact and he can only urge that the whole of the evidence on the subject was not considered by the District Judge. His only reason for saying so is, that the District Judge has not recapitulated in his judgment every piece of evidence which is on the record. In the first place, this is not, in my opinion, a sufficient reason for holding that the District Judge did not consider every piece of evidence and, even if it could be shown that he did not do so, there would still be no justification for attacking in second appeal the findings of fact which are certainly based on evidence.

As to the existence of the custom, the onus doubtless lay upon the plaintiff and in support of his case he produced the *Riwaj-i-am* of the Hoshiarpur District relying more especially on the answer to question 69, three decided cases described as P. 6, P. 7 and P. 8 on the record, Art. 35 of the Rattigan's Customary Law, *Beg v. Allah Ditta* (1), *Hassan v. Samma* (2), and the various instances quoted by Mr. Humphreys in his *Riwaj-i-am*, of the existence of the custom amongst Muhammadan *Rajputs* in this and other Tahsils of this District. Both sides rely on *Umar Bakhsh v. Sohne Khan* (3) which appears to me to be of special value to the plaintiff, for in that case, in spite of the general entry made by Mr. Humphreys in the *Riwaj-i-am*, to the effect that the Muhammadan *Rajputs* of the Garhshankar Tahsil did not follow custom in this matter, the Chief Court held that it was established by instances that they did. It is true that in the course of that judgment the value of the *Riwaj-i-am* was discounted, but on the whole I think the judgment helps the plaintiff more than it does the defendants. The answer to question 69 in

the *Riwaj-i-am* regarding adoption by Muhammadan *Rajputs* runs as follows:— "*Rajputs* of Tahsil Dasuya. In the absence of collaterals, only a daughter's son and sister's son can be adopted no other persons outside the *got* are eligible." Counsel contends that this means that a man who has collaterals cannot adopt at all and, if he has none, can adopt his daughter's son or sister's son. The wording is not very happy but, if the answer be read with the context, it is clear that it means that the sonless proprietor can adopt a collateral and, if he has no collateral, can go further afield and adopt his daughter or sister's son. Art. 35 of Rattigan's Customary Law explains the position generally as regards Muhammadan agriculturists in the Central and Eastern Punjab. It is clear that, amongst the purer Muhammadan tribes, especially those residing in the North-Western Districts, the influence of their religion has been more marked, but in the Central Punjab, Muhammadan agriculturists as a whole have retained the custom of adoption. This is more especially the case with regard to Muhammadan *Jats* converted from Hinduism, and Sir William Rattigan definitely places the onus of disproving the existence of the custom among such *Jats* on the man who denies it. The position with regard to Muhammadan *Rajputs* is not so strongly established but even amongst them in this area of the Province the more general practice is clearly to recognise the right of adoption. Out of the decided cases P. 6, P. 7 and P. 8 one only is among *Bhatti Rajputs*, namely, P. 6, and comes from this very village, but, as pointed out by the learned District Judge, it is of no value inasmuch as the property was self-acquired. P. 7 and P. 8 are instances of Muhammadan *Rajputs* but not of *Bhattis*. Counsel urges that, unless it can be shown by instances that *Bhatti Rajputs* have adopted the custom, the evidence of its existence among other Muhammadan *Rajputs* is of no value. With this contention I cannot agree, for it appears to me that the Muhammadan *Rajputs* of this area must be taken as a whole and it is clearly established by the many instances given by Mr. Humphreys in his *Riwaj-i-am* as well as by the reported cases amongst Ghorewaha and other *Raj-*

(1) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89; 15 A. L. J. 595 (P. C.).

(2) 54 P. R. 1874.

(3) 53 Ind. Cas. 404; 110 P. R. 1919; 48 P. L. R. 1920.

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puts quoted in Art. 35 of Rattigan's Customary Law that the custom clearly exists amongst Muhammadan *Rajputs* in this tract. The case for the defendants-appellants rests entirely on challenging the plaintiff's case and it is not even seriously contended before me that the contrary has been proved, namely, the non-existence of the custom or the observance of strict Muhammadan Law in this matter by *Bhatti* or any other Muhammadan *Rajputs* of this District. I find, agreeing with the learned District Judge, that the custom is fully established and I dismiss the appeal with costs.

J. K.

*Appeal dismissed.***BOMBAY HIGH COURT.**

SECOND CIVIL APPEAL No. 875 OF 1918.

December 15, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.
GANGADHAR NARAYAN PANDIT

—PLAINTIFF—APPELLANT

VERSUS

IBRAHIM BAVA DINGANKAR

—DEFENDANT—RESPONDENT.

Hindu Law—Inheritance—Divided sons and grandsons.

The right of divided sons and grandsons and great-grandsons of the last male owner to succeed to his divided property, is the same as in the case of undivided sons.

Marudayi v. Doraisami Karambian, 30 M. 348, 17 M. L. J. 275, followed.

Second appeal from the decision of the Acting District Judge of Ratnagiri, in Appeal No. 118 of 1917, reversing a decree passed by the Subordinate Judge at Deorukh, in Civil Suit No. 309 of 1916.

Mr. P. B. Shingne, for the Appellant.

JUDGMENT.—The question in this appeal is, whether Gangadhar as the surviving son or Naro succeeded to Naro's property to the exclusion of the sons of his deceased brothers. Naro and his four sons had become separated. Gangadhar contended that after the death of Naro he was entitled

to one-fifth share in the *khochi* which had come to Naro on the partition. The question was considered in *Marudayi v. Doraisami Karambian* (1). It was there held that the right of the divided sons, grandsons and great grand-sons of the last male owner to succeed to his divided property, is the same as in the case of undivided family property. Their Lordships said (p. 351):—

"It must, however, be conceded that to allow a rule of succession *per stirpes* in a separated family is to admit an exception to the rule of Hindu Law by which the inheritance devolves on the nearest *sapinda*; but the exception is one which, in our opinion necessarily follows from the exposition given by Vijnaneswar (Mit. i. l. 3) of the rights of sons and grandsons in the estate of the grandfather."

With respect, I agree. Moreover, speaking for myself, I should not be inclined to differ from a decision on the question such as the present one, by a Division Bench of another High Court, unless it could be established in argument before me that there were very good grounds for thinking that we were justified in coming to a different conclusion. In this case the applicant's Pleader has not been able to put before us any reasons why we should differ from the decision of the Madras High Court except that it would be against the interest of his client.

There is a further reason why we should follow it, as this case is cited in the 8th Edition on Mayne's Hindu Law, paragraph 540, at page 755, and no exception whatever has been taken to the law as laid down therein. We, therefore, follow that decision and dismiss the appeal. As the respondent has not appeared, there will be no costs.

W. C. A.

Appeal dismissed.

(1) 30 M. 348; 17 M. L. J. 275.

SUNDARAM AIYAR v. RAJESWARA MUTHURAMALINGA SETHUPATHI AVERGAL.

MADRAS HIGH COURT.

CIVIL, MISCELLANEOUS PETITION NO. 2989
OF 1922.

December 11, 1922.

Present:—Mr. Justice Kumaraswamy
Sastri.

C. SUNDARAM AIYAR—PETITIONER—
RESPONDENT
versus

Raja RAJESWARA MUTHURAMALINGA
SETHUPATHI AVERGAL, THROUGH HIS
AUTHORIZED AGENT AND DEWAN RAO-
SAHIB S. THIRUMALI AIYANGAR—
APPELLANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XLI,
r. 1—Limitation Act (IX of 1908), s. 5—Appeal
—Copy of decree filed after expiry of limitation—
Delay, whether can be excused—Ex parte order
excusing delay, whether can be vacated.*

Order XLI, r. 1, of the Civil Procedure Code is
imperative and it is a condition precedent to the
valid presentation of an appeal that the memo-
randum of appeal should be accompanied by a
copy of the decree appealed against. Where it
is not filed, the appeal is incompetent. [p. 308,
col. 2]

Sitikantha Roy v. Bipra Das, 27 Ind. Cas. 447,
Khrode Sundari Debi v. Jnanendra Nath, 6
C. W. N. 283, *Chamela Kuar v. Amir Khan*, 16
A. 77; A. W. N. (1893) 223; 8 Ind. Dec. (N. S.)
51, relied on.

An Appellate Court has power to excuse delay
in the presentation of a copy of the decree appealed
against if it is satisfied that the discretion vested
in it under section 5 of the Limitation Act should
be exercised in favour of the appellant. [p. 309,
col. 1.]

Binapani Debi v. Sashibhushan Sinha, 17 Ind.
Cas. 119; 16 C. L. J. 133, *Prosonno Kumari
Debi v. Ram Chandra Singha*, 17 Ind. Cas. 155; 17
C. L. J. 66, relied on.

Where an *ex parte* order is passed excusing delay,
it is open to the other party to apply to have it
set aside. [p. 309, col. 1.]^t

Dand Bahadur Singh v. Deo Nandan Prasad,
20 Ind. Cas. 513; 17 C. L. J. 596, followed.

Petition praying that, in the circumstances
stated in the affidavit filed herewith, the
High Court will be pleased to vacate the
ex parte order, dated the 20th January
1922, excusing the delay in representation
of the S. A. No. 50 of 1922, preferred to the
High Court against the decree of the Court
of the Temporary Subordinate Judge,
Sivaganga, in A. S. No. 4 of 1918, preferred
against the decree of the Court of the District
Munsif, Paramakudi, in Ordinary Suit
No. 415 of 1915, and to dismiss the second
appeal.

Mr. R. Kesava Aiyangar, for the Petitioner.
Mr. N. Chandrasekhara for Mr. A. Krishna-
swamy Aiyer, for the Respondent.

ORDER.—This is an application to vacate
an *ex parte* order excusing the delay in
representation and to dismiss the second
appeal with costs.

The second appeal in which the Rajah of
Ramnad is the appellant was filed in time
but without a copy of the decree appealed
against. The papers were returned for
re-presentation with a copy of the decree.
When the copy of the decree was filed,
the appeal was 53 days out of time as the
papers were returned on the 6th of December
1918 and the decree was filed on the 16th of
January 1919. On the 18th of January
1919 the papers were again returned with
the remark that the appeal became out of
time when the copy of the decree appealed
against was filed and that an affidavit
explaining the cause of the delay should be
filed. On the 20th January 1922 the papers
were again presented with an affidavit
and orders were obtained from me on the
same day excusing the delay. The petitioner
who was served with notice of the appeal
on the 15th of April 1922 has filed this
application on the 13th of November 1922
for setting aside the *ex parte* order passed.

There can be little doubt, that, though
the second appeal was presented in time,
there was no valid presentation because
the Memorandum of Appeal was not accom-
panied by a copy of the decree appealed
against. Order, XLI, r. 1 is imperative and
states that a Memorandum of Appeal shall be
accompanied by a copy of the decree appealed
against. In *Sitikantha Roy v. Bipra Das* (1)
it was held that it was a condition precedent
to there being a valid Memorandum of Appeal
that it should be accompanied by a copy
of the decree appealed from. The same
view was taken in *Binapani Debi v. Sashi-
bhushan Sinha* (2), *Khrode Sundari Debi
v. Jnanendra Nath* (3) and *Chamela Kuar v.
Amir Khan* (4). In *Dand Bahadur Singh v.
Deo Nandan Prasad* (5), it was held that

(1) 27 Ind. Cas. 447.

(2) 17 Ind. Cas. 119; 16 C. L. J. 133.

(3) 6 C. W. N. 283.

(4) 16 A. 77; A. W. N. (1893) 223; 8 Ind. Dec.
(N. S.) 51.

(5) 20 Ind. Cas. 513; 17 C. L. J. 596.

MAHABLESHWAR NARAYANBHAT v. SUBRAMANYA SHIVRAM.

where an *ex parte* order is passed excusing the delay, it is open to the other party to apply to have it set aside. There can be little doubt that Courts have power to excuse the delay in the presentation of a copy of the decree appealed against, and I need only refer to *Binapant Debi v. Sashibhushan Sinha* (2), *Hem Chandra v. Jadub Chandra* (6) and *Prosonno Kumari Debi v. Ram Chandra Singha* (7) where it has been held that it is open to the Court to pass an order that a certified copy of a decree be received and attached to the Memorandum of Appeal, if it is satisfied that the discretion vested in it under section 5 of the Limitation Act should be exercised in favour of the appellant.

The question here is, whether the delay should be excused. So far as the affidavit filed on behalf of the appellant is concerned, the reason for not filing the copy of the decree appealed against along with the Memorandum of Appeal is that the *Dewan* of the appellant did not send a copy of the decree along with the papers to be filed and that as the last day for filing the appeal was the 7th of November 1918 the clerk of Mr. A. Krishnaswamy Aiyar, Vakil for the appellant, filed the appeal without the copy of the decree. On the application to set aside the *ex parte* order excusing the delay, no affidavit has been filed either by the appellant or his *Dewan* or any other person explaining why a copy of the decree was not sent along with the other papers or why there was a delay of 53 days. In the absence of any explanation, I am of opinion that the delay has not been properly explained. I am, after hearing the petitioner, of opinion that the long delay has not been explained so as to justify me in exercising my discretion under section 5 of the Limitation Act and excuse the delay in the presentation of the appeal, as the authorities which have been cited to me by the petitioner's Vakil show that the second appeal itself was incompetent at the time of presentation owing to the absence of a copy of the decree appealed against.

I, therefore, set aside my order excusing the delay and direct that the second appeal be posted for orders before a Bench.

V. N. V.

Order set aside.

(6) 17 Ind. Cas. 99; 16 C. L. J. 116.

(7) 17 Ind. Cas. 155; 17 C. L. J. 66.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 22 OF 1922.

November 24, 1922.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
MAHABLESHWAR NARAYANBHAT
DEVTE—PLAINTIFF—APPELLANT
versus

SUBRAMANYA SHIVRAM JOSHI

AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Partition—Adoption
of divided member—Property, whether divested

Under the Hindu law where a member of a joint Hindu family has obtained an absolute right to a share in the family property on partition, the fact of his adoption subsequently into another family does not divest him of the property which had come to him on partition. [p. 311, col. 1.]

Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row, 29 M. 437 at p. 451; 16 M. L. J. 178, followed.

Dattatraya Saktharam v. Govind Sambhaji, 34 Ind. Cas. 423; 40 B. 429; 18 Bom. L. R. 258, distinguished.

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 36 of 1920, confirming the decree passed by the Subordinate Judge at Kumta, in Civil Suit No. 37 of 1919.

Mr. Nilkant Atmaram, for the Appellant.

Mr. G. P. Murdeshwar, for the Respondents.

JUDGMENT.

Macleod, C. J.—A joint Hindu family consisted of one Shivram Joshi, his three sons, Mahabaleshwar, Ganpati and Venkatraman, by his first wife, and one son Subramanya, by his second wife. In 1904 there was separation of the family and partition of the family property, the father and his four sons each taking one-fifth of the family property. Mahabaleshwar, the present first defendant, after partition, was in 1907 given in adoption by his father to one Narayan Bhatta Devte. He thereby became a member of his new family. Shivram Joshi died leaving a Will dated September 28, 1907, wherein he stated that he was not quite confident as to whether he could own the entire property which had been acquired by partition by the first defendant or only one-fourth share. If he owned the whole, he left it in equal shares to Subramanya and Ganpati. If he only had a share, he left it all to Subramanya. Subramanya then brought this suit seeking to recover from the first defendant the share which was given to him by his father's Will in the property originally acquired by the first

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defendant on the partition. The suit has been decreed in both Courts on the ground that the decision in *Dattatraya Sakharam v. Govind Sambhaji* (1) was conclusive on the point.

In order to see whether the decision in that case applies, it is necessary to ascertain the facts. One Mahadev and his brother Sambhaji were divided in interest. Mahadev died more than twenty years before the suit, leaving a widow Parvatibai, a son Ram Chandra, and daughters. After Mahadev's death Ramchandra was given in adoption to a different family at Gwalior, and the properties in suit, which were originally assigned to the share of Mahadev and which were vested in Ramchandra alone after Mahadev's death, were mortgaged by Parvatibai in 1909 to one Dattatraya, long after Ramchandra's adoption. The mortgagee filed a suit to enforce the mortgage. The opponents were the sons of the divided brother of Mahadev and the heirs of Paravatibai. The plaintiff's claim was contested on the ground that the property being vested in Ramchandra at the time of his adoption remained vested in him even after he was given in adoption, and that Paravatibai had no right to mortgage the property as Ramchandra was alive. Mr. Justice Shah in giving judgment, at page 433* said:—

"The text of Manu (Adhyaya IX. verse 142) bearing on this point is clear. It is translated in Volume XXV of the Sacred Books of the East, at page 355, as follows:— 'An adopted son shall never take the family (name) and the estate of his natural father; the funeral cake follows the family (name) and the estate, the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned).'"

It was urged there by Mr. Shingne that there was no provision in the text for the divesting an estate once vested in a person, and that the person leaving the family of his birth could not be divested of property exclusively vested in him before adoption. But the learned Judge thought that that argument ignored the essential idea of an adoption. He said:

"There is a change in the position of

(1) 34 Ind. Cas. 423; 40 B. 429; 18 Bom. L. R. 258.

*Page 40 B.—[42.]

the boy, and this divesting of the estate of the natural father is an incident, and, in my opinion, a necessary incident, of that change. The boy given in adoption gives up the rights, which may be vested in him by birth, to the property of his natural father, if the adoption takes place in his father's lifetime. To that extent the rights vested in him are divested after adoption. If the divesting of a vested interest so far is to be allowed, I do not see any difficulty in holding that even if the estate of the natural father be wholly vested in the boy before adoption, he is divested of it when he is given in adoption."

That is the *ratio decidendi* in that case. If the father and son are joint, and the son is given in adoption, then any vested interest which the son had in the joint family property is divested by virtue of the adoption. If the father dies and the whole estate becomes vested in the son, then on the son being adopted the learned Judge thought the same result would follow.

There was a further argument that if the adopted boy could take his self-acquired property with him and was under no obligation to leave it in the family of his birth, there was no reason why he should not take with him the property which had vested in him exclusively on the death of his father before the adoption. The learned Judge thought that that argument ignored the difference between the self-acquired property and the estate which had become vested in him exclusively on his father's death. In one case the property was his own, and in the other it was the estate of his natural father.

The same question came before a Bench of the Madras High Court in *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row* (2). One Venkata mayya had become entitled after partition with his brother to what was called the Madur estate. Venkatamayya had a son Narayya who on his birth became a co-sharer with his father in that estate. Then Venkata died and his son became the last surviving member of the family and was solely entitled to the estate subject to the right to maintenance of his mother. Narayya was adopted by the widow of another Narayya belonging to an elder branch of the same family and the question was whether he was divest-

(2) 29 M. 437 at p. 451; 16 M. L. J. 178.

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ed of the Madur estate by reason of his adoption. The learned Judges, after citing the texts bearing on the question, including the text of Manu, Adhyaya IX, verse 142, came to the conclusion that there was nothing in those texts which necessarily carried with it the idea that the adopted son was divested of property which was his own absolutely at the time of adoption. In their opinion the correct view seemed to be that, by the adoption the filial relationship, as the author of the Chandrika said, was extinguished in one family and was created in the other family, and that thereafter the person adopted could not claim or take any property in his natural family by virtue of the extinguished filial relationship therein.

With the very greatest respect, it seems to me that there was a good foundation for the conclusion arrived at by their Lordships.

In the present case the first defendant had an absolute right to the share in the family property which had come to him on partition. He could have disposed of it so long as his right of disposition was not fettered by a son being born to him. It might be said that the rights of disposition possessed by the sole surviving member of the joint family would be the same until a son was born to him, but the origin of his title to the property would be of a different character, since nothing would have been done to put an end to the existence of the joint family. In my opinion it cannot be said that in the case of a partition in a Hindu joint family consisting of a father and his sons, the sons take their shares as the estate of their natural father and, therefore, the decision in *Dattatraya Sakharām v. Govind Sambhaji* (1) cannot be taken as governing this case. Otherwise, the heir of the defendant at the time of his adoption would have had to be ascertained as if he was dead and if there were no heirs then such property would have escheated to the Crown. As their Lordships said in *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row* (2), there is a great danger in speaking of adoption as civil death and a re-birth and in attempting to enforce the consequences that might be supposed to logically flow from those conceptions. It could only be on the assumption that the first defendant was civilly dead that his

father as his heir would be considered as entitled to deal either *inter vivos* or by will with the property in the first defendant's possession. There are certain circumstances which by operation of law may bring about the devolution of an interest in property from the holder to another person; but I do not think that the texts which have been relied upon in this case show that under Hindu Law the interest of the first defendant in the suit property devolved upon his father on his adoption. I think the appeal must be allowed and the suit dismissed with costs throughout.

Crump, J.—I agree.

W. C. A.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 764 OF 1921.

August 2, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kr., and Mr. Justice Rankin.

BALI MOHAMMAD SAHA AND OTHERS—
DEFENDANTS—APPELLANTS

versus

JANAKI NATH MAZUMDAR—PLAINTIFF
—RESPONDENT.

Landlord and tenant—Tenant, death of—Possession of tenancy by stranger—Payment of rent in deceased's name—Tenancy, new, creation of.

Where a landlord accepts rent tendered in the name of a deceased tenant by a person in possession of the holding, such acceptance has the effect of constituting the person paying the rent a tenant of the landlord, and the latter is not competent to eject him as a trespasser.

Appeal against the decree of the Additional District Judge, Dinajpur, dated the 23rd December 1920, affirming that of the Munsif, Second Court, Dinajpur, dated the 20th August 1919.

Babu Priya Sankar Mazumdar, for the Appellant.—Suit for ejectment. I purchased from the tenant in 1903. The holding is non-transferable. I had been paying rent to the landlord who knew that the original tenant died in

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1918. He accepted rent even after that. I submit there is estoppel by conduct. His acceptance of rent amounts to sufficient recognition. They cannot turn me out as trespasser.

Babu *Girija Prosanna Sanyal*, for the Respondents.—It has been found that the defendant admitted that he was not recognised. Mere acceptance of rent would not convert him into a tenant. He was a *marfatdar*. The tenancy existed in the name of the deceased tenant. I submit the case should be remanded.

Babu *Priya Sankar Marumdar*, replied in brief.

JUDGMENT.—This is an appeal by the defendants in an action in ejectment. The plaintiff sued to eject the defendant as trespassers in possession of a non-transferable occupancy holding. The defendants have proved that in 1919 and 1920 the plaintiff accepted rent from them for the lands in suit in the name of the deceased *raiya*s. The effect of this acceptance of rent was to constitute the defendants tenants under the plaintiff. Consequently, at the date of the suit, the plaintiff was not competent to eject the defendants as trespassers. In this view, it is unnecessary to consider whether there was a recognition by the plaintiff of the defendants as the holders of the original tenancy.

The result is that this appeal is allowed and the suit dismissed with costs in all the Courts.

W. C. A.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 630 OF 1921.
November 10, 1922.

Present.—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
RAGHUNATH VITHAL BHAT

—DEFENDANT—APPELLANT

versus

PURNANAND SARASWATI SWAMI

—PLAINTIFF—RESPONDENT.

Hindu Law—Religious office, share in, transfer

The transfer of a share in the emoluments as well as the duties of a religious hereditary office by one member of a Hindu family to an outsider or to the original grantor of the office is invalid, but such a transfer to another member of the family is not open to objection. [p. 313, col. 1.]

Mancharam v. Pranshankar, 6 B. 298; 6 Ind. Jur. 426; 3 Ind. Dec. (N. S.) 655 and *Kuppa v. Dorasami*, 6 M. 76; 7 Ind. Jur. 75; 2 Ind. Dec. (N. S.) 391, considered.

Second appeal from the decision of the District Judge, Kanara in Appeal No. 119 of 1920, confirming a decree passed by the First Class Subordinate Judge at Karwar, in Civil Suit No. 18 of 1919.

Mr. G. S. Rao, for the Appellant.

Mr. Coyajee (with him Mr. S. S. Mulgaonkar), for the Respondent.

JUDGMENT.—This appeal raises a question on which there does not appear to be any direct authority. The facts are simple. Fifty years ago a Guru owned a temple at Sadashivgad and he appointed a certain person as a priest to perform *Puja* and other services to the deity on receipt of a certain quantity of paddy. The present plaintiff is the third Guru in order of descent. The defendant is the son of the original *Pujari* who had two sons, the defendant and Dattatraya, the plaintiff's case being that Dattatraya having a half interest in the office of *Pujari* transferred or surrendered it to him. It has been held in this Court in *Mancharam v. Pranshankar* (1) that hereditary offices, whether religious or secular, are no doubt treated by the Hindu text writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property by means of the performance of the duties of the office and the enjoyment of the emolument by the different co-parceners in rotation. The Court said that "there was no reason why the alienation of a religious office to a person standing in the line of succession, and free from the objections relating to the capacity of a particular individual to perform the worship of an idol or do any other necessary functions connected with it, should not be upheld." It was, therefore, in favour of alienations in the family of the original grantee of the office.

(1) 6 B. 298; 6 Ind. Jur. 426; 3 Ind. Dec. (N. S.) 655.

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In *Kuppa v. Dorasami* (2) it was held that the sale of a religious office to a person not in the line of heirs, though otherwise qualified for the performance of the duties of the office, was illegal. *Mancharam v. Pranshankar* (1) was discussed and the Court was not prepared to go so far as to say that a purchase by a person standing in the line of heirs, or otherwise qualified should be upheld.

We have been referred to no decision which differs from those cases and, therefore, unless there is direct evidence of custom, it should be taken that the transfer by one member of the family entitled to an hereditary office to an outsider would be considered by the Court invalid. The transfer by one member of his share to another member of the family could not be considered in any way objectionable. It would only reduce the number of members who were entitled to the office and a share in the emoluments.

The other question that arises is, whether one member of the family entitled to an hereditary office can surrender his share to the original grantor. If all the members of the family agree to give up the duties of performing worship and receiving emoluments, then there could be no objection to their doing so. But there is a great difference between the whole group of members surrendering their rights to the grantor, and one member purporting to give up his rights to the grantor which would cause an interference with the rights amongst the remaining members of the family. It seems to us that the matter is entirely one of first impression, and it can only be decided in accordance with the principles which would be most consistent with the proper performance of an office of this nature. We do not propose to decide anything which might cause disputes in future or interfere with the harmonious performance of the duties appertaining to the office. It seems to us that the duties of the office and the emoluments appertaining thereto remain within the family of the original grantee, and those members of the family, who wish to retain the office

and share the emoluments, are entitled to do so, and if one of the members of the family wishes to get rid of his duties as well as his rights, he could only do so in favour of the remaining members of the family, and he cannot evade the ordinary rule as to alienations by purporting to surrender his share to the original grantor, or, put in other words, the alienation of a share by one member of the family is invalid whether it is made in favour of an outsider altogether or whether it is made in favour of the original grantor of the office.

It seems to us that this aspect of the case has not been considered by the lower Courts. The District Judge has treated the matter as a question of contract. No doubt, every promisee may dispense with or remit the performance of any promise made to him. But we do not think that is a proper principle to apply to the decision of this case.

Then, it was argued that the plaintiff lay under an estoppel because Dattatraya, who was a plaintiff in a suit against the Guru, admitted that he had parted with his share in favour of his brother. There could be no case of estoppel. It would be a question of proof whether Dattatraya had, as a matter of fact, transferred his share to his brother, the present defendant, for it is difficult to say that, in consequence of that statement, the defendant altered his position for the worse. However that may be, it is hardly necessary for the purposes of this case to decide, when sitting in second appeal, that as a matter of fact Dattatraya, when he purported to assign his share to the plaintiff, had, as a matter of fact, already surrendered it to his brother. We decide the case on principles that are already recognised in this Court. Dattatraya, although he could have given up his share in the office to his brother, could not endeavour to alienate it either to a person outside the family or to the original grantor or a descendant from him. The appeal, therefore, must be allowed and the suit dismissed with costs throughout.

W. C. A.

Appeal allowed.

(2) 6 M. 76; 7 Ind. Jur. 75; 2 Ind. Dec. (N. S.) 333.

UTHUMAN AMMAL v. NAINA MAHAMAD.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 876 OF 1921.

December 5, 1922.

Present:—Mr. Justice Krishnan.

UTHUMAN AMMAL, AND ANOTHER—
PETITIONERS

versus

NAINA MAHAMAD ROWTHER—

COUNTER-PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 21, applicability of—Case remanded to one Court—Trial by another Court—Jurisdiction.

The jurisdiction of a Court trying a remanded case depends entirely on the order of the Appellate Court when remanding the case.

When the High Court remands a case for trial to a particular Court no other Court has jurisdiction to try it. Where a case is tried by a Court other than the one to which it is remanded, objection can be taken at any time to the jurisdiction of the Court, and the Court is bound to give effect to it. Section 21 of the Civil Procedure Code has no application to such a case.

Annammal v. Sambasiva Aiyar, 53 Ind. Cas. 463; 37 M. L. J. 349; 26 M. L. T. 186; 10 L. W. 293; (1919) M. W. N. 636, distinguished.

Petition, under section 115 of Act V of 1908, praying the High Court to revise an order of the District Court, Madura, dated 6th September 1921, in Civil Miscellaneous Appeal No. 6 of 1921, preferred against an order of the District Munsif, Madura Taluk, at Madura in I. A. No. 773 of 1920, in Original Suit No. 118 of 1917.

Mr. T. L. Venkatarama Aiyar, for the Petitioners.

Mr. M. Patanjali Sastri, for the Respondents.

JUDGMENT.—In this case the main point taken before me is, that the High Court having remanded the case for trial by the Munsif's Court of Madura Town, the Court of the Madura Taluk, which is a different Court altogether, has no jurisdiction to deal with it or pass any orders in it, and consequently the orders passed by that Court must all be set aside and the Town Court directed to dispose of the case.

This argument seems to me to be sound. Though the judgment of the High Court indicated "the Court of the first instance" as the Court to try the remanded case, that Court had been abolished and the decree, therefore, specified the Town Court as the Court to try the case in quite unambiguous language. So long as that direction

stands, I must hold the Town Court alone can deal with the case.

The learned Vakil for the respondent attempted to contend that I should apply the principle underlying section 21, Civil Procedure Code, to this case and refuse to give effect to the objection as it was not taken at the earliest stage in the Taluk Munsif's Court which actually was dealing with the case. It is conceded section 21 will not in terms apply. I am unable to accept the argument that any principle underlying it applies to this case. The jurisdiction of the Court trying a remanded case like the present one depends entirely on the order of the High Court when remanding the case. It is not a matter of doubt or difficulty. Nor is it a matter for the parties to make up their minds about. The rule in *Annammal v. Sambasiva Aiyar* (1) is not applicable to the present case at all. There the objection was taken to the High Court's jurisdiction in a subsequent suit by a party to the High Court suit in which it had been alleged that he was resident in Madras to give jurisdiction to the High Court. The party had not disputed this averment, but actually submitted to the trial. He could not afterwards be permitted to assert that he was not so resident and object to the Court's jurisdiction. If he had raised the objection in the High Court suit itself, it would have been a matter for that Court to decide and its decision could not be attacked collaterally in another suit. That case is thus entirely different from the present one.

The objection as to jurisdiction was taken at a fairly early stage in the First Court itself in this case. But, even otherwise, the objection is now taken in the same proceedings and I see no ground for refusing to give effect to it. I must, therefore, set aside all orders of the Taluk Munsif of Madura and direct him to forward the records to the Town Munsif's Court for disposal of the case. It is to be regretted that more care was not taken in reading the High Court's decree before the Taluk Munsif began to deal with it.

In the circumstances, there will be no order as to costs for either side in this Civil

(1) 53 Ind. Cas. 463; 37 M. L. J. 349; 26 M. L. T. 186; 10 L. W. 293; (1919) M. W. N. 636.

RAMCHANDRA LAXMAN V. BALBHIM BABAJI.

Revision Petition or in the lower Courts after the remand.

V. N. K.

Order set aside.

Z. K.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 31 OF 1922.

November 17, 1922. •

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

RAMCHANDRA LAXMAN—

PLAINTIFF—APPELLANT

versus

BALBHIM BABAJI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 11, 47—Mortgage—Redemption suit—Decree nisi—Second suit for redemption, whether barred.

If a mortgagor brings a redemption suit and obtains a decree nisi, which entitles him on payment of a certain sum by a certain time to get back the property, and nothing further is done, and no attempt is made to get back possession, and no order is made barring the mortgagor's right to redeem, then a second suit can be brought for redemption and the same would not be barred either by section 11 or section 47 of the Civil Procedure Code. [p. 315, col. 2.]

Ramji Bapuji Patil v. Pandharinath Ravji, 49 Ind. Cas. 894; 43 B. 334; 21 Bom. L. R. 56 (F. B.), followed.

Second appeal from the decision of the Assistant Judge, with A. P., at Sholapur, in Appeal No. 133 of 1921, confirming, a decree passed by the Subordinate Judge at Madha, in Civil Suit No. 39 of 1920.

Mr. J. R. Gharpure, for the Appellant.

Mr. P. V. Kanz, for Respondents Nos. 1, 4, 5, 7 and 8.

JUDGMENT.—The plaintiff sued to recover possession of the suit property as the mortgagor. The original mortgage was passed by his father to his uncle Dada acting *benami* for the plaintiff's father. Dada mortgaged the plaint land with possession to one Bala in 1884. Dada brought a suit for redemption in 1892 under the Dekkhan Agriculturists' Relief Act, and on taking account it was found that nothing was due under the mortgage and, therefore, a decree was passed directing that he should get possession. In appeal this decree was set aside. It was found that Rs. 310-9-0 were due to the mortgagee, and unless the sum was paid the possession was to be given back to the mortgagee. The amount was not paid and an order was made restoring the land to the possession

of the mortgagee. It may be noticed that, but for the erroneous order of the Trial Court, the land would never have got into the possession of the mortgagor. We may take it, therefore, that on the final order of the Appellate Court the same effect resulted as if there had been originally a decree nisi in favour of the mortgagor, directing that if he paid Rs. 310-9-0 within the time fixed he should get possession of the property. He did not pay, and, as far as one can see, there is no order of the Court which could be considered to operate as a decree for foreclosure so as to put an end to the mortgage. Dada's heir Pandharinath gave up all his rights over the plaint property in favour of the plaintiff by a deed of release in 1920. The plaintiff has brought this suit for redemption. The defendants contended that the equity of redemption had been extinguished by the proceedings in the previous suit and this contention has found favour with both the lower Courts.

We think that the learned Judges have not sufficiently recognized the effect of the Full Bench decision in *Ramji Bapuji Patil v. Pandharinath Ravji* (1). The simple decision there was that if a mortgagor brings a redemption suit and obtains a decree nisi, which entitles him on payment of a certain sum by a certain time to get back the property, and nothing further is done, and no attempt is made to get back possession, and no order is made barring the mortgagor's right to redeem, then a second suit can be brought for redemption and the same would not be barred either by section 11 or section 47 of the Civil Procedure Code, and if the facts in the present case could be brought within that Full Bench ruling, then the mortgagor, in spite of the previous suit, is entitled to redeem.

It has been suggested that if the suit is brought under the provisions of the Dekkhan Agriculturists' Relief Act, some inherent element in a decree passed thereunder prevents the Full Bench ruling being made applicable. The Chief Justice said (page 355*):

"A suit for redemption under the Dekkhan Agriculturists' Relief Act is substantially

(1) 49 Ind. Cas. 894; 43 B. 334; 21 Bom. L. R. 56 (F. B.).

* Page of 43 B.—[Ed.]

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a suit to have an account taken in accordance with the provisions of section 13, and a decree for foreclosure is never passed in the first instance, or until the mortgagor has had ample opportunity of paying the sum found to be due. But in such cases section 47 of the Civil Procedure Code might affect the plaintiff's right of suit as Chapter XXXIV of that Code would not be applicable."

These remarks were commented on by Mr. Justice Heaton in the same case when it returned to the Court after the decision of the Full Bench: [reported as *Bapu Ramchandra Kulkarni v. Guja Mhadu Dhangar* (2).] The learned Judge was evidently referring to the last paragraph of the Chief Justice's judgment when he said that there was a disturbing element in the judgment, which was the possibility of their being under the Dekkhan Agriculturists' Relief Act a decree in a redemption suit which was not a decree *nisi*. Then he came to the conclusion that the decree, although it was made in a suit filed under the Dekkhan Agriculturists' Relief Act, was a decree of the ordinary kind. Here it may be said also that the decree is made under the Dekkhan Agriculturists' Relief Act, but it is a decree of the ordinary kind, and not one of the variant decrees which can be passed under section 15-B of the Act. Whether a decree made under the Dekkhan Agriculturists' Relief Act in a mortgage suit is a decree *nisi* or a decree which puts an end to the mortgage will always be a question for decision in each case when it comes before the Court. We think that in this case there was a decree *nisi*, and it comes within the Full Bench ruling. The appeal must be allowed and the case sent back to the Trial Court for the hearing on the merits. The appellant to get his costs here and in the Court below. Costs of the Trial Court to be costs in the cause.

Crump, J.—I agree. This decree, on the face of it, is within the Full Bench ruling in *Ramji Bapuji Patil v. Pandharinath Ravji* (1) and unless it can be shown that there is something in the special provisions of the Dekkhan Agriculturists Relief Act to prevent the operation

of that ruling we are bound by it. I can find nothing in the special provisions of the Dekkhan Agriculturists' Relief Act and indeed the respondent's Pleader has not specifically referred to any section which could have the effect of altering the nature of this decree in such a way as to prevent the operation of the law as laid down in the Full Bench case. It is, on the face of it, a decree which does not put an end to the relations of the mortgagor and mortgagee, and, therefore, the present suit for redemption cannot be held to be barred.

W. C. A.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL, NO. 49 OF 1922.

June 5, 1922.

Present:—Mr. Justice Campbell.

AHMAD KHAN—DEFENDANT—

APPELLANT

versus

JANGBAZ KHAN AND ANOTHER —
DEFENDANTS, HUSSAIN KHAN AND
ANOTHER—PLAINTIFFS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), ss. 15, 21—
Sale of occupancy rights—Landlord, right of, to pre-empt.

The landlord of an occupancy tenancy is not entitled to sue under section 21 of the Punjab Pre-emption Act for pre-emption of that tenancy against a person having a right of pre-emption under section 15 (a) or (b) of the Act.

Ahbar Hussain v. Ali Ahmed, 38 Ind. Cas. 712; 116 P. R. 1916; 186 P. L. R. 1916, distinguished.

Second appeal from the decree of the District Judge, Attock at Campbellpur, dated the 5th October 1921, affirming that of the Munsif, First Class, Attock, at Campbellpur, dated the 20th May 1921.

Mr. *Badr-ud-Din Qureshi*, for the Appellant.

JUDGMENT.—This judgment will dispose of three Second Appeals Nos. 49, 50 and 51 of 1922 in all of which the question for decision is the same, *viz.*, whether the landlord of an occupancy tenancy is entitled to sue under section 21 of the Punjab Pre-emption Act, 1913, for pre-emption of that tenancy against a person having a right of pre-emption under section 15 (a) or (b) of the Act.

(2) 44 Ind. Cas. 908; 42 B. 246; 20 Bom. L. R. 164.

AHMAD KHAN v. JANGBAZ KHAN.

There were two sales and three suits as follows:—

(1) Nadir, one of several joint occupancy tenants, sold two *kanals* of the tenancy to Mir Baz, his nephew and a co-sharer in the tenancy, for Rs. 40. Sardar Khan, landlord, sued to pre-empt. His suit was dismissed by the First Court but was decreed on appeal by the District Judge who held, on the authority of *Akbar Hussain v. Ali Ahmad* (1), that the landlord has a right of purchase against all the world.

The vendee's second appeal is No. 50 of 1922.

(2) Jang Baz, a co-sharer in a joint occupancy tenancy, sold 1 *kanal* 15 *marlas* out of the tenancy to Saadulla, a stranger, for Rs. 350. Two pre-emption suits were brought one by Hasan Khan and Sardar Khan, landlords, and the other by Ahmad Khan, nephew of the vendor and co-sharer in the tenancy. Both the Courts below concurred in finding, on the strength of *Akbar Hussain v. Ali Ahmad* (1), that the landlords had the superior right and decreed in their favour relegating Ahmad Khan to the position of inferior pre-emptor. The latter has preferred two Second Appeals Nos. 49 and 51 of 1922.

All three appeals have been heard *ex parte* against the respondents.

The records do not show under which section of the Punjab Tenancy Act the tenancies are held but the point is not material. The lower Appellate Court appears to me not to have appreciated the significance of the difference in situation between the present cases and that reported as *Akbar Hussain v. Ali Ahmad* (1).

In *Akbar Hussain v. Ali Ahmad* (1) there was no suit by a landlord to claim and enforce a right of pre-emption. The landlord had purchased the tenancy and the vendor's collaterals sought to utilize the provisions of the Punjab Pre-emption Act, 1913, to turn him out. It was held that the landlord's position as a vendee was unassailable by any one claiming to pre-empt under the Punjab Pre-emption Act, because he (the landlord) had power under another Statute (The Punjab Tenancy Act) to prevent any sale whatsoever of the

tenancy, and because, by purchasing himself, when the tenant wished to sell, he had in effect done no more than exercise that power. It was pointed out, for example, that to interpret the law otherwise would lead to absurdities, for example, if a statutory pre-emptor were allowed to pre-empt, the defeated landlord might annul the sale by having recourse to a Revenue Court.

In the present cases the landlord is not in possession as a vendee resisting attempts to oust him by the heirs or relatives of the vendors. He has come into Court as a plaintiff to assert a right which he does not possess under the law of pre-emption. His rights are perfectly clear under the Punjab Tenancy Act. He can sue in a Revenue Court to annul any sale of a right of occupancy held under him, which, if under section 5, has not been offered to him under section 53 at a price to be fixed by a Revenue Officer, or if under one of the other sections, has not been sanctioned previously by him in writing. The practical effect of this power to set aside transfers is that, if an occupancy tenant finds himself forced to sell, the landlord can acquire the tenancy at a bare market-price, if under section 5, or on his own terms, if under sections 6 or 8. His position is much more favourable than that of any pre-emptor, and this is why we find that section 15 of the Punjab Pre-emption Act confers a right on an occupancy tenant to pre-empt his landlord's proprietary land, but confers no right on the landlord to pre-empt in that capacity his occupancy tenant's rights in land owned by himself, and confers a right to pre-empt those rights upon other persons, who are owners in the same estate but otherwise are in no way connected with the tenancy.

A decree for pre-emption of an occupancy tenancy can only be passed by a Civil Court in this Province in favour of a person declared entitled to a right of pre-emption by the Act of 1913. The landlords in the cases before me are so entitled but only under sub-section (c) of section 15 as owners in the sub division in which the land is situate. The rights of the vendee in one case and of the rival pre-emptors in the other are superior, they being collaterals and coming under sub-section (b) of section 15. As landlords, Hasan Khan and

(1) 38 Ind. Cas. 712; 116 P. R. 1916.; 186 P. W. R. 1916.

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Sardar Khan have no rights at all under the Act, and hence in these suits they cannot succeed against the co-sharers.

The respective positions of a defendant and of a plaintiff differ. A defendant in a pre-emption suit can resist the claim on any and every possible ground and is not restricted to showing that he has a superior right under the section 15 of the Act. A plaintiff must depend for success upon the letter of the Act. He cannot seek the aid of another Act, the administration of which is not in the hands of the Civil Courts. Herein lies the distinction between the present cases and *Akbar Hussain v. Ali Ahmad* (1).

All three appeals are accepted with costs and the decrees of the lower Appellate Court are set aside and varied as follows:—

The suit *Sardar Khan v. Nadar and Mir Baz* is dismissed with costs throughout.

In the suit *Ahmad Khan v. Jangbaz Khan* the plaintiff is given a decree directing that, on payment into Court of Rs. 350 less costs due to him from the defendants in this and the two Courts below, on or before 1st December, 1922, the defendants shall deliver to him possession of the land in suit and his title thereto shall be deemed to have accrued from the date of such payment, and that, on failure to make such payment by the date fixed, the suit shall stand dismissed.

In the suit *Hasan Khan and Sardar Khan v. Jang Baz and others* the decree in the plaintiff's favour is modified to the extent of declaring that it shall not take effect unless and until the superior pre-emptor Ahmad Khan has failed to comply with the provisions of the decree in the suit *Ahmad Khan v. Jang Baz and others*. In that event, the date for payment of Rs. 350 by the plaintiffs will be extended to the 15th January 1923.

Z. K.

Appeals accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 641 OF 1921.

February 2, 1923.

Present:—Mr. Batten, J. C.

PANDURANG AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

SAMPAT AND ANOTHER—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 35, O. XXI, rr. 36, 96—Symbolical possession—Formal possession—Actual possession.

There can be no symbolical possession as between the parties to a decree where the property is immoveable property which is capable of immediate actual possession and comes within the scope of the directions in sub-rule (1) of r. 35 of O. XXI of the Civil Procedure Code. Symbolical possession is the term properly applied where the property is of a kind which can be taken possession in an execution only under sub-r. (2) of r. 35 and r. 36 and r. 96 of O. XXI of the Code—these being the cases when actual possession cannot be given.

Formal delivery of possession under section 35 (1) of the Code is actual delivery of possession, it is not delivery of symbolical possession.

Appeal against the decree of the District Judge, Nimar, dated the 20th September 1921, in Civil Appeal No. 20 of 1921.

Mr. G. G. Hatwalne, for the Appellant.

Mr. W. R. Puranik, for the Respondent.

JUDGMENT.—The main question raised by the appellants in this appeal is, whether the decision of the lower Courts that actual possession of the *malik makbuza* field in suit was not delivered to him in execution proceedings is a correct decision. The learned District Judge, in paragraphs 10 to 19 of his judgment, does not appear to have appreciated exactly what had to be established by the plaintiffs. The District Judge seems to have been under some misapprehension as to what is meant by symbolical possession. There can be no symbolical possession as between the parties to a decree where the property is immoveable property which is capable of immediate actual possession and comes within the scope of the directions in sub-rule (1) of r. 35 of O. XXI of the First Schedule to the Civil Procedure Code, either the decree-holder is put in actual possession or not. Symbolical possession is the term properly applied where the property is of a kind which can be taken

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possession of in execution only under sub-rule (2) of r. 35, and rr. 36 and 96 of O. XXI. These are all cases where actual possession cannot be given. Rule 35 (1) lays down in what manner possession of immoveable property in the actual possession of the judgment-debtor is to be given, and what the lower Courts had to decide was whether possession was given in such manner or not. The point mentioned by the District Judge that the order-sheet contains nothing about the *malik makbuza* field is entirely irrelevant since the warrant shows that possession of the *malik makbuza* field was to be given. Unfortunately, the prescribed form of warrant under r. 35 does not give separate directions for carrying out execution under sub-rules (1) and (2); the warrant is the same in both cases. In this case part of the property had to be delivered under sub-rule (1) and part under sub-rule (2); the property in dispute fell under sub-rule (1). It is impossible to give actual possession of a field without the process-server and the person to whom he gives possession going to that field. The process-server can then put the representative of the decree-holder in possession by declaring that he is in possession of it; if any person representing the judgment-debtor is in possession, he may under sub-rule (1) be removed, but unless such a person is on the field he cannot be removed. If, then, the process-server and the decree-holder's representative did go to the field, it was not necessary for the decree-holder's representative to assert his possession by some means or other so long as he was not obstructed; once a person is put in possession in this manner, for however short a time, the execution is complete. If he is resisted in the actual taking possession the obstructor can be removed, and recourse may be had to rr. 97 and 98.

Formal delivery under the provisions of r. 35 (1) is actual delivery, as is made clear in the case of *Dhansingh v. Ganpat* (1). In some rulings, the words "symbolical possession" seem to be loosely used in the sense of formal possession which has not been subsequently maintained. The question here is, whether possession even formal has been given under r. 35 (1); if it is so,

then certainly the plaintiffs have a cause of action.

I would remark that the District Judge was in error in not having referred to the original execution proceedings. If he does so, he will find that the application for execution did refer separately to the *malik makbuza* field. What the lower Courts have to decide is, whether or not the provisions of section 263 of the old Civil Procedure Code and of r. 35 (1), O. XXI of the present Code, were carried into effect. Of the problem so stated, the lower Appellate Court has not, as far as I can see, attempted to arrive at any decision which is conclusive. I, therefore, remand the appeal to the lower Appellate Court with reference to the above remarks.

The decree is supported by the learned Pleader for the defendants-respondents on the ground that it is not proved that the present field in suit is the same field as Field No. 64 which was the field mortgaged. I am bound to say that the reasons given by the lower Courts for coming to a conclusion that it is the same field appear to me, on the face of it, inadequate. The matter should be gone into more deeply. The decree is also supported on the ground that the second defendant was not properly represented in the mortgage-suit and that the decree therein can have no effect as against him. This is a point which must also be taken into consideration. Costs will be costs in the suit; there will be no refund certificate.

G. R. D.

Case remanded.

JITENDRA NATH V. FATEH SINGH.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 14 AND 13 OF
1921.

July 29, 1922.

Present:—Justice Sir N. R. Chatterjea, Kt.,
and Mr. Justice Chotzner.JITENDRA NATH BHATTACHARJEE—
CREDITOR NO. 1—APPELLANT*versus*FATEH SINGH NAHAR AND OTHERS—
RESPONDENTS.*Provincial Insolvency Act (V of 1920), s. 4, sub-
ss. (1), (3)—Question of title—Sale of insolvent's
property.*

Although under sub-section (1) of section 4 of the Provincial Insolvency Act an Insolvency Court has full power to decide a question of title, yet when it does not deem it expedient or necessary to decide any question of the nature referred to in sub-section (1) but has reason to believe that the debtor has a saleable interest in any property, it may follow the course laid down in sub-section (3) and may without further enquiry sell such interest in such manner and subject to such conditions as it may think fit.

IN APPEAL NO. 14 OF 1921.

Appeal against an order of the First Additional District Judge, 24-Parganahs, dated the 22nd of December 1920.

IN APPEAL NO. 13 OF 1921.

Appeal against an order of the District Judge, 24-Parganahs, dated the 25th of September 1920.

Dr. Sarat Chandra Basak, Babu Sarat Chandra Mookerjee, for the Appellant.

Babus Banku Behari Mullick Chowdhuri, Jitendra Nath Roy, Peary Mohan Chatterjee and Krishna Lal Banerjee, for the Respondents.

JUDGMENT.—The Court, no doubt, under sub-section (1) of section 4 of Act V of 1920, has full power to decide a question of title, but the Judge has in the present case followed the course laid down in sub-section (3).

It is contended that no sufficient reasons are given for adopting this course and that evidence ought to have been given before doing so. But the Court, where it does not deem it expedient or necessary to decide

any question of the nature referred to in sub-section (1) but has reason to believe that the debtor has a saleable interest in any property, may without further inquiry sell such interest in such manner and subject to such conditions as it may think fit.

It appears that notice was served upon Jitendra Nath Bhattacharjee, who is the appellant before us, on the 8th September 1919. He did not appear in Court until the 25th September 1920. The learned Judge put to him certain questions and the purport of the answers is mentioned in his order. Upon a consideration of the matters stated in the report of the Receiver and of the answers given by the appellant when questioned by the learned District Judge, he came to the conclusion that the debtor had saleable interest in the property.

At one stage of the case, it is true, the creditors wanted to have a decision on the question whether the properties were joint family properties or not; but we understand that the creditors are now willing to purchase whatever interest the insolvent had in the property.

In these circumstances, we do not think that we should interfere with the order of the Court below.

The appeals are accordingly dismissed with costs—two gold mohurs—to be divided among the persons who have appeared.

Appeals dismissed.

B. N.

KURPAL, HEMRAJ v. SHAMRAO RAGHUNATH.

BOMBAY HIGH COURT.ORIGINAL CIVIL JURISDICTION APPEAL
No. 50 OF 1921.ORIGINAL CIVIL JURISDICTION SUIT No.
2293 OF 1919

December 22, 1922.

Present :—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice
Crump.KURPAL, HEMRAJ AND OTHERS—
DEFENDANTS—APPELLANTS

versus

SHAMRAO RAGHUNATH RAOTE

AND OTHERS—PLAINIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 35—"In the same case," meaning of—Decree for specific performance of contract—Default in payment under decree—Rescission of contract—Separate suit, if necessary.

The words "in the same case" in the last paragraph of section 35 of the Specific Relief Act refer to case (c) in that section. Where therefore, a default in payment has been made in a case under that clause, the Court can make an order to rescind the contract in the same suit in which the decree has already been made, instead of putting the opponent to file another suit for rescission.

Sir Thomas Strangman, in support of the notice of motion.

Mr. Mirza, for the Opponent (Respondent No. 1.)

JUDGMENT.—A decree was passed in this suit granting specific performance to the plaintiff of the suit contract for the sale of certain land. The decree directed him to pay Rs. 12,000 as the purchase price, but, unfortunately, no time was mentioned within which the purchase price should be paid. As the plaintiff did not comply with the direction in the decree that he should pay the purchase price, an application was made to this Court for an order in the suit that the decree should be vacated as a consequence of such default on the part of the plaintiff. The plaintiff has now paid the money. So that the only question is, whether the plaintiff should pay the costs of the motion. It is urged on his behalf that a wrong procedure has been followed, for, under section 35 of the Specific Relief Act, a suit ought to have been filed in order to secure the performance of the contract or its rescission. There can be no doubt that section 35 is somewhat obscurely drafted. First, it directs that any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by

the Court in any of the following cases:—

"(a) Where the contract is voidable or terminable by the plaintiff:

"(b) Where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff:

"(c) Where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the Court has ordered him to pay."

Therefore, in the last case where there has been a default in payment of the purchase-money which the Court has ordered a party to pay in a decree for specific performance of the contract of sale, it is open to the opponent to file a suit for a rescission of the contract. Then by the last paragraph of the section it is stated:—

"In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require."

It is not at all clear to what the words "in the same case" refer, but it appears to me that these words must refer to case (c) in the section, so that the Court is empowered to make an order in the suit in which a decree has already been made, to rescind the contract, instead of putting the opponent to file another suit for rescission. That is clearly the English practice as appears from Fry on Specific Performance, Sixth Edition, pp. 546, 547, paragraph 1171:—

"There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself."

Paragraph 1172 (i):

"He may obtain (on motion in the action) an order appointing a definite time and place for the completion of the contract by payment of the unpaid purchase money and delivery over of the executed conveyance and title-deeds, or a period within which the judgment is to be obeyed, and, if the other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate and effects."

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And paragraph 1173 (ii):

"He may apply to the Court (by motion in the action) for an order rescinding the contract. On an application of this kind, if it appears that the party moved against has positively refused to complete the contract, its immediate rescission may be ordered: otherwise, the order will be for rescission in default of completion within a limited time."

In my opinion this is the practice which it has been directed should be permissible by the last paragraph of section 35 of the Specific Relief Act, and the argument urged by Mr Mirza, that this Court has no jurisdiction to make an order on a motion of this kind after specific performance has been decreed cannot be sustained. The opponents must, therefore, pay the costs of the motion; including costs reserved.

W. C. A.

Order accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1516 OF 1920.

December 15, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice and Mr. Justice Wallace.

DURASAMI IYER—

PLAINTIFF—APPELLANT

versus

SUBBARAYA IYER AND OTHERS—

DEFENDANTS NOS. 1 to 7 AND 9—

RESPONDENTS.

Hindu Law—Joint family—Alienation, invalid, by co-parcener—Partition—Alienated property taken into account—Subsequent suit to recover property, whether maintainable.

It is only in his capacity as co-parcener that a member of a joint family can sue for joint family property unlawfully alienated. His suit must be in the nature of a partition suit. But once there has been a general partition in which the property in question and the sale of it has been taken into account, the parties to that partition cease to be co-parceners and none of them has any right to sue to recover the property alienated [p. 323, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Salem, in Appeal Suit No. 87 of 1919 (Appeal Suit No. 41 of 1918 on the file of the District Court), preferred against the

decree of the Court of the District Munsif of Namakkal, in Original Suit No. 571 of 1915.

Mr. C. S. Venkatachariar (with him Mr. V. N. Venkatavaradachariar), for the Appellant:—This is a suit to set aside an alienation and partition. Both the lower Courts have sustained the alienation on the ground that it was of benefit to the family.

The sale was for Rs. 1,960 of which Rs. 1,000 was paid in cash and for the rest a mortgage was executed by the alienee. There was admittedly no antecedent debt or family necessity. The sale-deed recites the object was to purchase other lands. None was admittedly purchased. A series of decisions of this Court have held that this is not legally sufficient to sustain an alienation of joint family properties. The lower Courts rely on some sand sifting which can not entitle a manager to sell family land. Clearly, there was no necessity within the meaning of the decisions and the alienation cannot be upheld. See *Palaniappa Chetty v. Sreemath Deivasikamony Pandara Sannadhi* (1), *Sahu Ram Chandra v. Bhup Singh* (2).

[SCHWABE, C. J.—But the real point against you is the prior general partition. The lower Court has found, that the sale proceeds were invested in the family money-lending business which was taken into account in the partition. How can you now bring a suit for partition of the alienated property?]

There is no estoppel. The prior partition was only of the admitted family properties. The co-parcener's right to set aside the alienation is not lost by a partition of the other items. There is no acquiescence or ratification of the alienation. Where the alienation is not for necessity, it is void as regards the share of others and as such is incapable of ratification.

A subsequent assent or ratification by a junior member cannot validate the

(1) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 (P. C.).

(2) 39 Ind. Cas. 286; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

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void alienation. The assent is only evidence of the family necessity. Where there is no necessity, a subsequent assent is of no avail. See *Kamakshi Ammal v. Chakrapany Chettiar* (3), *Kandsami Asari v. Somaskanta Ela Nidhi* (4). The case in *Bommali Musiligadu v. Madugula Nannigadu* (5) cited in the latter case rested on personal estoppel of which there is none in the present case. See also Mayne's Hindu Law, paragraphs 342—345.

Further, the question of acquiescence is one of fact and has not been raised in either of the Courts below. If necessary, the matter must go down to the lower Court for a finding.

[SCHWABE, C. J.—But the lower Court has found as a fact that the purchase-money was in effect partitioned.]

Even if that is so, it can only entitle defendant to ask that plaintiff should be directed to pay his share of the consideration before the sale is set aside. That cannot constitute a legal bar to the maintainability of the suit.

[SCHWABE, C. J.—If the property itself had been partitioned you would certainly have had no right of suit. Instead, that into which the property had been converted was included in the assets for partition. The result is the same. We have further recently held that unless the other co-parceners are prejudiced the alienee's right in equity to get the alienated properties allotted to alienor's share must prevail over a co-parcener's right to partition.]

Mr. C. S. Venkatachariar. In Second Appeal No. 817, 1920 the question that arose for consideration was somewhat different from the present one. But, apart from that, it was open to the alienee in this suit to have asked for a general partition. He has not asked for any. There is nothing to prevent him even now from filing such a suit separately. He was not a party to the partition between the father and the sons and is not bound by it. There is nothing to prevent him from re-opening it to work out his right in equity. Those rights of the alienee cannot bar the present suit. The alienation not being for a binding purpose,

the co-parceners are legally entitled to have it set aside.

Mr. L. S. Veera Raghava Iyer for the alienee and Mr. A. Srirangachariar for the other co-parcener, were not called upon.

JUDGMENT.

Schwabe, C. J.—In this case the facts are, that the 1st plaintiff, the managing member of a joint Hindu family, in 1903 sold some land. It is conceded that that sale was not binding on the other members of the family as not being for necessity. The plaintiff was at the date of that sale 17 years of age and he knew all about it then and thereafter. The money that was realised on the sale was invested by the managing member in a family money-lending business which he carried on. In 1915 there was a general partition of the family property between the plaintiff and the 1st defendant and other members of the family. In that partition the money-lending business was brought into account but the property alienated in 1903 was not, though the proceeds of that sale, were in effect brought into the accounts of the money-lending business as it stood in 1915.

After this partition, plaintiff sued the other members of his family and the alienee to recover back the property alienated. It was held by the Munsif and the Subordinate Judge that the alienation was perfectly good. It was also held by the Subordinate Judge that on the partition in 1915 this property was brought into account in the way I have mentioned. In my judgment, that finding which was on admitted facts, was conclusive of the suit. It is only in his capacity as co-parcener that a member can sue for joint family property unlawfully alienated. His suit must be in the nature of a partition suit. In that suit, it is open to the alienee to claim partition, so that the property in dispute may, if possible, without injustice, be decreed to the alienor on partition and the alienee standing in his shoes may keep it. But once you have got a general partition in which the property in question and the sale of it has been taken into account, the parties to that partition ceased to be co-parceners. If there were property left outstanding and not dealt with in that partition, they would be entitled, indeed, to claim that property and to have that property divided. But the

(3) 30 M. 452; 17 M. L. J. 405; 3 M. L. T. 23.

(4) 5 Ind. Cas. 922; 35 M. 177; 7 M. L. T. 165; 20 M. L. J. 371; (1910) M. W. N. 580.

(5) 15 M. L. J. 492.

KHIMCHAND NAROTAMDAS v. SOBHAGCHAND.

property in question in this suit was taken into consideration in the partition between the parties and the plaintiff has no right, title or interest whatever to it. He cannot sue for partition, there being nothing left outstanding for partition. He cannot sue his father or other members of the family. I entirely fail to see, that being so, how he can sue the alienee of his father. The second appeal on that ground alone must be dismissed with costs.

Wallace, J.—I agree.

V. N. V.

Appeal dismissed.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION

No. 318 OF 1920.

December 18, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

KHIMCHAND NAROTAMDAS BHAV-

SAR—DEFENDANT—APPLICANT

versus

SOBHAGCHAND BHOGILAL—

OPPONENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Withdrawal of suit—Costs of defendant—Discretion of Court—Revision.

Where a plaintiff is allowed to withdraw his suit, the ordinary rule is that costs follow the event and if a plaintiff finds he is unable to proceed with his suit and asks for leave to withdraw it, the opposite party is entitled to the costs which he has been put to in defending the suit. [p. 324, col. 2.]

The discretion of the Court as to the award of costs, so long as it is judicially exercised, should not be bound down by any artificial rules. A great deal must depend upon the facts of each case. [p. 324, col. 2.]

Although in a particular case of a withdrawal of a suit it may be a sound exercise of discretion to refuse costs where the suit is based on a state of law which has afterwards been altered, the most important thing to consider in all such cases is on which of the parties rests the responsibility for the litigation. Where the plaintiff has been in the wrong throughout, the defendant should not be deprived of his costs. [p. 324, col. 2.]

Ramaswami Naicken v. Venkataswami Naicken, 53 Ind. Cas. 7; 43 M. 61; 37 M. L. J. 271; 26 M. L. T. 219; 10 L. W. 326; (1919) M. W. N. 792, explained.

Where, in the matter of costs, there is an omission to consider the necessary circumstances, there is not a sound exercise of discretion, and the High Court is entitled to interfere in revision. [p. 325, col. 1.]

Civil extraordinary application from an order passed by the First Class Subordinate Judge, Ahmedabad, in Suit No. 572 of 1919.

Mr. H. V. Divatia, with him Mr. Hiralal D. Nanavati, for the Applicant.

Mr. R. J. Thakor, for the Opponents.

JUDGMENT.—This is an application in revision to set aside the order of the First Class Subordinate Judge of November 17, 1920, by which he allowed the plaintiff's Suit No. 572 of 1919 to be withdrawn, but refused to allow the defendants their costs. The ordinary rule is, that costs follow the event, and that, if the plaintiff finds himself unable to proceed with his suit, and asks for leave to withdraw it, then the opposite party is entitled to the costs which he has been put to in defending the suit. The granting of leave to withdraw from a suit is a concession because the defendant is ordinarily entitled to ask the Court to decide the suit on the merits, and if he wins, he would be entitled to his costs. The Judge declined to follow the ordinary rule, as he thought he ought to follow the decision in *Ramaswami Naicken v. Venkataswami Naicken* (1) where it was held that it was a good cause for depriving a successful respondent of the costs of an appeal if the law had been altered since the filing of the appeal. But it seems to me that he has read one portion of the judgment in that case, and not the other, with the result that he has failed to realize the *ratio decidendi*. No doubt it may be in a particular case a sound exercise of discretion to refuse costs where the suit is based on a state of law, which has been afterwards altered either by Statute or by the decision of a superior Tribunal, and that might be a good ground for the decision in this case provided the learned Judge had also considered the facts, for the judgment in *Ramaswami Naicken v. Venkataswami Naicken* (1) proceeds at page 64:—

"Under the Indian law, it can safely be stated that the discretion of the Court as to the award of costs, so long as it is judicially exercised, should not be bound down by any artificial rules. A great deal must depend upon the facts of each case and upon its presentation by the party and upon circumstances and authorities which were pre-existing before the suit was launched. In the present case, the first defendant

(1) 53 Ind. Cas. 7; 43 M. 61; 37 M. L. J. 271; 26 M. L. T. 219; 10 L. W. 326; (1919) M. W. N. 792.

*Page of 43 M.—[Ed.]

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has been responsible for the whole of the litigation; neither the plaintiffs nor the other defendants have been guilty of any act of commission or omission which can be charged against them. If the judgment of the Divisional Bench had stood, the appellants might have succeeded. That is a consideration which cannot altogether be ignored in apportioning costs. Taking all these circumstances into consideration, we think the appellant should not be made to pay the costs of defendants."

There the costs had followed the event. The first defendant who was responsible for the whole of the litigation was made to pay the costs of the other defendants. In this case it is just the opposite way. From the decision in Civil Suit No 85 of 1918, the basic suit in these disputes, which came up to this Court, and is reported [see *Khimchand v. Bhogilal* (2)], it will be seen that it is the present respondents-plaintiffs who had been in the wrong throughout, and if the learned Judge had considered all the facts and surrounding circumstances of the case, he would have seen, that it was not the present applicant who was responsible for the litigation but the respondents-plaintiffs. That makes a great deal of difference in considering who should pay the costs of the suit which was allowed to be withdrawn. In this case the Judge has not considered all the facts which he was bound to consider, before exercising his discretion with regard to the award of costs; and when there is an omission to consider the necessary circumstances then there cannot be a sound exercise of discretion, and this Court is entitled to interfere. We think the application must be allowed, and the applicant must get his costs of the suit and of this application.

W. C. A.

Rule made absolute.

(2) 67 Ind. Cas. 913; 24 Bom. L. R. 361; 46 B. 854; (1922) A. I. R. (B.) 436.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 17 OF 1922.

December 21, 1922.

Present.—Mr. Justice Krishnan.

G. A. SUNDARA IYER—PETITIONER

versus

ARUMUGAM PILLAI AND OTHERS—RESPONDENTS.

Pleadings—Pro-note, suit on—Claim on original debt—Amendment of plaint.

In a suit on a pro-note for money due under a loan where there is difficulty in enforcing the note, the plaintiff is entitled to fall back on the original consideration where the claim based on it is not barred by limitation and have the plaint amended accordingly.

Duggempudi Nagamma v. Tirumala Reddi, 59 Ind. Cas. 363; 12 L. W. 147, relied on.

Ma Shwe Mya v. Maung Mo Hnaung, 63 Ind. Cas. 914; 48 C. 832; (1921) M. W. N. 396; 4 U. B. R. (1921) 30; 30 M. L. T. 28; 24 Bom. L. R. 682; (1922) A. I. R. (P. C.) 249 (P. C.), distinguished.

Petition, under section 115 of Act V of 1903 and section 107 of the Government of India Act, praying the High Court to revise an order dated, 13th October 1921, of the Court of District Munsif, Tinnevely, in I. A. No. 766 of 1921, in Original Suit No. 73 of 1921.

Mr. N. A. Krishna Iyer, for the Petitioner.

Mr. C. Narasimachari, for the Respondents.

JUDGMENT.—I think the amendment was properly allowed in this case. There is nothing to show that the claim based on the original debt is barred by limitation. That is a matter to be decided in the suit. If it is barred, the suit will no doubt be dismissed. There is no reason why a claim for money due based on the original loan or dealings should not be combined with a claim for the same money as due under a pro-note; in case there is any difficulty in enforcing the note, the party is entitled to fall back on the original consideration. See *Duggempudi Nagamma v. Tirumala Reddi* (1). The two causes of action in such a case are not so distinct as the claim which their Lordships of the Privy Council were dealing with in *Ma Shwe Mya v. Maung Mo Hnaung* (2). Their Lordships' language has to be

(1) 59 Ind. Cas. 363; 12 L. W. 147.

(2) 63 Ind. Cas. 914; 48 C. 832; (1921) M. W. N. 396; 4 U. B. R. (1921) 30; 30 M. L. T. 28; 24 Bom. L. R. 682; (1922) A. I. R. (P. C.) 249 (P. C.).

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taken with the facts of the case they were dealing with. The civil revision petition fails and is dismissed with costs.

V. N. V.

Petition dismissed.

BOMBAY HIGH COURT.

SECOND APPEAL NO. 170 OF 1922.

December 19, 1922.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

DIGAMBAR GOVIND DESHPANDE—

DEFENDANT—APPELLANT

versus

LAHYADEO BHAU DESHPANDE—

PLAINTIFF—RESPONDENT.

Pleadings—Appeal, second—Question of limitation Question of law, when not entertainable.

Although questions of limitation, being questions of law, are not excluded from being heard in second appeal when they have not been raised in the lower Courts, where a question of law depends upon a finding of fact or evidence, and that evidence has not been led in the Trial Court, the High Court in second appeal will not deal with the question.

Second appeal from the decision of the Assistant Judge, Satara, in Appeal No. 284 of 1920, confirming the decree passed by the Second Class Subordinate Judge at Wai, in Civil Suit No. 833 of 1918.

Mr. S. R. Bakhale, for the Appellants.

Mr. P. B. Shingne, for the Respondents.

JUDGMENT.—The plaintiff sued to obtain a declaration that he was the owner of the plaint lands, and that the tenants in actual cultivation of the lands were his own tenants, and for an injunction restraining the defendants from recovering rent of the lands from the tenants or otherwise interfering with them in any way. The suit was brought in the Court of the Second Class Subordinate Judge at Wai, although the lands were situate within the jurisdiction of the Court at Rahimatpur. No objection, however, was taken to the jurisdiction of the Wai Court, presumably because the suit asked for personal relief respecting immoveable property held by or on behalf of the defendant within the proviso to section 16 of the Civil Procedure Code, and

it may be admitted that the suit is not one for possession of land, in which case the Wai Court could have had no jurisdiction. So we need not consider the question whether the point of jurisdiction had been raised too late under section 21 of the Civil Procedure Code. But, although it is not a suit for possession, the issues which were raised in the Trial Court were the same issues as would be raised in a suit for possession, and it was found by the Court that the plaintiff was in possession of the suit lands within twelve years of the suit. In the first appeal Court the decree in favour of the plaintiff was confirmed.

For the first time in second appeal it is suggested that the period of limitation for such a suit is six years, not twelve. It may very well be that the period of limitation for the plaintiff's suit was six years. But it would be a question of fact when time began to run against the plaintiff for the suit which he brought; and although questions of limitation being questions of law are not excluded from being heard in second appeal, when they have not been raised in the lower Courts, we have always maintained that where a question of law depends upon a finding of fact on evidence and that evidence has not been led in the Trial Court, then this Court in second appeal will not deal with the question of law. The defendants have not proved that the plaintiff was not in possession within six years of the suit, and they have not put the plaintiff to the proof that he was. We cannot, therefore, remand the case to the Trial Court for a finding on an issue of fact which was never raised in the Trial Court, and as we cannot consider the question of law without that finding, we now decline to deal with it. It follows, the plaintiff's suit was rightly decreed. The appeal must be dismissed with costs.

W. C. A.

Appeal dismissed.

VITHAL v. RAMCHANDRA.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 176 OF 1922.

January 25, 1923.

Present.—Mr. Pridaux, A. J. C.

VITHAL AND OTHERS—APPLICANTS—
DEFENDANTS

versus

RAMCHANDRA AND ANOTHER—NON-
APPLICANTS—PLAINTIFFS.*Insolvency—Joint Hindu family—One member declared insolvent—Debt due from family—Suit to recover—Venue—Provincial Insolvency Act (V of 1920), s. 28.*

Where a member of a joint Hindu family has been declared insolvent, the Insolvency Court alone has jurisdiction in the matter of a debt due by him jointly with other members of the family, despite the fact that there are minors concerned who are not insolvents. Such a debt must be proved under section 28 of the Provincial Insolvency Act. It cannot be split up so as to render a suit competent for the recovery of a moiety of the debt from the non-insolvent members of the family in the ordinary Courts.

Application for revision of the judgment and decree of the Judge, Small Cause Court, Wardha, dated the 30th June 1922, in Civil Suit No. 54 of 1922.

Mr. D. T. Mangalmurti, for the Applicants.

Mr. Atmaram Bhagwant, for the Non-Applicants.

ORDER.—In this case plaintiffs state that after making accounts the deceased Shrikrishna and defendants Nos. 1, 2 and 3 and defendant No. 4 were found to owe Rs. 1,443 on 4th January 1916. Rs. 1,000 were remitted, Rs. 143 paid off and for the balance of Rs. 300 the 4th defendant executed a bond for himself and for the minor defendants Nos. 1 to 3, they being members of a joint Hindu family. Plaintiffs sue on that bond.

The plaint contains the following note:—

“Defendant No. 4 in this suit has been declared insolvent. An application is made to the Insolvency Court for permission to file a suit against him. Plaintiffs will file a copy of that order in this suit later on.” That order was never filed. The bond itself states that it was signed by Ganpat Balkrishna for himself and as guardian of defendants Nos. 1, 2 and 3. The lower Court has found for the plaintiff. It finds that Ganpati executed the bond in suit for previous debts owing by himself and his brother Shrikrishna, the deceased father

of defendants Nos. 1, 2 and 3. The family was joint and Ganpati was the managing member of the family after the death of Shrikrishna and that as the most senior member of the family he could execute the money bond on behalf of the family. There being a plea that the first defendant was of age the Court thinks this point immaterial for Ganpati as manager could act for the family.

It is here not denied that Ganpati was declared an insolvent on 14th April 1909 and it is here contended that plaintiffs were bound to bring this case in the Insolvency Court. As a matter of fact, they brought the existence of this debt to the notice of the Insolvency Court but nothing further seems to have been done. It is contended that under section 28 of the Provincial Insolvency Act the debt would have to be proved under that Act. There seems to me some force in this contention. It has been held that, where the father of a joint Hindu family which includes minor sons as well as himself seeks the protection of the Bankruptcy Court, he must place all his property at the disposal of the Court: see *Barwan Das v. O. M. Chiene* (1); and it has also been held that the members of a joint Hindu family can be adjudicated insolvents in a single petition by a creditor if they are liable on a joint debt or have been guilty of a joint act of insolvency.

It is very clear that in the present case the plaintiffs could not proceed against Ganpati in the Court they did. This situation is accepted by the learned Pleader for the plaintiffs here. But it is contended that the suit against the minors would lie and that at the most the debt should be cut into half and half, and the half appertaining to Shrikrishna's share be made payable from Shrikrishna's share of the family property. I am not able to accede to this request. It seems to me that in a case like the present it was the plaintiffs' business to proceed with their case under the Insolvency Act despite the fact that there were minors concerned who were not bankrupts. It is impossible to split the debt into two and to treat the debt as two separate debts, one against the representatives of Shri-

(1) 64 Ind. Cas. 976; 44 A. 316; 20 A. L. J. 155; (1922) A. L. R. (A.) 79.

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krishna and the other against Ganpati. The debt is one, if it exists at all, for which the family property of the whole family would be liable. I think the plaintiffs have mistaken their venue and that this case should not have been gone into by the Small Cause Court but by the Bankruptcy Court.

For the above reasons, I set aside the decree of the lower Court and dismiss plaintiffs' suit with costs. They will pay the defendants' costs throughout.

W. C. A.

Decree set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1423 OF 1920.

November 3, 1922.

Present :—Mr. Justice Oldfield and Mr. Justice Devadoss.

GOLLA CHAKRAPANI—PLAINTIFF—
APPELLANT

versus

KATENENI LAKSHMAPERUMALLUR

AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu temple—Idol, removal and replacement of—Worshiper, right of.

The removal of an idol from a temple in order to replace it by a new one is not an act of worship; such removal is an act of management, and a worshipper who claims the right to remove it, must prove that he has some right to manage the temple.

Second appeal against a decree of the Court of the Temporary Subordinate Judge, of Ellore, in Appeal Suits No. 187 and 188 and 190 and 191 of 1919 (Appeal Suit, Nos. 170, 171, 176 and 177 of 1918 on the file of the Sub-Court, Ellore) preferred against a decree of the Court of the District Munsif of Ellore, in Original Suit No. 307 of 1916.

Messrs. A. Krishnaswami Aiyar and A. Venkatachalam, for the Appellant.

Messrs. B. Sathanarayana and Ch. Raghava Rao, for the Respondents.

JUDGMENT.—In this case the question is, whether the plaintiff can sue to establish his right to remove an idol from the temple of his village, that idol being alleged to be cracked, and to re-place it by a new idol made by himself. The temple, it is not disputed, has no trustees and no property. It is referred to as the temple of the villagers, who are the worshippers in it.

The plaintiff supports his right to remove the idol and to re-place it by a new one on the ground that it would be an act of worship, which, like any other villager, he is entitled to perform. We cannot see how, in any ordinary sense, the removal of an idol from a temple and the substitution of a new one is an act of worship.

Next the plaintiff argues that such removal and substitution would be an act of management. The difficulty, however, is that he has not shown that he has any right to manage. He, no doubt, presented an application in the Court of first instance for leave to sue as representing the villagers as a body. But that application was dismissed, and, as he has no ground of appeal against the dismissal as improper, we are not prepared to allow him to argue the point. In these circumstances, the appeal fails and is dismissed with costs payable by the plaintiff (appellant) to defendants Nos. 1 to 9, 12, 13, 15 and 16 (respondents Nos. 1 to 9, 11, 12, 14 and 15). There was no necessity for the 14th defendant (13th respondent) to appear here and he will bear his own costs.

V. N. V.

W. C. A.

Appeal dismissed.

AKBAR SARCAR v. RAMESH CHANDRA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 702
OF 1921.

August 9, 1922.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Chittre.

AKBAR SARCAR AND OTHERS—

DEFENDANTS—APPELLANTS

versus

RAMESH CHANDRA MOITRA—

PLAINTIFF—RESPONDENT.

*Landlord and Tenant—Assessment of rent, suit
for—Limitation—Limitation Act (IX of 1908),
Sch. I, Arts. 130, 131, applicability of.*

In a suit for assessment of *mal* lands presumably liable to be assessed, the circumstance that rent has not in fact been paid for more than twelve years before suit, is not *per se* sufficient to support a decree of dismissal. [p. 331, col. 2.]

Prosonna Kumar Mukherjee v. Srikanth Raut, 16 Ind. Cas. 365; 40 C. L. J. 173; 16 C. L. J. 202; 17 C. W. N. 137 and *Jagdeo Narain Singh v. Baldeo Singh*, 71 Ind. Cas. 984; 3 P. L. T. 605; (1922), A. I. R. (Pat.) 272; 36 C. L. J. 499; 32 M. L. T. 1 (P. C.). *Birendra Kisore Manikya Bahadur v. Nazir Mahommed*, 30 Ind. Cas. 917; 22 C. L. J. 122, *Prolap Chunder Chowdhury v. Shukhee Soonduree Dasse*, 2 C. L. R. 569, *Bir Chunder Manikya v. Raj Mohun Goswami*, 16 C. 449; 8 Ind. Dec. (N. S.) 296, *Jotindra Mahan Tagore v. Chandra Nath Saffai*, 6 C. W. N. 360, *Jagannatha Pandiayar v. Muthia Pillai*, 14 M. L. J. 477, *Mohammad Husain v. Mohammedi Bibi*, 28 Ind. Cas. 600; 13 A. L. J. 333, *Hurryhur Mookhopadhyaya v. Madub Chunder Baloo*, 14 M. L. A. 152; 20 W. R. 459; 8 B. L. R. 566; 2 Sath P. C. J. 484; 2 Sar. P. C. J. 713; 20 E. R. 743 and *Arfunnessa v. Peary Mohun Mookerjee*, 1 C. 378; 25 W. R. 209; 1 Ind. Dec. (N. S.) 237, referred to.

Article 130 of the First Schedule to the Limitation Act does not apply unless and until the land is found to be rent-free; the mere non-payment of rent for a period does not bar the landlord's right to have the rent assessed and to recover rent from his tenant. [p. 331 col. 1.]

Kamini Sundari Chowdhurani v. Abdul Halim, 47 Ind. Cas. 420; 28 C. L. J. 254 and *Dhanajoy Manjhi v. Upendranath Deb*; 46 Ind. Cas. 428; 22 C. W. N. 685, relied on.

Under Article 131 of the First Schedule to the Limitation Act the right to levy assessment, as a recurring right, accrues when there has been a demand and refusal only in those cases where the relationship of landlord and tenant or landlord and occupant has ever existed. Once that right is established, then the non-payment of rent or assessment would not be sufficient to enable the tenant to begin to set up a title by adverse possession. There must be some overt act, such as refusal to pay the rent or assessment, before time begins to run. [p. 332 col. 2.]

Ganesh Vinayak Joshi v. Sitabai Narayan Joshi, 38 Ind. Cas. 54; 41 B. 159; 18 Bom. L. R. 950, *Abhoy Churn Pal v. Kally Pershad*, 5 C. 9499;

C. L. R. 260; 2 Ind. Dec. (N. S.) 1213, *Madhwarao Harikharrao v. Anusuyabai*, 36 Ind. Cas. 505; 40 B. 606; 18 Bom. L. R. 708, *Kirpa Ram v. Jai Chand*, 23 Ind. Cas. 445; 140 P. L. R. 1914; 46 P. W. R. 1914, *Bangarayya Guru v. Jagannatha Raju Guru*, 5 Ind. Cas. 615; 7 M. L. T. 278; (1910) M. W. N. 485 and *Manavikrama Zamorin Raja Avergal of Calicut v. Achutha Menon*, 23 Ind. Cas. 806; 38 M. 916; (1914) M. W. N. 228; 15 M. L. T. 226; 26 M. L. J. 377, referred to.

A suit to assess and recover rent of the plaintiff's *mal* land is not barred by limitation under Art. 131 of the First Schedule to the Limitation Act where the defendant repudiates the right of the plaintiff to assess and recover rent for the first time within 12 years of the suit. [p. 332, col. 2.]

Where a contract between the landlord and tenant contemplates that liability to pay rent should accrue only after assessment, the tenant should not be made liable for rent for a period anterior to the assessment. [p. 332, col. 2.]

Rangayya Appa Rao v. Bobba Sriramulu, 31 I. A. 17; 27 M. 143; 8 C. W. N. 162; 14 M. L. J. 1; 6 Bom. L. R. 241; 8 Sar. P. C. J. 617 (P. C.) and *Assanullah v. Mohini Mohan Das*, 26 C. 739; 13 Ind. Dec. (N. S.) 1072, relied on.

Jagannath Manjhi v. Jumman Ali Patwari, 29 C. 247 and *Upendra Nath Nag Chowdhury v. Surya Kanta Roy Chowdhury*, 20 Ind. Cas. 205, dissented from.

Appeal against a decree of the Subordinate Judge, Rajshahye, dated the 30th of November 1920, affirming that of the Officiating Munsif, Boalia, dated the 27th of September 1918.

Babu Jalindra Nath Lahiri, for the Appellants:—The Courts below ought to have held that the plaintiff's suit was barred by limitation under Art. 130 of the Schedule to the Limitation Act. Under that Article a suit like the present ought to have been instituted within 12 years from the date when the right to resume or assess the land first accrues. The right to assess the land first accrued on the termination of the first ten years of the settlement. But after the expiration of that period no rent was ever assessed and the present suit having been instituted more than 12 years after the expiration of the first ten years of the settlement, that is, more than 12 years after the right to assess accrued, is barred by limitation under Art. 130 of the Limitation Act. Even if it be held that the suit is within time, having regard to the express terms of the settlement, the tenant could not be made liable to pay rent for a period antecedent to the assessment.

Babu Krishna Kamal Moitra, for the Res-

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pondents.—Article 130 of the Limitation Act has no manner of application to the facts of the present case. That Article relates to the assessment of rent-free land. See *Kamini Sundari Chowdhurani v. Abdul Halim* (1). The mere non-payment of rent cannot make the land rent-free. Refers to *Prosonna Kumar Mukherjee v. Srikanth Raut* (2), *Barhamdat Missir v. Krishna Sahay* (3) and *Ganesh Vinayak Joshi v. Sitabai Narayan Joshi* (4). If the liability to assessment is established there is no reason why the tenant should not be liable to pay rent for the period antecedent to the assessment.

Babu Jotindra Nath replied.

JUDGMENT.

Mookerjee, J.—This is an appeal by the defendants in a suit for assessment and recovery of rent upon declaration that the disputed land is rent-paying. The Courts below have found in favour of the plaintiff, and the substantial question now in controversy is, whether the claim for assessment is or is not barred by limitation. The defendants have urged a further point of subordinate importance, namely, that rent should not be decreed for a period antecedent to the date of assessment.

On the 18th December 1844 one Karim Sarcar, now represented by the defendants-appellants, executed a *kabuliyat* in favour of Mritunjoy Moitra, the father of the plaintiff-respondent. As the determination of the rights and obligations of the parties depends upon the terms of the contract between them, the relevant portion of this document is set out here:

"I, Karim Sircar, son of Fozdar Sircar, of Haldi, Thana Tanar, District Rajshahye, executed this *kabuliyat* in the year 1251 to the effect following:—

"That you have an eight-anna *Zemindari* interest in Kismat Haldi the Mahal No. 1210, borne on the *Touzi* of the Collectorate, within Pargana Chinashour which you are in ownership and possession of without

any objection of others. Two plots of land described in schedule below appertaining to your distinct Saham of the aforesaid eight-annas of the aforesaid *Touzi* and measuring about 4 *bighas*, are now lying *patit* and covered with *jungle*. As it requires great labour and expense of money to render the lands of the aforesaid two *dags* fit for cultivation by clearing the jungle thereof and filling up *khals* and *khandars* you notified to make the said land *hassil* by granting a settlement thereof for a term of 10 years, free of rent, that is to say, keeping the rent in abeyance. I, accordingly, having agreed to take the said land, execute this *kabuliyat* and agree that I shall myself bear the expenses that will be required to render the lands of the two *dags* mentioned in schedule below fit for cultivation by clearing the *jungle* thereof and filling up the *khals* and *khandars*, and to recoup myself for the said expenses, I shall enjoy the profits of the said lands and hold the same as *lakheraj* for 10 years from the beginning of 1252 up to the end of 1261: that is, up to (torn) you shall not get any rent (torn) but on the expiry I shall be bound to pay the rent that may be fixed upon a measurement and according to the rate and the area of land whether more or less. If I, through any neglect on my part, fail to re-claim the said lands within the said term or if I partly re-claimed the same and leave partly unreclaimed, then you shall, on the expiry of the term, bring the said land into your *khas* possession, and I shall be bound to pay the costs that will be incurred to bring the said land under cultivation, as also damages. If I do not pay the same amicably, you shall realise the same with costs by bringing a suit in proper Court. I shall keep intact the limits, etc., of the land. If any one encroaches upon the boundaries through any neglect on my part, then I shall make good the loss that you may sustain to bring the same in your possession, together with interest thereon. If any measurement of the *mahal* or assessment of rent thereof is made, then I shall be bound to pay the rent that may be fixed at any time according to the rate. To the above effect I, having received a *patlak* as a counterpart of this *kabuliyat*, do execute this

(1) 47 Ind. Cas. 420; 28 C. L. J. 254.

(2) 16 Ind. Cas. 365; 40 C. 173; 16 C. L. J. 202; 17 C. W. N. 137.

(3) 20 Ind. Cas. 910; 18 C. W. N. 466.

(4) 38 Ind. Cas. 54; 41 B. 159; 18 Bom. L. R. 950.

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habuliyat. Finis. The 5th Pous 1251 B. S."

There is no room for doubt that the land leased out was *mal* land, which was intended to be re-claimed and brought under cultivation by the lessee. No rent was to be paid during the first ten years, inasmuch as the lessee would have to undergo great labour and incur heavy expenditure. On the termination of ten years, that is, with effect from 13th April 1855, the lessee would be liable to pay such rent as might be fixed upon a measurement and according to the rate and the area of the land. No rent was, however, ever assessed, and in the course of Survey and Settlement proceedings, which took place shortly before this suit, the defendants asserted before the Revenue Authorities that the land was held by them as perpetually rent-free. The plaintiff thereupon instituted the present suit on the 3rd October 1917 for declaration that the land was rent paying, for assessment of rent at the rate of Rs 6. a *bigha*, or such other rate as might be deemed fair and equitable by the Court, and for recovery of arrears at the assessed rate with effect from the 14th April 1914. The defendants resisted the claim on a variety of grounds which need not now be re-capitulated. They were all overruled by the Primary Court, and rent was decreed at the rate claimed. This decree has been affirmed by the Subordinate Judge on appeal. On the present appeal, two points have been urged, namely, firstly, that the suit was barred by limitation under Art. 130 of the Schedule to the Indian Limitation Act; and, secondly, that rent should not have been decreed for a period antecedent to the assessment.

As regards the first question, our attention has been invited to Art. 130 which prescribes that a suit for the resumption or assessment of rent-free land must be instituted within twelve years from the date when the right to resume or assess the land first accrued. This Article, in our opinion, has no application to the present case. It was pointed out in *Kamini Sundari Chowdhurani v. Abdul Ha'im* (1) that Art. 130 can have no application, unless and until the land is found to be rent free; the mere non-payment of rent for a period does not bar the landlord's right to have the rent assessed and

to recover rent from his tenant. To the same effect is the decision in *Dhananjay Manjhi v. Upendranath Deb* (2). There, as here, the suit was not for the resumption or assessment of rent-free land, but for the assessment of *mal* land presumably liable to be assessed. In that state of things, the circumstances that rent has not in fact been paid for more than 12 years before suit, is not *per se* sufficient to support a decree of dismissal; *Prosonna Kumar Mukherjee v. Srikanth Raut* (2) which has been affirmed by the Judicial Committee in *Jagdeo Narain Singh v. Baldeo Singh* (6). The right to have rent assessed must continue so long as the relationship of landlord and tenant continues in respect of land liable to be assessed; *Birendra Kisore Manikya Bahadur v. Nazir Mahommed* (7). The right can only be lost by one or other of the modes recognised by law. The land is *prima facie* *mal* land, and until the presumption and the results flowing therefrom are rebutted, the principle applied which underlies the decision in *Protap Chunder Chowdhury v. Shukhee Socnduree Dassee* (8) as explained in *Bir Chunder Manikya v. Raj Mohun Goswami* (9), see also *Jotindra Mohan Tagore v. Chandra Nath Saffi* (10), *Barhamdai Missir v. Krishna Sahay* (13), *Jagannatha Pandiajiar v. Muthia Pillai* (11), *Mohammad Husain v. Mohammadi B. B.* (12). Reference may also be made to the decision of the Judicial Committee in *Hurryhur Mookhopadhyaya v. Madub Chunder Baboo* (13) and the decisions of this Court in *Arsumnessa v. Peary Mohun Mookerjee* (14) and *Koylashbhashiny Dossee v. Gocoolmoni Dossee* (15) where the law applicable to the resumption and assessment of *lakheraj* grants will be found reviewed; see also Regulation

(5) 46 Ind. Cas. 428; 22 C. W. N. 685.

(6) 71 Ind. Cas. 984; 3 P. L. T. 605; (1922) A. I. R. (P. C.) 272; 36 C. L. J. 499; 32 M. L. T. 1 (P. C.).

(7) 30 Ind. Cas. 917; 22 C. L. J. 122.

(8) 2 C. L. R. 569.

(9) 16 C. 449; 8 Ind. Dec. (N. S.) 296.

(10) 6 C. W. N. 360.

(11) 14 M. L. J. 477.

(12) 28 Ind. Cas. 600; 13 A. L. J. 333.

(13) 14 M. I. A. 152; 20 W. R. 459; 8 B. L. R. 565; 2 Suth. P. C. J. 484; 2 Sar. P. C. J. 713; 20 E. R. 743.

(14) 1 C. 378; 25 W. R. 209; 1 Ind. Dec. (N. S.) 237.

(15) 8 C. 230; 10 C. L. R. 41; 4 Ind. Dec. (N. S.) 117.

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XIX of 1793, section 10 and Regulation II of 1805, section 3. The true scope of Arts. 130 and 131 was recently explained by the Bombay High Court in the cases of *Sakharam Gopal Page v. Trimbakrao Ramchandra* (16) and *Bhimabai v. Swamirao* (17). The right to levy assessment upon rent-free lands is governed by Art. 130 and is consequently extinguished under section 28, if no suit to enforce the right is instituted within the time allowed, *Abhoy Churn Pul v. Kally Pershad* (18), *Madhavrao Hariharrao v. Anusuyabai* (19). On the other hand, under Art. 131, the right to levy assessment would, as a recurring right, accrue when there has been a demand and refusal, only in those cases where the relationship of landlord and tenant or landlord and occupant had ever existed. Once that right is established, then the non-payment of rent or assessment would not be sufficient to enable the tenant to begin to set up a title by adverse possession. There must be some overt act, such as a refusal to pay the rent or assessment, before time begins to run, see *Ganesh Vinayak Joshi v. Sitabai Narayan Joshi* (4), *Kirpa Ram v. Jai Chand* (20), *Bangarayya Garu v. Jagannatha Garu Raju* (21), *Manavikrama Zamorin Raja Avergal of Calicut v. Achutha Menon* (22). This is in harmony with the view that where a tenant claimed land as rent-free to the knowledge of the plaintiff, and no suit for resumption or assessment was brought till after the expiry of 12 years, the suit was barred by limitation under Art. 130, *Birendra Kishore v. Roshan Khan* (23), *Birendra Kishore v. Akram Ali* (24), *Birendra Kishore v. Dilwar Ali* (25).

(16) 61 Ind. Cas. 40; 45 B. 694; 23 Bom. L. R. 314.

(17) 60 Ind. Cas. 892; 45 B. 638; 23 Bom. L. R. 100.

(18) 5 C. 949; 6 C. L. R. 260; 2 Ind. Dec. (N. S.) 1213.

(19) 36 Ind. Cas. 505; 40 B. 606; 18 Bom. L. R. 768.

(20) 23 Ind. Cas. 445; 140 P. L. R. 1914; 46 P. W. R. 1914.

(21) 5 Ind. Cas. 615; 7 M. L. T. 278; (1910) M. W. N. 485.

(22) 23 Ind. Cas. 806; 38 M. 916; (1914) M. W. N. 228; 15 M. L. T. 226; 26 M. L. J. 377.

(23) 13 Ind. Cas. 518; 39 C. 453; 15 C. L. J. 203; 16 C. W. N. 931 *note*.

(24) 13 Ind. Cas. 513; 39 C. 439; 16 C. W. N. 304; 15 C. L. J. 194.

(25) 13 Ind. Cas. 517.

In the case before us, the defendants repudiated the right of the plaintiff to assess and recover rent, for the first time within 12 years of the suit, consequently, the suit is not barred under Art. 131.

As regards the second question, we are of opinion that the defendants should not be made liable for a period antecedent to the assessment. The contract clearly contemplated that liability to pay rent should accrue only after assessment. We should, in such circumstances, follow the course adopted in *Rangayya Appa Rao v. Bobba Sriramulu* (26) and *Assanulla v. Mohini Mohan Das* (27) rather than apply the principle that a landlord may claim back rents for additional area, *Jagannath Manjhi v. Jumman Ali Patwari* (28), *Upendra Nath Nag Chowdhury v. Surya Kanta Roy Chowdhury* (29).

The result is, that this appeal is allowed in part, and the decree of the Court below modified. The plaintiff will be declared entitled to rent at the rate claimed with effect from the date of the judgment of the Trial Court (27th September 1918) and not before. The plaintiff will, however, be entitled to his costs in all the Courts.

B. N.

Appeal allowed partly.

(26) 31 I. A. 17; 27 M. 143; 8 C. W. N. 162; 14 M. L. J. 1; 6 Bom. L. R. 241; 8 Sar. P. C. J. 617 (P. C.).

(27) 26 C. 739; 13 Ind. Dec. (N. S.) 1072.

(28) 29 C. 247.

(29) 20 Ind. Cas. 205.

HANUMANTRAO V. G. I. P. RAILWAY CO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 258 OF 1921.

December 21, 1922.

Present:—Mr. Hallifax, A. J. C.

HANUMANTRAO AND ANOTHER—

PLAINTIFFS—APPLICANTS

versus

G. I. P. RAILWAY CO. THROUGH AGENT

AT BOMBAY—DEFENDANT—

NON-APPLICANT.

Railways Act (IX of 1890), s. 72—Non-delivery of consignment—Suit for damages—Risk Note, B—Loss of consignment—Burden of proof.

Under section 72 (1), Indian Railways Act, 1890, the responsibility of a Railway Administration for the loss, destruction or deterioration of animals or goods delivered to the Administration to be carried by Railway is that of a bailee under sections 151, 152, and 161 of the Contract Act. But this responsibility might be limited by special contract as provided by clause (2) of the section. Risk Note B is one form of such contract, which exempts the Railway Administration from liability, unless for the loss of a complete consignment under particular circumstances. [p. 334, col. 1.]

Where in a suit against a Railway Company for damages caused by non-delivery of goods consigned to it under a Risk Note B executed by the consignor, the Company admit non-delivery, such admission does not exonerate them from liability; they must plead and prove that the circumstances in which the Risk Note was intended to operate and exempt them from liability have occurred. A mere allegation of loss by the Company or an admission of non-delivery by the consignor is no proof of such loss. [p. 334, cols. 1 & 2.]

Application for revision of the decree of the Small Causes Court, Nagpur, dated the 26th September 1921, in Civil Suit No. 1098 of 1921.

REFERENCE.

Hallifax, A. J. C. (August 10, 1922.) The plaintiff sued the G. I. P. Railway Company for compensation for their failure to deliver goods which he had consigned at Nagpur for delivery to himself at Ahmadabad. The defendant Company apparently admitted the loss of the whole consignment, which consisted of one bale of cotton only, though it was asserted that the loss took place after the bale had been handed over to another Company. As the consignor had executed what is known as Risk Note Form "B", it was held, on the

authority of *Agent, G. I. P. Railway, Bombay v. Karaylal* (1), that the plaintiff had to prove that the loss occurred in the special circumstances mentioned in his contract which would make the Company liable to him in damages for it, and as no evidence was given the suit was dismissed. Several later rulings of the Bombay High Court have been published, particularly *Ghelabhai v. E. I. Railway Company* (2), in which a somewhat different view has been taken of this matter, which is that mere non-delivery is not necessarily "loss", and that the Railway Company cannot prove loss by merely admitting it but must at least prove that the goods are really lost and are not lying about on their premises, that is to say, that some kind of a search has been made for them. I am distinctly inclined to the view that, if nothing is known about the goods except that they were delivered to the Railway Company by the consignor but were not delivered by the Railway Company to the consignee, the presumption must be that they are still in the possession of the Company, and it is for the Company to rebut that presumption by showing that they have gone out of their possession, that is to say, are lost. This view appears, however, to conflict with that taken in the published ruling of this Court already mentioned, where the admission of loss by the Company was accepted as sufficient, though the point was not specifically raised. Under section 9 of the C. P. Courts Act, 1917, I, therefore, refer for a decision of a Bench the question of law which is already sufficiently defined in this order.

OPINION.

Kotwal, A. J. C. and Pridaux, A. J. C.—(December 12, 1922).—Under section 72 (1), Indian Railways Act, 1890, the responsibility of a Railways Administration for the loss, destruction or deterioration of animals or goods delivered to the Administration to be carried by Railway is that of a bailee under sections 151, 152 and 161 of the Contract Act. The

(1) 48 Ind. Cas. 294; 14 N. L. R. 122.

(2) 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525.

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goods delivered for carriage may be wholly or partly lost or destroyed and to that extent not delivered to the consignee by the Railway Company or they may have deteriorated or been damaged while in the Company's possession before delivery to the consignee. It may also be that the goods are neither lost nor destroyed but are still in the Company's possession, mislaid as it were and not delivered. In most cases of non-delivery the plaintiff is not in a position to say whether the goods are lost by the Company or are destroyed though in the plaint the allegation is made that the goods are lost. All that is meant is that the Company has failed to deliver the goods and alleges in explanation that they are lost. It is possible that before the institution of the suit the Company may have satisfied the plaintiff that the goods are really lost and the plaintiff may come into Court with an admission that they are lost, but that has never happened in our experience.

To lay a foundation for the Company's liability the plaintiff would have to prove non-delivery, loss, destruction or deterioration of the goods bailed but the responsibility under section 72 (1) might be limited by special contract as provided in clause (2) of the same section. Risk Note B is one form of such contract. It provides for exemption of liability for any loss, destruction or deterioration of or damage to the goods from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of the consignment due either to the wilful neglect of the administration or to theft or to the wilful neglect of its servants, etc. As stated in the order of reference, the plaintiff in this case really sues on the ground that he delivered certain goods to the Railway Administration for carriage to Ahmedabad and delivery to himself there and that the Company has failed to deliver them to him. Apparently, he is not in a position to admit that the Railway Company has lost the goods.

The Company admit non-delivery but set up in defence the Risk-Note. It is for them, therefore, to plead and prove that the circumstances in which the Risk

Note is intended to operate and exempt them from liability have occurred, or in other words the goods have in this case been lost or destroyed. Neither a mere allegation of loss by the Company nor an admission of non-delivery by the plaintiff is proof of such loss. If the Railway Company prove the loss, which they may do as stated in the order of reference, they are exempted from liability by the Risk-Note unless the plaintiff proves that his case comes within the exception mentioned therein. It may be that the loss alleged by the Railway Company is admitted by the plaintiff. In such a case the Company need not adduce evidence to prove the loss. In *Agent, G. I. P. Railway, Bombay v. Karaylal* (1) the point now raised was not discussed and it may be that the plaintiff had admitted that the goods were lost. It is probable, however, that what both parties meant when they spoke of "loss", in that, as in most other similar cases decided before the point was raised by the Bombay High Court, was that the Company did not know where the goods were at the moment and so had not delivered them, not that any serious search had been made for them and had failed or that they were known to have gone out of the Company's possession or control. We agree with the view taken in the Order of Reference and the Bombay case referred to in it.

JUDGMENT.—Mr. R. N. Padhye appears for the Applicants and Mr. P. Lobo for the Railway Company. For the reasons stated in the Order of Reference, dated 10th August 1922, and the judgment of the Bench thereon dated 12th December 1922, (of both of which copies will be sent to the lower Court with this order) the decree of the lower Court is set aside and the suit is remanded to that Court for a fresh decision. The costs of these proceedings, in which the Pleader's fee will be Rs. 15 will follow the result.

C. K. D.

Case remanded.

DHANAMMAL v. VEERARAGHAVALU NAIDU.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 855 OF 1921.

December 19, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

DHANAMMAL—PETITIONER.

versus

VEERARAGHAVALU NAIDU AND
OTHERS—PETITIONERS—COUNTER-PETITIONERS—RESPONDENTS.*Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 89—Application under r. 58—Subsequent application under r. 89, whether barred.*

The purpose of a petitioner who makes a claim under O. XXI, r. 58 of the Civil Procedure Code to a property attached is to have the attachment set aside. If the claim is negatived there is nothing to prevent the same person coming forward and applying unconditionally to have the sale set aside under r. 89 of the Order for the reason, that he holds an interest in the suit property. [p. 336, col. 1.]

The dismissal of an application to stay a sale on payment of the decretal amount does not bar a subsequent application by the same person to set aside the sale under O. XXI, r. 89 of the Civil Procedure Code. [p. 336, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise an order of the District Court, Chingleput, in Miscellaneous Appeal No. 10 of 1921, preferred against an order of the Court of the District Munsif, Conjeevaram, in Miscellaneous Petition No. 325 of 1921, in Original Suit No. 722 of 1910.

Mr. K. Rajah Iyer, for the Petitioner.

Mr. K. P. Rama Krishna Iyer, for the Respondent.

JUDGMENT.

Spencer, J.—The petitioner applied under O. XXI r. 89, Civil Procedure Code, to have the sale of certain properties set aside on depositing the amount specified in the proclamation of sale plus 5 per cent of the purchase-money. The District Munsif and the District Judge to whom she appealed both disallowed her application but on different grounds. The District Munsif's reason for dismissing her application was that she had previously applied to pay the amount due to the decree-holder before the sale was held and that he then rejected her application because she had no *locus standi* to pay the amount. The District Judge dismissed the appeal on the ground that the petitioner having claimed the property previously in a claim

petition under O. XXI, r. 58, and that claim petition having been dismissed, her only right was to bring a suit within one year to establish her title.

The property sold in Court-auction originally belonged to Swaminadha Mudali. The petitioner claims as a legatee under a Will of Papammal, who purchased the property from Swaminadha Mudali in 1907. In 1911 when the property was attached by another creditor of Swaminadha Mudali, Papammal put in a claim petition and having failed therein, she instituted a suit and established her title in second appeal. Again, the property was attached in 1915 by another creditor and upon a further claim petition being put in by her in 1915 being dismissed she brought a second suit which was dismissed for default. The appellant also preferred a claim petition in 1920 which was dismissed as too late, and upon the sale being adjourned, she filed a second application on February 9th, 1921 which was dismissed on 23rd, March 1921.

That being the history of the case, we must see whether the orders of the lower Courts can be supported for the reasons given therein. The District Munsif observed that the order passed on the petitioner's application before the sale was binding on her. He describes the petition as a similar one. The earlier application was one made under no definite provision of law, to have the sale stopped on payment of the decree amount. It may have been treated as an application under O. XXI, r. 2, for adjustment of the decree. The Court held that the petitioner had no *locus standi* to make the application and that money could not be received from her. There is no connection between her application made after the sale had taken place as a person holding an interest in the property sold to have the sale set aside under O. XXI, r. 89, and the application to pay the decree amount before the sale took place. The District Munsif has not decided that the petitioner is a person not holding any interest in the property either in his previous order or in the present order and, so the previous order cannot operate as *res judicata* to prevent her making the present application.

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The District Judge has misconceived the effect of the claim petition. The purpose of a petitioner who makes a claim under O. XXI. r. 58 to a property attached is to have the attachment set aside. Granting that the right was negatived, there is nothing to prevent the same person coming forward and applying unconditionally to have the sale set aside under r. 89 for the reason that he holds an interest in the suit property. The learned Judge went on to observe that the petitioner's only remedy was to set aside the sale by a regular suit. At the time when the application under r. 89 was made, the right to bring a suit under r. 63 had not become barred. That remedy was still open to her. But so also was this other remedy. The effect of the dismissal of the petitioner's claim petition was not to decide finally that the petitioner had no interest to ask that the sale should be set aside on payment of the decree amount *plus* five per cent. into Court but only to decide that she had no right to have the attachment raised. These are two very different things. The first (that under r. 89) may imply the existence of an interest derived from the same source as the owner's or an interest paramount to the judgment-debtor's; the second (that under rule 58) implies the existence of a right independent from and an antagonistic to the judgment-debtors. It is impossible to conceive how the dismissal of the claim petition could operate as *res judicata* to prevent the admission of an application to pay the decree amount and get the property released after the sale. As the Courts below have not decided whether the petitioner owns or holds any interest in the property sold by virtue of a title acquired before the sale, that question must now be remitted to the District Munsif for decision upon the merits and for the disposal of the application made to him. The petitioner is entitled to recover costs of this civil revision petition. Costs of the subsequent proceedings will be provided for in the final order.

Venkatasubba Rao, J.—I agree.

I would like to add just a word. It has been argued that the applicant's right is

based upon a title paramount to that of the judgment-debtor, and that r. 89 is not, therefore, applicable and in support of the proposition, *Dulhin Molkura Koer v. Bansidhar Singh* (1) has been cited. With great respect, I am unable to follow that decision. It seems to me that to take this narrow view of r. 89 will in many cases defeat its object. Let me take an example. Supposing *B* sold a property worth Rs. 10,000 to *A*, that long subsequent thereto a decree was passed against *B* for the trifling sum of Rs. 10 and the decree-holder attached the property and brought it to sale, why should *A* not be entitled to make the deposit and apply under r. 89, if, in his opinion, it would not be worth his while to put himself to the trouble and expense of preferring a claim before sale under r. 58 or establishing after sale his right to the property in other legal proceedings? I am entirely opposed to unduly restricting the scope of the beneficent provision enacted in r. 89 when there are no words indicating that a narrow interpretation should be placed upon it.

V. N. V.

Z. K.

(1) 10 Ind. Cas. 580; 15 C. L. J. 83; 16 C. W. N. 904.

NARAYANAN CHETTIAR, A. R. R. M. N. V. KADIRAYA GOUNDAN.

MADRAS HIGH COURT.CIVIL MISCELLANEOUS PETITION NO. 1418
OF 1922.

December 21, 1922.

Present.—Mr. Justice Oldfield and Mr.
Justice Ramesam.A. R. R. M. N. NARAYANAN CHETTIAR
—PETITIONER—COUNTER-PETITIONER

versus

KADIRAYA GOUNDAN AND OTHERS—
RESPONDENTS.*Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Order made by Munsif set aside by Sub-Judge—District Judge, jurisdiction of, to interfere—Delay in making application, effect of.*

For the purposes of section 195 (7) (a) of the Criminal Procedure Code, appeals from a Subordinate Judge's Court must be regarded as ordinarily lying to the District Court; and a District Judge is competent to revoke or grant a sanction granted or refused by a Sub-Judge in a case in which sanction had originally been refused or granted by a Munsif. [p. 338, col. 2.]

Rapaka Viyyanna v. Parakala Bajamma, 44 Ind. Cas. 120 at p. 121; 19 Cr. L. J. 264, referred to.

Proceedings under section 195 are not appellate proceedings though they may in some respects resemble them. At each stage they are constituted by the grant or revocation of the sanction which some inferior Court has refused or granted and not with direct reference to the setting aside of that inferior authority's order. [p. 338, col. 2.] Where an application for sanction is made after considerable delay, and no satisfactory explanation is offered for the delay, it is a good ground for refusing sanction. [p. 338, col. 2.]

Petition praying that in the circumstances stated therein the High Court will be pleased to set aside the order, dated the 20th October 1921 of the District Court, Madura, in C. M. P. No. 191 of 1921, revoking the sanction that has been granted by the Subordinate Judge, Dindigul, for prosecuting the respondents herein in O. P. No. 10 of 1920 (O. P. No. 38 of 1920 on the file of the Court of the District Munsif, Periakulam.)

FACTS.—This was an application for granting sanction to prosecute the respondents for an offence under section 183, Indian Penal Code, in the following circumstances. The petitioner obtained a decree against the 1st respondent and others for a sum of money, in pursuance of which he applied for execution and obtained an order for the attachment of the judgment

debtor's moveables. The *amin* went to the spot under the orders of the District Munsif, but was there resisted by the respondents and some others by threats of criminal force. The Police Inspector who accompanied the *amin* applied for sanction to prosecute the respondents under some sections of the Indian Penal Code (not section 183) and obtained it. But he having set on foot no criminal proceedings for more than 6 months, the petitioner applied for sanction about 8 months thereafter to the Deputy Munsif of Periakulam. The District Munsif dismissed the application because the petitioner was not ready with his evidence on the day the case was called. On appeal therefrom the Sub-Court of Dindigul set aside the dismissal and admitting into the evidence, the report of the *amin*, gave sanction to the petitioner. The respondents applied against that order to the District Judge and the District Judge on the merits held, that the delay of 8 months was not satisfactorily explained by the petitioner and revoked the sanction. On this, the petitioner filed this petition to the High Court under section 195, Criminal Procedure Code.

Mr. D. Ramaswami Ayyangar, for the Petitioner:—The District Judge's order revoking the sanction granted by the Sub-Judge was without jurisdiction. Under section 195 the appeal from the order passed by the Sub-Judge on appeal from the District Munsif, lies only to the High Court. The order passed by the Sub-Judge is of course to be regarded as an original order when we consider the applicability thereof. But then the jurisdiction invoked in, and the jurisdiction exercised by, the Sub-Court in this case is appellate. My contention as to the nature of the jurisdiction is supported by *Jamna Das v. Sabapathy Chetti* (1), *Bapu v. Bapu* (2), so that the order is to be regarded as an original order passed in the exercise of the Appellate Jurisdiction. Section 106 of the Civil Procedure Code provides that from such orders the appeal lies only to the High Court.

(1) 12 Ind. Cas. 521; 36 M. L. J. 138; 10 M. L. T. 278; (1911) 2 M. W. N. 259; 21 M. L. J. 1074; 12 Cr. L. J. 545.

(2) 14 Ind. Cas. 303; 39 M. L. J. 750 at pp. 763, 768; 11 M. L. T. 367; (1912) M. W. N. 499; 22 M. L. J. 419; 13 Cr. L. J. 209.

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I submit *Rapaka Viyyanna v. Parakala Bajamma* (3) was not correctly decided. Without denying that the order is not an original order, the form is decided by section 106, Civil Procedure Code. Their Lordships' attention does not seem to have been drawn to section 106 but only to 100. There being nothing in section 195, Criminal Procedure Code, to preclude the above interpretation, I submit the appeal to the District Court was without jurisdiction.

On the merits, the delay should not be looked into except as evidence of the *bona fides* of the applicant. Here the offence being of serious public importance and the finding being that it was not with personal motives the application was made, the sanction ought to be granted. In any case I have no objection to the sanction being accorded in the name of the Public Prosecutor of the District.

Messrs. K. S. Jayarama Ayyar, K. Rajah Aiyar and V. Ramaswami Ayyar, for the Respondents:—The order of the District Judge is in no sense appellate in character. The sanction proceedings do not really contemplate an appeal at all. In each case it is independent original jurisdiction. From the Sub-Judge's orders, appeals will lie both to the High Court and the District Court, the latter being of inferior jurisdiction will be the proper forum to apply to for revoking the Sub-Judge's sanction.

The decision in *Rapaka Viyyanna v. Parakala Bajamma* (3) in point.

On the merits, the delay in applying for sanction has not been properly explained. The District Judge's discretion should not be interfered with, in a matter like this.

ORDER.—This is an application for the grant of a sanction, which was originally granted by the Subordinate Judge, but was revoked by the District Judge.

The first question raised is whether the District Judge had jurisdiction to pass his order of revocation. That question must be answered with reference to the terms of section 195 (7) (a) of the Criminal Procedure Code. It is argued that this provision is not applicable or, if it is applicable, that the only Court competent to revoke the Sub-Judge's sanction was the High Court.

That argument is based on the consideration that the Subordinate Judge's sanction was itself given in the exercise of his Appellate Jurisdiction, because the matter had arisen in proceedings before the District Munsif, who had in the first instance refused sanction. We cannot see how with reference to the terms of section 195 (7) (a) the nature of the sanction proceedings is material, the only question under that provision being of the Court, to which appeals generally lie. It is then immaterial that appeals against appellate orders would lie from the Sub-Court to the High Court, and this is consistent with *Rapaka Viyyanna v. Parakala Bajamma* (3). It is a further objection to this argument that proceedings under section 195 are not appellate proceedings, though they may in some respects resemble them. For at each stage they are described as constituted by the grant or revocation of the sanction which some inferior authority has refused or has granted, not with direct reference to the setting aside of that inferior authority's order. We have no doubt that appeals from a Sub-Court must be regarded as ordinarily lying to the District Court and not to the High Court, because with reference to section 195 (7) (a) appeals actually lie from the Sub-Court to both those Courts and of the two the District Court is the Court of inferior jurisdiction. In these circumstances we hold that the District Judge's order was passed with jurisdiction.

Turning to the merits, we find that the sanction is asked for in respect of an occurrence on 23rd December 1919. No doubt that occurrence, as it is alleged, constituted a grave obstruction to the execution of a legal process. But we find that no application was made for sanction by the present petitioner for over 8 months after it. His explanation is that for six months of that period he did nothing, because the Police Sub-Inspector who was also concerned, had obtained sanction and he expected him to prosecute. We do not think that a sufficient explanation. For the petitioner could easily have ascertained whether the Sub-Inspector was going to prosecute and could have himself applied to the Court. For the remaining two months' delay, no particular explanation has been offered; and the Subordinate Judge in granting sanction observed with regard to it only

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that such delays were usual. We do not think that indulgence was justified on that ground. In these circumstances, no reason for dissent from the lower Court's order has been shown, and the petition must be dismissed.

V. N. V.
Z. K.

Petition dismissed.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE. NO. 95
OF 1921.

November 24, 1921.

Present :—Mr. Justice Bucknill.

MAHADEB MARWARI AND OTHERS—
ACCUSED—PETITIONERS

versus

KISHUN LAL MARWARI—COMPLAINANT
—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526
—Conviction of accused—Remand to same Magistrate, whether desirable—Magistrate having tried similar case between parties previously—Subsequent case, transfer of.

Where a Magistrate has already convicted an accused person of an offence and the latter, for some reason or other, has to be re-tried, that Magistrate is competent to try the case over again. But, where it is possible, it is desirable that such a re-trial should not be taken by an officer who has already expressed his final opinion upon the matter.

The mere fact, that a Magistrate has tried some other case involving somewhat similar facts possibly between the same parties, does not by itself necessarily constitute any ground why a case should not be tried by that Magistrate.

Criminal application.

Messrs. Manuk, Yunus and P. C. Roy,
for the Petitioners.

Mr. Bankim Charan De, for the Opposite Party.

JUDGMENT.—This is an application for the transfer of a case from the file of William Raha, Magistrate of Dhanbad, with second class powers, to the cognizance of some other competent Magistrate in the same place under the following circumstances.

The petitioners here were tried before Mr. Raha for offences under sections 323 and 448 of the Indian Penal Code and were

sentenced to various penalties. There was, however, an appeal against this decision, made to the Deputy Commissioner of Dhanbad who, finding that the proper legal procedure, particularly with reference to section 342 of the Criminal Procedure Code, had not been complied with by Mr. Raha, remanded the case to him for re-trial from the point from which proceedings had begun to be irregular. I may also mention incidentally that another case (which is here described as the counter-case between these parties or some of them) had also been tried and disposed of by Mr. Raha in the early half of this year (that is to say, in April 1921) while his present judgment was dated the 18th of July last. I have read the judgment which Mr. Raha gave in July, and no doubt he has expressed a very strong opinion upon the guilt of the accused persons. The application is now made to me that it is desirable and fair in the interests of the accused persons that the matter should go back for a re-trial to some officer other than Mr. Raha who has already convicted and sentenced these applicants and had as well dealt with another case between the parties.

It is pointed out to me, by the learned Vakil for the respondents here, that there is ample authority for saying that because a Magistrate has tried some other case involving somewhat similar facts possibly between the same parties, that in itself does not constitute necessarily any ground why a case should not be remanded to the same Magistrate for re-trial by him. Similarly, too, I am far from saying that because a Magistrate has already convicted a person of an offence and the accused, for some reason or other, has to be re-tried, that Magistrate is incompetent to try the case over again. On the other hand, I think that, where it is possible, it is highly desirable that such a re-trial should not be taken by the officer who has already expressed his final opinion upon the matter. It is quite true that an endeavour may be made (and no doubt is made) to keep the mind entirely free from bias, and to eject from it any preconceived ideas which may have been formed in general by what has taken place at the earlier trial. But those are after all counsels of perfection, and, I am bound to say, that if I was in the position

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of having been convicted and sentenced of an offence by an individual; I should feel the greatest apprehension if my case was remanded to the same person for a re-trial.

I am satisfied that in this case the fairest and the most proper thing for all concerned will be to allow the application and to have the case re-tried by some other competent Magistrate in the Dhanbad Sub-Division, and I order accordingly.

Application allowed.

N. K.

MADRAS HIGH COURT.

FULL BENCH.

ORIGINAL SIDE APPEAL NO. 25 OF 1922.
May 5, 1922.

Present.—Sir Walter Schwabe, Kt.,
Chief Justice, Mr. Justice Oldfield and
Mr. Justice Coutts-Trotter.

K. V. MUNUSWAMY MUDALIAR—
PLAINTIFF—APPELLANT

versus

RAJARATNAM PILLAI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195—Penal Code (Act XLV of 1860), ss. 193, 465, 467—Sanction to prosecute—Duty of Trial Court—Discretion, exercise of—Appellate Court, duty of—"Produced or given in evidence" in s. 195 (1) (c), meaning of.

The expression "produced or given in evidence" in section 195 (1) (c) of the Criminal Procedure Code means tendered or admitted in the antecedent judicial proceeding. The mere fact that a document is mentioned in the affidavit of documents filed by a party and is filed in the office of the Court Translator for purposes of translation does not amount to its being "produced or given in evidence" within the meaning of the section. [p. 341, col. 2.]

Per Oldfield, J.—The duty of a Court granting sanction is discharged if it exercises a judicial discretion, and, similarly, the duty of the Appellate Court if it satisfies itself that such a discretion has been exercised. The former Court must, therefore, be required, whatever the extent to which the investigation undertaken for its own satisfaction has been carried, to put on record sufficient to demonstrate to the latter that its exercise of discretion has been judicial; and it is undesirable in fairness to the accused that it should do more. In case it does less the Appellate Court will have no choice but to ascertain the necessary facts for itself and base its conclusions on them. [p. 342, col. 2.]

The Court granting a sanction cannot be regarded as having exercised a judicial discretion when it has satisfied itself only that a *prima facie* case has been made out, it by that is meant only that formal evidence of the ingredients of the offence is available, without reference to defects which may deprive that evidence wholly or to a material extent of value. [p. 342, col. 2.]

The procedure laid down in section 195 of the Criminal Procedure Code is necessary in order to avoid the risk of frivolous or vexatious charges designed, not to vindicate justice, but to harass and annoy the persons against whom they are directed. Unless this has been borne in mind, the Court's use of its discretion cannot be regarded as judicial. The remoter the prospect of any public purpose being served the greater is the degree to which the Court should insist on ordinary evidence in support of the charge. [p. 343, col. 1.]

Per Coutts Trotter, J.—A Court in sanctioning a prosecution arising out of facts which have come before it during the trial of a civil case should not be supposed to be discharging that which is the task of the Committing Magistrate at a later stage and usurping his functions by explicitly or tacitly pronouncing that there is a *prima facie* case. [p. 344, col. 1.]

A Court which allows sanction does no more than say that, on the materials before it, it is not apparent that a prosecution would be against the public interests or a mere indulgence of private spite. On the other hand, a Court which refuses sanction does no more than express the opinion that public interest would not be served by such a prosecution and it is not debarred from acting upon that view even where there is a strong *prima facie* case. [p. 344, cols. 1 & 2.]

A Court before whom an application for the grant of a sanction is made is invested with a very wide discretion with the exercise of which an Appellate Court should be extremely slow to interfere. [p. 344, col. 2.]

It is not a necessary ingredient of an offence under section 193 of the Penal Code that the evidence alleged to be fabricated should actually have been produced in the antecedent judicial proceeding; but in considering the advisability of sanctioning a prosecution, its production or non-production in the Court is a circumstance to which the Court might attach very considerable importance, in deciding whether it is against the public interest to allow Criminal proceedings to be instituted. [p. 344, col. 2; p. 345, col. 1.]

A Court to whom an application for the grant of a sanction is made has no jurisdiction to direct the respondent to produce a document for the sole purpose of considering whether or not a prosecution should be launched upon it. [p. 345, col. 1.]

Per Schwabe, C. J.—If a Court is clearly of opinion, on the evidence before it, that no reasonable Jury would convict on it, it is its duty to refuse sanction. But the mere fact that a Court sanctions a prosecution is no intimation to the Magistrate who is to enquire into the case that it thinks that there is a case to go to a Jury or that he thereby is in any way relieved from his duty of considering whether the accused ought to be committed for trial or not. [p. 341, col. 1.]

MUNUSWAMY MUDALIAR K. V. P. RAJARATNAM PILLAY.

Appeal from the order and judgment of Mr. Justice Phillips, dated 21st December 1921, granting sanction to prosecute the appellant (plaintiff) in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 522 of 1920.

Messrs. *Nugent Grant* and *M. P. Sundara-raja Aiyar*, for the Appellant.

The Advocate-General (*Mr. C. P. Ramaswami Aiyar*) and *Mr. N. Swaminatha Aiyar*, for the Respondents.

JUDGMENT.

Schwabe, C. J.—I have had the opportunity of reading the judgments of my learned brothers who are more familiar with the practice of this Court than I am and with those judgments in general I agree. I have little to add.

I think it should be made clear that the fact that this Court sanctions a prosecution is no intimation to the Magistrate that this Court thinks that there is a case to go to a Jury or that he thereby is in any way relieved from his duty of considering whether the accused ought to be committed for trial or not. This view is not at all inconsistent with the duty of this Court to refuse sanction, if it is clearly of opinion, on the evidence before it, that no reasonable Jury should convict.

There is one matter in the judgment of my brother *Coutts-Trotter, J.*, on which I wish to reserve the expression of my view until the matter directly arises, namely, whether the learned Judge was justified in ordering the document in question to be brought into Court on the application for sanction, and I must not be taken as expressing assent of the view that, in so doing, he was acting without jurisdiction.

On the question of costs, this case might involve the consideration of the vexed question whether it is a criminal or civil matter and whether there is power to grant costs. Under all the circumstances of this case, we think that it is not necessary to consider that question as, in our view, it is a case in which each party should bear his own costs.

Oldfield, J.—This application is for the revocation of a sanction granted by *Phillips, J.*, under section 195, Criminal

Procedure Code for the prosecution of the petitioner for offences punishable under sections 193, 465, 467, 474 and 109, Indian Penal Code.

Petitioner occupied shops as respondents' tenant. They gave him notice to quit and moved for his ejectment under section 41, Presidency Small Cause Courts Act. He sued for damages under section 47 obtaining stay of the ejectment proceedings, and in his suit set up an agreement to lease to him for a term of five years in consideration of a payment of Rs. 1,000, pleading that certain sums aggregating Rs. 265 were actually paid to respondents through 6th respondent towards this amount. In his affidavit of documents he mentioned an account-book on one page of which payments to 6th defendant are shown consistently with the statement in his plaint; and, after his suit had been withdrawn before the trial began, his prosecution was sanctioned as stated above, on respondents' application with reference to this book.

The provision under which sanction was granted in respect of the offence under sections 465, 467 and 474, Indian Penal Code, is section 195 (1), (c), Criminal Procedure Code and it is urged, first, that this provision is inapplicable, because the book was neither "produced" nor "given in evidence," as it requires. It is not contended that the book was given in evidence, but only that it was produced, because it was mentioned in petitioners' affidavit or in the alternative because it was filed in the Court Translator's Office for translation in accordance with the rules. But the affidavit, which is in the ordinary form, merely discloses the documents in petitioner's possession relating to the matters in issue; and neither it nor the filing in the Translator's Office amounts to what is required, i.e., actual production in Court. In fact, the learned Judge relied on neither, as constituting production. What he relied on, as the reference in the last sentence of his order to "the account-book which has now been filed" shows, was that petitioner filed it, not in the suit, but after its termination, on being required to do so by the Court on the application of respondents dated 9th December 1921, in the course of the proceedings, in which the sanction was given. With all respect, the proceeding,

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in which the sanction was asked for, was distinct from the suit, the proceeding to which petitioner was a party and in which he was alleged to have committed those offences; and his production of the account book in the former cannot be regarded as the production in the latter, which section 195 (1) (c) requires. The learned Judge, in these circumstances, had no right to give and respondents no duty to obtain sanction in respect of the offence under sections 465, 467 and 474, Indian Penal Code, if indeed sanction need be given in respect of the last mentioned.

This is material, because we have further to deal only with the remaining offence specified in the learned Judge's order, that punishable under section 193; and there is nothing in the order to show that any difference between the considerations arising under section 195 (1) (b), Criminal Procedure Code, and those under section 195 (1) (c), was present to the learned Judge's mind or influenced the judicial use of his discretion. That the relevant considerations are different is clear. For under the former provision the offence may be alleged as committed, not only in, but more remotely, "in relation to" a proceeding, whilst under the latter it must be committed "in respect of a document produced or given in evidence;" that is, in connection with a trial, which has begun and, therefore, in direct and public prejudice to the reputation of the Court and its administration of justice. Here and in other cases under section 195 (1) (b), when no question of such prejudice can arise the exercise of the Court's discretion will be judicial, only if it considers whether with reference to the evidence available and the other circumstances a prosecution is desirable in the public interest, and not, if it merely satisfies itself, as the learned Judge statedly did in the order before us, that "a *prima facie* case has been made out."

The latter is the view of the Court's duty and of the test to be applied by the Appellate Court advocated on behalf of respondents; and the judgment of Napier, J., in *Krishnamma Chittur v. Chinna Perajai* (1) and that of the High Court of Calcutta in

Hume, Public Prosecutor v. Poresh Chunder Ghose [An Attorney, *In re*] (2) are relied on as generally in accordance with it. But it is difficult to deduce from them or other authorities cited, *Palaniappa Chettiar v. Ramaswami Chettiar* (3) and *Hajee Mohamed Habibulla. Badsha Sahib, In the matter of* (4), any such rigid general rule as respondents contend for; and, necessarily so, since such decisions are naturally worded with reference to the circumstances of the cases under disposal and give prominence to the considerations which assumed importance in them. I accordingly restrict myself to a statement of what I believe to be the law on the points at present material and in doing so aim rather at a general adherence to the effect of the authorities than a detailed reconciliation of the apparent difference between them.

Firstly, the duty of the Court granting sanction is discharged, if it exercises a judicial discretion; and, similarly, the duty of the Appellate Court, if it satisfies itself whether such a discretion has been exercised. The former Court must, therefore, be required, whatever the extent to which the investigation undertaken for its own satisfaction has been carried, to put on record sufficient to demonstrate to the latter that its exercise of discretion has been judicial; and it is undesirable in fairness to the accused that it should do more. In case it does less the Appellate Court will have no choice but to follow the course indicated in the judgment of Ayling, J., in *Palaniappa Chettiar v. Ramaswami Chettiar* (3), with which I am in general agreement, and to ascertain the necessary facts for itself and base its conclusions on them.

In the next place, it may be said at least that the Court cannot be regarded as having exercised a judicial discretion in granting sanction, when it has satisfied itself only that a *prima facie* case has been made out, if by that is meant only that formal evidence of the ingredients of the offence is available, without reference to defects which may deprive that evidence wholly or to a material extent of value. Further, apart from the considerations to be referred to and the

(2) 22 Ind. Cas. 321; 41 C. 446; 15 Cr. L. J. 49.

(3) 38 Ind. Cas. 321; 4 L. W. 615; 32 M. L. J. 54; 20 M. L. T. 557; 18 Cr. L. J. 289.

(4) 49 Ind. Cas. 641; 43 M. 1; 36 M. L. J. 601; 20 Cr. L. J. 193.

(1) 27 Ind. Cas. 179; 17 M. L. T. 15; (1915) M. W. N. 141; 16 Cr. L. J. 115.

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interest of the accused, it will promote the mischief deprecated by Coutts-Trotter, J., in *Hajee Mohamed Habibulla Badsha Sahib*, in the matter of (4). "The frivolous abuse of the powers of the Criminal Court" to authorise a prosecution, which has not, in the words of Ayling, J., in the case already referred to, even "a fair chance of success."

There remains the more difficult class of cases, of which on the assumption most favourable to respondents the case before us is one and in which there is some evidence deserving consideration at a trial; and of course the requisites for the case of a judicial discretion in connection with them can be indicated only in the most general terms. But it is here that the prospects of further proceedings serving any public purpose, on which all the authorities insist, becomes material. It is so, with all deference to the opinion of Seshagiri Aiyar, J., in *Palaniappa Chettiar v. Ramaswami Chettiar* (3), not wholly or principally out of respect for the rights of the accused or the liberty of the subject. For if that were the justification for the sanction procedure, there would be no reason for applying it only to cases, in which the offence is alleged in relation to legal proceedings, and for maintaining the ordinary rights of the complainant in connection with those offences, when they are not alleged as so related. The procedure is necessary, as Ayling, J., observed, in order "to avoid the risk of frivolous or vexatious charges designed, not to vindicate justice, but to harass and annoy the person against whom they are directed," since "without some such safeguard the Criminal Courts in this country would be flooded with useless prosecutions." Unless this has been borne in mind, the Court's use of its discretion cannot be regarded as judicial; and it follows that the remoter the prospect of any public purpose being served the greater the degree to which the Court should insist on ordinary evidence in support of the charge.

In the present case it is sufficient that, whilst the evidence against petitioner, with which the order before us is exclusively concerned, is at least of no special strength, no prospect of a prosecution serving any public purpose whatever is disclosed by the record. In fact, the petitioner's conduct,

if respondent's case is accepted, secured him no advantage, since his suit was withdrawn, before his alleged forged document could be used. It appears from the latter's affidavit, to which the learned Judge has not referred, that petitioner gave evidence in respondents' family quarrel as we were told by their learned Counsel, three years back with the result that two of them were imprisoned, and that they still intend to dispute the new title under which he now claims the property for which he sued. In these circumstances, the prosecution contemplated by respondents can only be regarded as vindictive and coercive; and the evidence is too weak to justify the grant of sanction for it.

I would allow the appeal and revoke the sanction.

Coutts Trotter, J.—The plaintiff brought a suit in which he alleged that he had an option to an extension of his lease of the suit premises for five years on payment of an advance of Rs. 1,000; and in paragraph 5 of his plaint he set out certain sums which he alleged he had paid towards the Rs. 1,000 ranging in date from the 12th of April to the 22nd of July 1920. In this affidavit of documents he included a rough *chitta* book which was said to contain an entry recording the payment of these sums, in all Rs. 265, which entry was alleged to be signed by the 6th defendant. He did not produce the rough *chitta* book for inspection by the opposite party for a considerable time and only did so in the end under an order of the Court. When the suit came on for trial, it was withdrawn, the plaintiff having meanwhile got what he wanted by attornment to the persons who he was satisfied could give him a better title than the defendants. After the withdrawal of the suit, an order was made upon the plaintiff by the learned Judge, to produce this *chitta* book in connection with an application for sanction to prosecute him, under various sections of the Indian Penal Code, the allegation being that the material entries in the rough *chitta* book were fabricated for the purposes of manufacturing false evidence and only came into existence after the signature of the 6th defendant had been obtained.

I do not wish to go into the facts in detail,

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for they are really not material to the point which we have to decide. It is sufficient to say that, in my opinion, this is a case in which no Jury would be likely to convict on the materials which were before the learned Judge, although it is clear that there was some evidence which, if put before the Jury and accepted by them, would justify a conviction; in other words, there appears to be what is called a *prima facie* case. The questions which I consider to be important in this case relate to the general position, first of a Court whose sanction is sought for a prosecution and, secondly, of an Appellate Tribunal on an appeal from the order granting or refusing sanction passed by the Court below.

In my opinion, entirely different considerations arise when a Court grants a sanction and when it refuses it. In *Hajee Mohamed Habibulla Badsha Sahib, In the matter of* (4) I expressed an opinion, to which I adhere, as to the considerations proper to guide a Court in granting a sanction and the inference proper to be drawn from the granting of such a sanction. The Code provides for the granting of sanction as a preliminary not merely to a trial but, in many cases, to the taking of the case before a Magistrate who has jurisdiction either to commit for trial to a higher Tribunal or to refuse to do so. It is, to my mind, vital that it should be recognised that a Court, in sanctioning a prosecution arising out of facts which have come before it during the trial of a civil case, should not be supposed to be discharging that which is the task of the Committing Magistrate at a later stage and usurping his functions by explicitly or tacitly pronouncing that there is a *prima facie* case. I adhere to the view that such a conception of the functions of the sanctioning Judge would turn what is intended to be an additional safeguard to accused persons into a weapon prejudicial to their interests. I do not think that a Court which allows sanction does more than say that, on the materials before it, it is not apparent that a prosecution would be against the public interests or a mere indulgence of private spite. On the other hand, a Court which refuses sanction, to my mind, does no more than express the opinion that the public interest would not be served by such a prosecution and it is not, as I

conceive the matter, debarred from acting upon that view even where there is a strong *prima facie* case. It is apparent that if this be the true conception of the functions of a Court on an application made for sanction they are of such a nature as necessarily to invest that Court with a very wide discretion, and one with the exercise of which an Appellate Court should be extremely slow to interfere. The Trial Judge is vested with the functions for granting or refusing sanction precisely because he has had the parties and witnesses before him and has the best opportunity of judging whether such a prosecution would serve any useful purpose or not.

The sanction granted in this case was for a prosecution for offences punishable under three substantive sections of the Penal Code, sections 193, 467 and 474, the other two sections cited being ancillary. Section 474 has been given up because it is clear that no sanction is required for that and where no sanction is required it is obviously proper that none should be sought or granted. Section 467, forgery of a document purporting to be a receipt, does require sanction under section 195 (1) (c) of the Criminal Procedure Code when such offence has been committed by a party to any proceeding in any Court in respect of a document "produced or given in evidence in such proceedings." In this case the document was not produced or given in evidence, on the construction of those words, that I think to be the right one, in the civil suit at all. Inspection of it was given to the opposite side but it was not before the Court until after the civil proceedings had terminated and the plaintiff had withdrawn his suit. "Produced or given in evidence," to my mind, can only mean "tendered or admitted" in the course of the civil proceedings which ended with their withdrawal. I confine the expression "civil proceedings," for my present purpose to the actual trial of the suit up to the point when it was withdrawn without expressing any opinion on the debated question whether the subsequent sanction proceedings are in their nature civil or criminal. But the offence under section 193 stands on a different footing, for, the offence defined by that section is that of fabricating false evidence for the purpose of being

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used in a stage of a judicial proceeding, and actual production or tender of the document to the Court is not a necessary ingredient of the offence. This, therefore, falls under section 195 (1) (b) of the Code of Criminal Procedure and is not obnoxious to the objection formulated to the other charges. I must, therefore, consider whether there is any good ground for refusing the sanction which the learned Judge in his discretion has granted. I think that there are two such grounds: The first is that, in my opinion, the whole proceedings were vitiated by the learned Judge ordering the plaintiff to produce the document for the sole purpose of considering whether or no a prosecution should be launched upon it. That was an order which I consider that the learned Judge had no jurisdiction to make and one which is absolutely repugnant to all those fundamental notions of fairness to a person accused or about to be accused of a criminal offence, which lie at the root of the criminal law of England and of India alike. He was never warned as to his position, nor was it intimated to him what the consequences of producing the document might be. In my opinion the plaintiff could have disobeyed that order with impunity and the fact that, from ignorance of his rights, he did not disobey it does not affect its irregularity. But there is an even more serious objection which appears on the face of the learned Judge's order. As I have pointed out, it is no necessary ingredient of an offence under section 193 of the Penal Code, that the evidence alleged to be fabricated should actually be produced in the antecedent judicial proceedings; but no one can doubt that, in considering the advisability of sanctioning a prosecution, its production or non-production in Court is a circumstance to which the learned Judge might attach very considerable importance, in weighing that which I have held to be the sole question proper before him, namely, whether it was against the public interest to allow criminal proceedings to be instituted. It is clear that, at the time he passed this order, the learned Judge was under the impression that the impugned document had been filed in the course of the civil proceedings, and entirely overlooked the consideration, that the document was only produced on

his own order after the civil proceedings in the strict sense had terminated. To my mind, that misapprehension must have vitiated the learned Judge's exercise of the discretion he undoubtedly possessed and leaves us free, on a knowledge of the true facts to differ from his view. Where it is shown that the learned Judge exercised his discretion on a mistaken view of the facts, it appears to me that he may be treated as not having exercised a judicial discretion at all, and that the Appellate Tribunal may be considered as thereby invested with an unfettered discretion to act on the true facts. Viewing the case in that light, it appears to me that no useful purpose would be served by allowing this prosecution; not only because I think that no Jury would convict on the materials before us, but also because I think it is clear that this prosecution was one which was projected not to satisfy the requirements of public justice, but to find an outlet for the anger of the defendants at being thwarted in their desire to get possession of this property.

I think that the appeal should be allowed.

V. N. V.

Appeal allowed.

Z. K.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 46 OF 1922.

February 17, 1922.

Present:—Mr. Justice Jwala Prasad.

BASAWAN PANDEY—2ND PARTY—
PETITIONER

versus

TILAK GOPE AND OTHERS—OPPOSITE
PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145
(3)—Omission to serve notice—Grave irregularity—
Prejudice to parties—High Court, interference by—
Procedure.*

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When a proceeding is drawn up under section 145 of the Criminal Procedure Code, the omission to serve it upon the parties or their Pleaders or affix it on some place in the locality, amounts to grave irregularity and in case of failure of justice or prejudice to any party vitiates the order under section 145 of the Code. [p. 347, col. 2.]

A High Court has jurisdiction to set aside the order of a Magistrate when the provisions of section 145 (3) of the Criminal Procedure Code have not been complied with and the parties are prejudiced thereby. [p. 347, col. 2.]

The procedure laid down in section 145 of the Criminal Procedure Code is indeed summary, but should not be cut too short. [p. 348, col. 1.]

Criminal Revision from an order of the Magistrate, Samastipur, dated the 14th December 1921.

Messrs. *Manohar Lal* and *S. N. Rai*, for the Petitioner.

Mr. Janak Kishore, for the Opposite Party.

JUDGMENT.—This is an application against an order of the Magistrate of Samastipur, dated the 14th December 1921, under section 145 of the Code of Criminal Procedure.

In the proceeding *Tilak Gope*, *Chhedi Gope* and *Musammat Bhikuni*, wife of *Chhedi Gope*, figure as the 1st party and *Basawan Pandey* as the 2nd party. The dispute relates to three *bhigas* odd *kathas* of land which was sold in execution of a rent decree, and was purchased on the 8th of April 1919, by the 2nd party. He obtained delivery of possession from the Civil Court on the 9th of June, 1921 (corresponding to the 19th of *Jaith* 1328). Upon an information lodged by the *chawkidar* on the 9th of October, the Junior Sub-Inspector of Police submitted a report, dated the 23rd of October 1921, holding that the land was in possession of the 2nd party and asking for a notice under section 144 of the Code of Criminal Procedure against the members of the 1st party, and also for taking action under section 107 of the Code. The Senior Sub-Inspector also enquired into the matter and submitted his report on the 31st of October 1921, pending that of the Junior Sub-Inspector. In that report also the Police found that the 2nd party was in possession of the property in dispute and the 1st party "seemed to be aggressive" and were trying to dispossess the 2nd party by force. He, therefore, asked for a notice under section 144 to be issued against the 1st party, and a proceeding under section 145 to be instituted

"to clear off the future disturbance."

On the 10th of November, the Magistrate called upon 1st party to show cause, why a proceeding under section 107 of the Code should not be drawn up against that party. Cause was shown by the members of the 1st party on the 1st of December separately. *Tilak Gope* filed one petition and *Chhedi* and his wife filed another petition. *Tilak* in his petition alleged that he had taken settlement of the land from *Basawan Pandey*, the 2nd party, some three years ago, namely, one *bhiga* six *kathas*, at an annual rental of Rs. 5, and since then he has been in possession of the property. He objected to the proceeding under section 107 on the ground that the dispute was concerning land, and consequently a proceeding under section 145 should be instituted. Before that, another petition by *Tilak* was filed on the 29th of October to the same effect. We are not concerned with the petition filed by *Chhedi Gope* and his wife in the present case.

On the 2nd of December the Magistrate heard the parties, and *Chhedi's* wife was directed to produce copies of certain *sudbharna* deeds by the 8th of December. On the 8th of December the case was adjourned to the 13th of December. On the 13th of December the Magistrate passed the following order: "Heard parties. Draw up a proceeding under section 145 and put up to-morrow." The next day, that is, on the 14th December the Magistrate passed the following order: "Orders passed." In the order in question, he has upheld the Civil Court *dakhaldhami* in favour of the 2nd party *Basawan Pandey*, and against *Chhedi Gope* and his wife *Musammat Bhikuni* members of the 1st party. *Chhedi Gope* was the judgment-debtor in the Civil Court decree. Neither he nor his wife now dispute the order of the Magistrate. The order must, therefore, stand so far as they are concerned.

The 2nd party challenges the order with respect to, 1 *bhiga* 6 *kathas* claimed by *Tilak* in respect of which the Magistrate has declared the possession of *Tilak* under section 145 of the Code. The Magistrate has shown no cause. *Tilak* has appeared in this case and has opposed the application of the 2nd party through a *Vakil*. It is obvious that the order of the Magistrate cannot be sustained for a minute.

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On the 13th of December, the Magistrate directed proceedings to be drawn up and the case to be put up the next day. The order-sheet does not show for what purpose the case was to be put up and what was to be done the next day. There appears to be a proceeding drawn up in the record purporting to be under section 145 of the Code of Criminal Procedure. This proceeding was not served upon the parties or their Pleaders, nor was it served upon the locality as is required by section 145, clause (3) of the Code. No written statement was filed by the parties, nor any evidence, oral or documentary, seems to have been adduced by them. It is contended on behalf of Tilak, one of the members of the 1st party, that the parties were present on the 13th of December, and the order to draw up a proceeding under section 145 was passed in their presence, and consequently there was no necessity of a copy of the proceeding to be served upon them under clause (3) of section 145 of the Code. He cannot advance a similar argument in favour of dispensing with service of notice on the spot. His argument with respect to the non-compliance of the aforesaid clause of section 145 is that, at best, it is only an irregularity and does not vitiate the trial or affect the jurisdiction of the Court which passed the order under section 145. The clause in question (3 of section 145) was newly added in the present Code of Criminal Procedure (1898), in order to give the parties full opportunity of putting in their claims, and also to any other person who may be interested in the subject-matter in dispute. The first is intended to be achieved by directing the service of notice upon the parties, and the second by service of the proceeding upon a conspicuous place at or near the subject-matter of dispute. The Legislature has not added this provision in vain, and the reason of this addition has been fully discussed by me in the case of *Ram Sahai Chowdhury v. Deonandan Prasad* (1) (Criminal Revision No. 341 of 1917). I have also in that case discussed the history of this change in the law, its effect and the authorities bearing upon it whatever difference there

may be as to whether the non-compliance with the requirement of clause (3) of the section is an illegality or an irregularity. There has been a consensus of view upon the point that the non-compliance of the aforesaid requirement constitutes such a grave irregularity as, when it has caused a failure of justice or a prejudice to any party, the order under section 145 is vitiated and the jurisdiction of the Magistrate is affected. As a result of my investigation into the authorities, I observed in that case that all the Judges agreed that the High Court had jurisdiction to set aside the order, when the provisions in clause (3) of section 145 were not complied with and the parties were prejudiced thereby. Taking the proviso at its lowest there can hardly be any doubt that its non-compliance in the present case has gone to the root of the jurisdiction of the Magistrate. Basawan Pandey, 2nd party-petitioner before us, has had in his favour the Civil Court writ of delivery of possession of such a recent date as the 9th of June 1921. Tilak claims through Basawan on the basis of an alleged Permanent Settlement 3 or 4 years ago. The Police reported that he has no document in his favour, no receipt of payment of rent and no evidence of possession. His settlement was not admitted. It lay upon Tilak, who claims possession of the land as against the Civil Court *dakhaldhani*, to prove that he took a valid settlement of the land from Basawan and that he actually cultivated and grew the crop in question. No evidence was given by him in this case. The learned Magistrate talks of having heard the parties and considered their evidence. I wonder what that evidence is. Surely, it cannot be any evidence oral or documentary under the Evidence Act. The Magistrate does not particularise that evidence in his judgment. The only reason why he thinks that Tilak, a member of the 1st party, is in possession of the land, as stated by the Magistrate to be, is that the possession was delivered by the Civil Court on the 9th of June 1921 and it was too late for the 2nd party to cultivate the land and grow *makai* and *marwa*. This is not evidence but a surmise. The real issue before him was as to who cultivated and grew the crops upon the land in question. Unless it was admitted by Basawan, the 2nd party,

(1) 43 Ind. Cas. 103; 4 P. L. W. 183; 19 Cr. L. J. 71.

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petitioner; the Magistrate was not in a position to hold that the 1st party must have necessarily cultivated it, without any evidence of witnesses to prove it. He does not also refer to any document, if any, which would conclusively show the crops on the land were grown by the 1st party. The 2nd party has, therefore, been seriously prejudiced by the order in question, and the order must be set aside. The Magistrate has not even considered the effect of a Permanent Settlement set up by the 1st party. Such a settlement is not admissible without a registered document; whereas Basawan who was not the decree-holder purchased the property at an auction-sale only recently. His right to settlement would arise after his purchase and *dakhaldchani*.

To draw up a proceeding on the 13th of December and to pass a final order on the 14th December is an extraordinary feat that could be performed only by the Magistrate in question. He is capable of doing so is obvious from a similar procedure adopted by him in Criminal Revision No. 17 of 1922. A reasonable expedition in the performance of one's work is no doubt commendable, but an attempt to cut too short the procedure prescribed by law would amount to an inexcusable haste and perfunctoriness. The Magistrate has not, it seems to me, properly apprehended the procedure laid down in section 145 of the Code. It is summary but it cannot be cut too short. I have, therefore, no hesitation in setting aside this order of the Magistrate. The Rule is made absolute.

I do not think the Civil Court *dakhaldchani* which the Magistrate has upheld in this case, so far as Chhedi and his wife, two members of the 1st party are concerned, can be so lightly treated as the Magistrate has done so far as Tilak is concerned. The Police reports upon which the action was taken by the Magistrate and which were the only documents before him at that stage clearly showed that the Civil Court *dakhaldchani* was given effect to and that the 2nd party was in possession of the land, and Tilak was only creating troubles.

In case of future dispute, I have no doubt the Magistrate will take proper action to prevent a breach of the peace.

N. K.

Rule made absolute.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 65 OF 1922.

February 24, 1922.

Present:—Mr. Justice Walmsley and

Mr. Justice Suhrawardy.

NASIR KHAN MISTRI—ACCUSED—

PETITIONER

versus

FYAZ HOSSAIN—COMPLAINANT—

OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 403—Marriage negotiations, break down of—Bona fide intention to marry—Refusal to return presents—Criminal misappropriation.

Where there is a *bona fide* intention on the part of an accused to give his girl in marriage and certain presents are delivered to him as a preliminary, if the negotiations break down on account of certain unfortunate disagreements, and the accused refuses to return the presents, he is not guilty of criminal misappropriation. In such a case, a Civil Court is the proper tribunal for the parties to seek a settlement of their dispute.

It cannot be laid down as a general proposition that whenever marriage negotiations break down, the relatives of the girl have a right to retain the presents made with a view to marriage. But before any action can be taken against them, it is necessary to prove dishonesty on their part.

Messrs. Aga Zaker Ali and Biswanatha Bose, for the Petitioner.

Messrs. Manmatha Nath Mukherjee and Satindra Nath Mukherjee, for the Opposite Party.

JUDGMENT.

Walmsley, J.—The petitioner has been convicted under section 403, Indian Penal Code and sentenced to pay a fine of Rs. 125.

The case for the prosecution is that an arrangement had been made for the accused to give his two daughters in marriage, one to the complainant's son and the other to his brother-in-law, and that complainant accordingly went to the accused's house with sweets, ornaments and clothing to perform the betrothal ceremony, and that the accused, pretending that the gifts were not as good as they should be, broke off the negotiations, and that afterwards the accused instead of returning the presents kept putting off the complainant with evasive answers and finally refused altogether to return the articles.

The accused tells a different story: He says that the negotiations broke down because the parties could not agree about the dower, and he appears to think that,

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because, according to him, the fault lay at the door of the complainant, he has a right to retain the articles brought by the complainant.

We may leave the perishables out of consideration and deal only with the ornaments and clothes. There is no doubt that they were delivered to the accused as a preliminary to the marriages and that they have been retained by him.

There are two explanations of the reason for this retention. If the complainant's story is correct the accused committed cheating, but it seems very doubtful whether that story is correct, and the learned Magistrate does not seem to have been prepared to accept it in its entirety. For my part I am disposed to regard the accused's explanation as the more probable, that is to hold that there was a *bona fide* intention on the part of the accused to give the girls in marriage, and that this intention was frustrated by an unfortunate disagreement as to the terms of the dower.

In these circumstances, I feel grave doubt as to whether the accused committed criminal misappropriation in refusing to return the presents. It must be remembered that a serious affront was put on him when the complainant withdrew with the bridegroom's party, and that the accused must have incurred expenditure, which complainant's conduct caused to be fruitless. I do not wish to justify the action of the accused or to lay down a general proposition that whenever marriage negotiations break down, the relatives of the lady have a right to retain the presents made with a view to the marriage, but, in the circumstances of this case, I think it is reasonable to hold that the element of dishonesty on the part of the accused has not been proved beyond doubt and that the Civil Court is the proper tribunal for the parties to seek a settlement of their dispute.

Accordingly, the Rule is made absolute, the conviction and sentence of the petitioner are set aside and the fine, if paid, will be refunded.

Su. Rawardy, J.—I agree.

N. K.

Rule made absolute.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 633 OF 1922.

December 20, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

NASURBHAI ABDULLABHAI LALJI—

ACCUSED

versus

EMPEROR—COMPLAINANT.

Companies Act (VII of 1913), ss. 76, 77, 131—Failure to hold general meeting under s. 76—Directors, liability of—Extraordinary meeting held on request of share-holders—Section, whether complied with.

A Company, registered in Bombay, held its statutory meeting under section 77 of the Companies Act on 30th March 1921, and also a general meeting on the same day. Under section 76 of the Act the Company had to hold a general meeting before 30th June 1922; no such meeting was held, but on a requisition of certain share-holders an extraordinary meeting was held on 29th June 1922. On the complaint of a share-holder the Directors of the Company were prosecuted for failing to comply with sections 76 and 131 of the Act, and it was argued on their behalf that the holding of the meeting on 29th June 1922, was a compliance with the provisions of section 76; they were, however, convicted. On appeal:

Held, that the conviction was right, as the meeting held on the requisition of the share-holders on 29th June 1922 was not a general meeting within the meaning of the term in section 76 of the Companies Act. [p. 359, col. 1.]

Appeal from the conviction and sentence passed by the Third Presidency Magistrate, Bombay.

Sir Thomas Strangman, Messrs. Jinnah and Desai, instructed by Messrs. Payne & Co., for the Accused.

Mr. Velinkar, instructed by Messrs. Mulla & Mulla, for the Complainant.

Mr. Kanga, instructed by Mr. J. C. G. Bowen, for the Crown.

JUDGMENT.—The first accused, the Standard Aluminium & Brass Works, Ltd., and accused Nos. 2 to 6 as Directors of the said Company were charged before the Third Presidency Magistrate with having committed offences under sections 76 and 131 of the Indian Companies Act, VII of 1913. The facts are not in dispute. The Company was registered on February 27, 1920, obtained a certificate from the Registrar on November 3, 1920, and commenced business on January 3, 1921. The statutory meeting under section 77 was held on March 30, 1921. A general meeting was held on the same day. Then under sec-

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tion 76 the Company had to hold a general meeting within fifteen months of that date, that is to say, before June 30, 1922. It must be admitted that no general meeting within the meaning of that term under the Articles of Association was held before June 30, 1922, nor was any balance-sheet, audited by the auditors of the Company, prepared and read before the Company in a general meeting. It appears then that there can be no doubt that the Company and its officers had committed a default under sections 76 and 131 of the Indian Companies Act. But reliance was placed by the accused on the fact that certain share-holders of the Company sent in a requisition to the Directors for the holding of an extraordinary meeting, and according to that requisition an extraordinary meeting was held on June 29. It was very strenuously argued before the Magistrate that the holding of that meeting was a compliance with the provisions of section 76.

Art. 60 provides for the statutory meeting required by section 77 of the Indian Companies Act. Then under Art. 61 other general meetings shall be held once in the year 1921, and in every subsequent year at such time and place as may be prescribed by the Company in general meeting, and if no other time or place is prescribed at such time and place as may be determined by the Directors. The first of such general meetings may be held on the same day as the statutory meeting. Under Art. 62 the general meetings referred to in the last preceding clause shall be called ordinary meetings; all other meetings of the Company shall be called extraordinary meetings.

It seems to us it is quite impossible for us to hold that extraordinary meetings such as the one which was held on the requisition of the share-holders on June 29, was a general meeting within the meaning of that term in section 76. Reference was made before the Magistrate to certain English cases, but we do not think there is any need to refer to cases decided under the English Act, as we have before us the Indian Companies Act and the Articles of Association of the Company, and we need only consider what is prescribed by that Act read with the Articles.

The convictions were, therefore, right unless any of the accused could prove that

they were not Directors at the time the default was committed. But that has not been proved. Only in the case of accused No. 2 it was argued that he could not knowingly be a party to the default, as he had sent in his resignation to the Company on March 24 and under Art. 97 he ceased *ipso facto* to be a Director at the time when the notice was sent in. Although afterwards he did attend meetings of the Board and actually presided at the meetings as Chairman, his contention now seems to be that he presided as a private individual. When we asked what meetings he had attended after he had sent in his resignation, we were told he presided at meetings on June 24 and June 28, and as it was quite impossible for the Company to hold a general meeting before June 30, in the absence of any notices having been sent out under Art. 64 he could not be liable for the default. We doubt very much whether that argument would be successful. But there is no need to consider it because on reference to the Minute Book the attendances of accused No. 2 at the Board-meetings can be seen. He presided at the meeting of March 9. He was absent from the meeting held on May 16. The first minute of that meeting is as follows:—"Mr. Hajibhoy A. Thaver was appointed Chairman in the absence of Mr. Nasurbhai A. Lalji (that is to say, the second accused) from Bombay." It is curious to note that we can find no reference to the letter of accused No. 2 resigning his office as Director in the minutes of that meeting, although there is a reference to a letter received from Dadabhoy S. Madan resigning his office of Director which was by a resolution accepted. At the time of the meeting of June 13, the second accused had returned to Bombay and presided as Chairman. Again, he presided at meetings of June 19, June 22, June 24 and June 28. Then, in accordance with the provisions of the Articles of Association, he resigned his office as Director on June 30. There is no substance, therefore, in the defence which has been urged before us on behalf of the second accused, which, as a matter of fact, was not urged before the learned Magistrate. We can only consider that the statement of the second accused which he made to the effect that after his resignation was

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sent, the Board for reasons best known to them did not choose to accept it, and in ignorance of the law on the subject he did attend some meetings, does him very little credit.

Then, accused Nos. 3 and 5 have not improved their case by alleging as an excuse for not complying with the provisions of section 131 that the auditor had conspired with some of the share-holders to delay in bringing out his report on the Company's accounts. The auditor in his evidence said he had asked to see the securities for the Rs. 2,47,000 drawn by the agents and had not seen them up to that day. Further comment on these allegations of this accused is unnecessary. In any event, even if such a conspiracy had been proved, that would not prevent a default on the part of the accused being committed.

Accused No. 4 complained that the Magistrate had unjustifiably fined him Rs. 50 more than accused Nos. 2, 3, and 5. The Magistrate says:—

"From the attitude taken up by the accused No. 4, Vaikunth Ambalal Desai, I have had reason to think that he had been misguiding the other accused in wrongly interpreting the law to them."

We can safely rely on the Magistrate's appreciation of the attitude of this accused. This case took a very long time before the Magistrate and he remarked at the end of his judgment:—

"In conclusion, it only remains for me to say that I was obliged to write a somewhat lengthy judgment after a regular trial by reason of the legal defences set up in the case. If that was not so, I should have disposed of the case in summary trial under section 278 of the Act."

The Magistrate was obviously right. None of these defences set up by the accused at very great length had any substance whatever, but the Magistrate was obliged to deal with them also at very great length in a very able judgment. If the accused had been better advised with regard to the attitude that ought to have been taken up before the Magistrate, they would have admitted the default, and pleaded extenuating circumstances. If that had been the case, we have no doubt the matter would have terminated in a way more

satisfactory to the accused than it did. The appeal will be dismissed.

W. C. A.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITIONS NOS.
383 AND 384 OF 1922.

October 13, 1922.

Present.—Mr. Justice Oldfield and
Mr. Justice Devadoss.

SIKKA GOUNDAN AND OTHERS—
ACCUSED—PETITIONERS.

*Criminal Procedure Code (Act V of 1898),
s. 526—Proceedings instituted in Court having no
jurisdiction—Transfer, whether can be directed—
Proper order.*

Proceedings instituted in a Court which has no jurisdiction in respect of them cannot be regarded as legally instituted at all, and the High Court has no power to transfer them to any other Court. The High Court can, however, in such a case, in the exercise of its inherent powers of superintendence, direct the Court not to proceed further in the matter. [p. 352, col. 2.]

Ledgard v. Bull, 9 A. 191; 13 I. A. 134; 4 S. P. C. J. 741; 5 Ind. Dec. (N. S.) 561 (P. C.), relied upon.

CRIMINAL MISCELLANEOUS PETITION NO. 383
OF 1922.

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to quash the proceedings in C. C. No. 2 of 1921, on the file of the Court of the Village Magistrate of Keeripatti, Attur Taluk, Salem

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District, and to issue an order directing stay of further proceedings in the above said C. C. No. 2 of 1921, pending the disposal of this petition.

CRIMINAL MISCELLANEOUS PETITION NO. 384
OF 1922.

Petition praying that, in the circumstances stated in the affidavit filed in Criminal Miscellaneous Petition No. 383 of 1922, on the file of the High Court, the High Court will be pleased to issue an order that the proceedings in C. C. No. 2 of 1921, on the file of the Court of the Village Magistrate of Keeripatti, be transferred from his file to the file of some other Magistrate and to stay further proceedings therein pending disposal of the Criminal Miscellaneous Petition.

Mr. V. N. Venkatavaradachariar, for the Petitioners.

Mr. J. C. Adam, Public Prosecutor, for the Crown.

ORDER.—There is before us, first, an application for the transfer of C. C. No. 2 of 1921, from the file of the Village Magistrate of Keeripatti to any other Village Magistrate and, next, an application for quashing the Village Magistrate's proceedings in that case. The relief asked for in the latter application is described somewhat inaccurately. For it does not appear that there are any proceedings by the Village Magistrate, which can be quashed or set aside. What has happened is that the Village Magistrate received an oral complaint against the petitioners and issued process to them thereon. They did not comply with that process on the ground that the occurrence in question did not take place within the Magistrate's jurisdiction and he had no power to issue process in respect of it. On that default the Village Magistrate filed a complaint against them, which was heard, of an offence punishable under section 174, Indian Penal Code. In dismissing that complaint, the Sub-Magistrate accepted the petitioners contention that the Village Magistrate had no jurisdiction. Afterwards, however, the Village Magistrate took a sworn statement from the complainant, in which it was alleged that the occurrence was within

his jurisdiction, and now proposes to proceed with the trial. It is not disputed that the offence referred to in the sworn statement just mentioned was identical with the offence which was the subject of the oral complaint.

The fact that the complainant in the sworn statement alleged that the occurrence took place within the jurisdiction is, of course, of no avail whatever. We have, however, a judicial decision, no doubt in collateral proceedings, still, one of which, in our opinion, we can in proceedings such as these legitimately take account, that the occurrence was outside the Village Magistrate's jurisdiction; and we accept that decision as the basis for our conclusion. So accepting it, we clearly cannot transfer this case, which is at present in a Court without jurisdiction and, therefore, has never been legally instituted [See *Ledgard v. Bull* (1)] to any other Court.

To turn then to the petition to quash the proceedings, for the reasons given we cannot comply with it literally. In the circumstance, however, we think we are justified with reference to our inherent powers of superintendence in directing the Village Magistrate of Keeripatti not to proceed further with the complaint of Muthuswami Goundan at present pending before him. It will be for Muthuswami Goundan, if he is so minded, to file a new complaint in any competent Court.

V. N. V.

Z. K.

Petitions allowed.

(1) 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 74; 5 Ind. Dec. (N. S.) 561 (P. C.).

GOVERNMENT PLEADER **V. G. K. TATKE.****BOMBAY HIGH COURT.**

CIVIL APPLICATION NO. 574 OF 1922.

December 18, 1922.

Present.—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
THE GOVERNMENT PLEADER

*versus***G. K. TATKE—OPPONENT.**

Legal practitioner—Misconduct—Letter imputing improper motives to Magistrate—Instructions from client—Justification—Civil Procedure Code (Act V of 1908), s. 80, scope of.

A Magistrate passed certain strictures against a defence witness in his judgment in a criminal case. Thereupon a Pleader acting under instructions from that witness sent a letter to the Magistrate which contained the following clause: "The tenor, tone and mould of your judgment clearly shows that you had a grudge and personal enmity against my client who is Brahmin by caste, and you thought that as the best opportunity to attack the character of my client under the garb of a judicial officer. My client still sincerely and honestly believes that you had no material to make objectionable remarks against him in your judgment. Before proceeding to take any action against you, my client thinks it his humble duty to draw your attention to the judgment and objectionable remarks therein and to give you sufficient opportunity to withdraw them."

Held, (1) that the letter contained merely vulgar abuse of the Magistrate and that under no circumstances was it proper for a Pleader to write to a Magistrate in such terms;

(2) that the fact that the letter was written under instructions from the client was no justification for it and that its writing amounted to misconduct.

It is perfectly open to a Pleader, on instructions from his client to send a Magistrate notice under section 80 of the Civil Procedure Code, but whatever his instructions, it is his duty as a Pleader to send the notice strictly in accordance with the terms of that section.

Mr. S. S. Patkar, Government Pleader, in person.

Mr. H. C. Coyajee, with him Messrs. S. R. Bakhale and P. S. Bakhale, for the Opponent.

JUDGMENT.—One Janai filed a complaint in the Court of the Second Class Magistrate of the Patan Taluka against two persons accusing them of having committed the offence of wrongful confinement. On August 31, 1921, the Magistrate delivered judgment acquitting the accused. The papers were sent up to the District Judge by the Magistrate in consequence of the view which the Magistrate had formed of the evidence given before him on behalf of the accused. The District Judge called for a report from

the Subordinate Judge and passed orders on March 6, 1922. He said in conclusion:

"I do not agree with the Magistrate's view of the evidence and consider that his strictures are unwarranted. His remark that the Sub-Judge's order is a fraud, presumably means that it was obtained by a fraud, but I have already said that there was absolutely no reason for any one connected with the Court to approach the complainant except for the purpose of serving the process upon her. It is, therefore, unnecessary to take any departmental action and the papers are returned."

Mr. Bhatye was the Pleader concerning whom the Magistrate in his judgment had passed certain strictures on August 31, 1921. After Mr. Baker's order, Mr. Tatke, the present respondent, wrote a letter on behalf of Mr. Bhatye to the Magistrate, which is the subject-matter of the present complaint by the Government Pleader. The letter begins.—

"Please take notice of the following: My client Mr. P. G. Bhatye was examined as a witness for the defence before you in your Court in Criminal Case No. 40 of 1921 of the file of the Second Class Magistrate, Patan, on 30th July 1921. In the judgment of the said case, while you acquitted all the accused you have made certain remarks against my client, and my client being a Municipal Councillor, a landholder and a Pleader of status and position, is lowered in estimation and reputation in the eyes of the public and thereby is likely to suffer in his profession. You had also sent a copy of the said judgment to the District Judge, Satara, with your report for inquiry and action. You knew that my client as a Pleader was an officer of the Court and liable to be punished by the District Judge under the Disciplinary Jurisdiction and Legal Practitioners Act. The tenor, tone and mould of your judgment clearly shows that you had a grudge and personal enmity against my client who is Brahmin by caste, and you thought that as the best opportunity to attack the character of my client under the garb of a judicial officer. My client still sincerely and honestly believes that you had no material to make objectionable remarks against him in your judgment. Before proceeding to take any action against you, my client thinks it his humble duty

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to draw your attention to the judgment and objectionable remarks therein and to give you sufficient opportunity to withdraw them."

The objectionable passages were then set out and the letter contained a general demand for an apology. A copy was sent to the Collector of Satara for his information. It is not suggested that this was a notice to the Magistrate under section 80 of the Civil Procedure Code. The Magistrate complained to the District Judge about this letter. The District Judge, who was then Mr. Percival, held an inquiry into the conduct of the opponent, and made a report to this Court on August 16, 1922. Exhibit 13 is the answer of the opponent dated August 12, 1922. He said there:

"By writing the words charged against him the opponent begs to state that he did not give or intend to give any insult or threat to anybody: nor was there any idea of extorting any alteration in the judgment or extorting any apology. Whatever was said, was said under clear instructions from the client of the opponent. The object of the client was simply to get a redress for the wrong done to him. The opponent was not actuated by any personal motives in the matter. If the language in the letter is considered too strong I have no hesitation in expressing regret for the same. The notice was given no publicity whatever. The notice was given in the form of a letter to Mr. Daduskar who was the party concerned and to the Collector who is the superior of Mr. Daduskar. The opponent honestly believes that there was no excess of privilege in the matter at all."

Now, it is perfectly clear that that letter was a most improper letter for any Pleader to write to a Magistrate with regard to the disposal of a particular case by that Magistrate; and if this explanation of Mr. Tatke was really expressive of what he believed to be the right course to take, then it is obvious that he has no knowledge whatever of what are the duties of a Pleader with regard to Magistrates and Judges in this Presidency. It was perfectly open to him on instructions from his client to send a notice under section 80 of the Civil Procedure Code. But whatever his instructions were it would have been his duty as a Pleader to send that notice strictly in accordance

with the terms of that section. But this letter, which is now before us, merely contains vulgar abuse of the Magistrate, and a demand for an apology, apparently followed by a threat of further proceedings. Instructions from a client are no excuse whatever for a Pleader exceeding what is his duty towards the Courts; and as it is presumed that a Pleader knows what his responsibilities are in addressing Magistrates and Judges, it is difficult to believe that the respondent did not know that the language in this letter was far too strong, judged by the ordinary standards with which he should have been acquainted. Indeed, there are too many cases in these Courts where notices have been issued against Pleaders for misconduct, in which we have been told that if we think that the line which divides proper and improper conduct has been crossed then an apology would be tendered. The point I wish to make clear is, that in most cases it is not for us to say whether the line is crossed or not, because it is absolutely plain on the record that the line has been crossed, certainly in this case it is too obvious, and a conditional apology of this character is valueless. If the Magistrate was of opinion on hearing the evidence that there had been an attempt to get up a case which was false in order to save the accused from being convicted, then he was certainly entitled to say so, and an aggrieved party had a remedy if he considered that the conclusions arrived at by the Magistrate were wrong. But in no circumstances would it be proper for a Pleader after judgment to write to the Magistrate in the terms which are contained in this letter. We think that there was absolutely no justification for that letter; and that the writing of that letter amounts to misconduct. The only question before us then is whether we should content ourselves with administering a reprimand or whether we should deal with the respondent's Sanad. We content ourselves with a reprimand, hoping that the remarks that have fallen from the Bench will be carefully considered by the respondent with regard to the future.

N. H.

Rule made absolute.

AMINULLA v. EMPEROR.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 30 OF 1922.

January 27, 1922.

Present.—Mr. Justice Walmsley and
Mr. Justice Suhrawardy.**AMINULLA AND OTHERS—PETITIONERS**
*versus***EMPEROR—OPPOSITE PARTY.***Compromise—Compounding offence—Magistrate,
duty of.*

When parties to a criminal case who are nearly related to one another succeed in patching up their quarrels, the Magistrate should not refuse to do what he can to restore peace and good will if the case is not compoundable without his approval.

Criminal revision against the order of the Additional District Magistrate, Chittagong, dated the 8th December 1921, affirming that of the Sub-Deputy Magistrate, Chittagong, dated the 4th November 1921.

Babu *Ramdayal De*, for the Petitioners.**JUDGMENT.**

Walmsley, J.—The petitioners have been convicted under section 147 of the Indian Penal Code, and sentenced to fifteen days' rigorous imprisonment each. In addition, two of them, Nur Ahmed and Aminulla, have been convicted under section 323, Indian Penal Code, and sentenced to fifteen days' rigorous imprisonment and Faizulla under section 324, Indian Penal Code, and sentenced to one month's rigorous imprisonment. The Rule was issued on three grounds. The first relates to the conviction under section 147, Indian Penal Code. The learned Magistrate drew up a charge in which the common object of the unlawful assembly was stated to be to assault Akiruddin and Mokheswar Rahaman. In his judgment he finds that three of the accused persons did assault Akiruddin and Mokheswar Rahman. As to the other three, that is, Munirullah, Mohabat Ali and Kasim Ali, he says "there is no positive evidence on the record that they took any serious part in the *mar pit* or caused injury to any person, although I am perfectly satisfied that they went with the other three accused to snatch away the cattle of the complainant in common object with that of the other accused persons." Clearly, there is a difference between the common object mentioned and

the common object he finds in the case of these three persons. If the common object of Faizullah, Nur Ahmed and Aminullah was to beat Akiruddin, then there were not five persons that shared in the common object and the ingredient of an offence under section 147, Indian Penal Code, is wanting. It is a great pity that so many Magistrates when dealing with charges under section 147, Indian Penal Code, are careless in setting out the common object and in directing their attention to whether that particular common object is proved or not. On this ground, the conviction under section 147, Indian Penal Code, against all the petitioners must fail.

The learned Magistrate concedes that the additional sentences passed under sections 323 and 324, Indian Penal Code, on three of the petitioners cannot stand with the sentence under section 147, Indian Penal Code. With the conviction and sentence under section 147, Indian Penal Code, removed, it becomes a question whether on the third ground the conviction of hurt should be allowed to stand. I find that the complainant put in a petition on the 5th of August last saying that he did not wish to go on with the case. So far as the charge against Nur Ahmed and Aminullah is concerned, he had an absolute right to compromise the case on the charge of simple hurt. In the case of Faizullah, the complainant had no such absolute right: his power to compound was subject to the Magistrate's approval. But, in this case, the learned Magistrate did not say anything about whether he approved or not. He simply says that he heard the Court Inspector. It is a great pity when parties who are apparently nearly related to one another succeed in patching up their quarrels, that the Magistrate should not do what he can to restore peace and good will. I think the petitioners Nur Ahmed and Aminullah should be acquitted of the charge under section 323, Indian Penal Code, on the ground that the complainant did not wish to proceed any further against them; and, so far as Faizullah is concerned, taking into consideration that he has already undergone some days' rigorous imprisonment and the complainant did not wish to proceed against him either, I think in his case, too, the conviction and sentence under section 324,

VENKATASUBBIER, In re. SUPDT. & REMB. OF LEGAL AFFAIRS, BENGAL, v. TROILOKHYA NATH.

Indian Penal Code, should be set aside. The result is, that the Rule is made absolute and the convictions and sentences passed on the petitioners are set aside.

Suhrawardy, J.—I agree.

B. N.

*Rule made absolute;
Convictions and sentences set aside.*

there may be in bringing the action of the accused within the definition of force it is clear they used violence which is sufficient under section 146 of the Indian Penal Code, to make their offence rioting. This view is supported by the ruling in *Samaruddin v. Emperor* (1), where it was held that the word "violence" was not restricted to force used against persons only but extends also to force against inanimate objects. The accused were, therefore, rightly convicted under section 147 of the Indian Penal Code.

The fines, however, seem to me to be excessive in the case of the Pariah accused Nos. 4 to 14. Their fines will be reduced to rupees ten each, in default two weeks' rigorous imprisonment. The sentences of the others are confirmed. Excess fines, if collected, would be refunded.

V. N. V.

Z. K.

*Fines reduced ;
Sentence modified.*

(1) 17 Ind. Cas. 565; 40 C. 367; 13 Cr. L. J. 821.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 395 OF 1922.

CRIMINAL REVISION PETITION NO. 344
OF 1922.

December 15, 1922.

Present:—Mr. Justice Krishnan.

In re VENKATASUBBIER AND OTHERS—
ACCUSED—PETITIONERS

Penal Code (Act XLV of 1860), s. 146—"Violence," meaning of.

The word 'violence' in section 146 of the Penal Code is not restricted to force used against persons only but extends also to force against inanimate objects.

Samaruddin v. Emperor, 17 Ind. Cas. 565; 40 C. 367; 13 Cr. L. J. 821, relied upon.

Petition, under sections 435 and 439 of the Code of the Criminal Procedure, 1898, praying the High Court to revise the judgment, dated the 27th February 1922, of the Court of the Sub-Divisional Magistrate, Erode, in Criminal Appeals Nos. 23 and 25 of 1922, confirming the conviction and the sentences passed on the petitioners by the Court of the Second Class Magistrate, Perundurai, in C. C. No. 502 of 1921.

Dr. Swaminathan, for the Petitioners.

The Public Prosecutor, on behalf of the Crown.

ORDER.—It is argued that the conviction under section 147, Indian Penal Code, was wrong as no force or violence was used to any person and the accused are guilty under section 143 only. The definition of 'force' is given in section 349 of the Indian Penal Code. Now these accused are found to have gone and beaten on the door when the complainant fled away to save himself from being beaten and shut himself up in his room. Whatever difficulty

CALCUTTA HIGH COURT.

CRIMINAL GOVERNMENT APPEAL NO. 2 OF
1922.

June 7, 1922.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Mr. Justice Panton.

In the matter of
SUPERINTENDENT AND REMEMBRAN-
CER OF LEGAL AFFAIRS, BENGAL,
—APPELLANT

versus

TROILOKHYA NATH CHATTERJEE—
RESPONDENT.

Bengal Municipal Act (III of 1884), s. 261—"Kiln", meaning of—Panja for firing bricks, if kiln.

The word "kiln" in section 261 of the Bengal Municipal Act refers to a structure which is of a permanent nature and does not include a *panja* for firing bricks.

Criminal Appeal.

Mr. Orr, for the Crown.

Babus Manmohla Nath Mookerjee and
Satindra Nath Mookerjee, for the Opposite
Party.

SUPDT. & REMR. OF LEGAL AFFAIRS, BENGAL V. TROILOKHYA NATH.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the Superintendent and Remembrancer of Legal Affairs, Bengal, against a decision of a Sub-Deputy Magistrate, 3rd Class, of Ghatal, and the matter arises out of a prosecution, in which one Troilokhya Nath Chatterjee was the defendant, under section 273 (2) of the Bengal Municipal Act, which provides that, "whoever, in a Municipality, without a license uses any place for any of the purposes specified in section 261, or section 263; or (uses any place as a kiln in contravention of the provisions of section 262A)" and so on, "shall be liable, for every such offence, to a fine." And the material part of section 261 which is applicable to this case is as follows:—"Within such local limits as may be fixed by the Commissioners at a meeting, no place shall be used without a license from the Commissioners, which shall be renewable annually, for any of the following purposes, namely, as a tannery, slaughter-house, or kiln for making bricks, pottery, tiles or lime."

The allegation in this case was that the defendant had, without a license used a place as a kiln for making bricks. The brick field was said to be about 50,000 square feet and the method of manufacturing bricks was, what is called in this country, in "Panjas" or as it has been said by one of the witnesses "clamps." The description of a "Panja" or clamp is given by the witness, Joy Kumar Sarkar, who was called for the defendant. He says "there is a difference between a kiln and clamp. In a 'clamp' or 'Panja' the fuel and bricks are placed in alternate layers. In a kiln, which means a room or masonry enclosure with or without roof, in which the bricks are stacked without any fuel and burnt from places or flues arranged below the stack, in which the fires are lighted and kept up with the fresh supplies of wood or coal till the bricks are burnt." "Then" he says "we never say Bull's clamp but Bull's kiln and we say 'country clamp' which does not mean a kiln. 'Then' in describing the process adopted by the defendant, he said, 'I would not say that the bricks were burnt there in kilns, but they were burnt in 'clamps' or country 'Panjas.'"

On the other hand, it has been contended that this process of burning bricks by placing the fuel and the bricks in alternate layers so that they reach up to a considerable height and cover a considerable area really, in effect, amounts to the creation of the kiln. The Magistrate decided in favour of the defendant holding that this process was not a kiln and the Legal Remembrancer has appealed. The definition of a kiln in the Oxford Dictionary is as follows:—A furnace or oven for burning, baking, or drying of which various kinds are used in different industrial processes." Then, it gives an instance, "An oven or furnace for baking bricks, tiles or clay vessels, or for melting the vitreous glaze on such vessels."

That definition, in my opinion, points to a structure which is of a permanent nature. Further, I was struck with the account which the learned Vakil read from the Encyclopædia Britannica in Volume IV, at page 520. It runs as follows:—"It is evident that the best method of firing bricks is to place them in permanent kilns, but although such kilns were used by the Romans some 2000 years ago, the older method of firing in 'clamps' is still employed in the smaller brick fields, in every country where bricks are made. These clamps are formed by arranging the unfired bricks in a series of rows or walls, placed fairly closely together so as to form a rectangular stack. A certain number of channels or fire mouths are formed in the bottom of the clamp and fine coal is spread in horizontal layers between the bricks during the building up of the stack. Fires are kindled in the fire mouths and the 'clamp' is allowed to go on burning until the fuel is consumed throughout. The clamp is then allowed to cool, after which it is taken down and the bricks sorted." In that description there is clearly a distinction drawn between that which is a "clamp" and that which is a "kiln", and the process of making bricks by means of "clamps" seems to be older than the kilns which were used by the Romans about 2000 years ago. Giving to the word "kiln" its ordinary meaning, I am inclined to the opinion that the Magistrate was right in his construction. If, however, there is a doubt about it, the words of the section ought not to be

CROWN PROSECUTOR *v.* A. DURAISWAMI.

strained unduly against the defendant. In my judgment, there is force in the argument which the learned Vakil presented, upon the construction of this part of the section. The words are "using a place as a kiln for making bricks." His argument was that if it had been intended to prohibit the manufacture of bricks not only by means of a kiln but also by means of the older system of "clamp" it would have been sufficient for the Legislature to provide that no place shall be used without a license from the Commissioners for the purpose of making bricks; consequently, we must take it that the words "no place shall be used as a kiln for making bricks," were advisedly used by the Legislature having regard to the ordinary meaning of the word "kiln" as distinguished from "clamps." In a case of this kind, in my judgment, it is not the function of the Court to strain the meaning of the particular section of the Act, because, if the process which is aimed at in this prosecution is really a nuisance and if it is, in the opinion of the authorities, such a process as ought to be brought within the purview of the section, it is open to them to amend the Act.

For these reasons, in my judgment, the appeal must be dismissed.

Panton, J.—I agree.

B. N.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 1196 OF 1922.

December 8, 1922.

Present:—Mr. Justice Krishnan.

THE CROWN PROSECUTOR—APPELLANT
versus

A. DURAISWAMI—ACCUSED.

Madras City Police Act (III of 1888), s. 78, rule under—"Ride", meaning of—Person carried on bicycle, whether rides.

The word "ride" in the rule made under the Madras City Police Act as to riding bicycles in any street or public place, does not necessarily imply that the person riding should propel the bicycle himself. A person, therefore, who is carried on a bicycle propelled by another, rides the bicycle.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Court of the Honorary Presidency Magistrates, Egmore, in C. C. No. 9555 of 1922, on their file.

The Crown Prosecutor, for the Crown.

JUDGMENT.—The interpretation put by the Honorary Magistrates on the rule referred to by them and published in the Fort Saint George Gazette of 10th February 1922 No. 189* seems to be erroneous. The first part of the rule applies to the person who pedals the bicycle and takes with him another on the same cycle; and the latter part of the rule clearly applies to the person who allows himself to be so carried, for he rides the bicycle but not on the saddle. The word "ride" does not necessarily imply that the person riding should propel the bicycle himself. It may be that the rule as worded covers the case of a single person riding a bicycle without being seated on the saddle, but it certainly covers also the case of a person riding a bicycle in the manner the second accused did. He pleaded guilty and, therefore, he should have been convicted, but as the Crown Prosecutor does not ask for a sentence it is not necessary to inflict one now. But his acquittal is set aside.

V. N. V.

W. C. A.

Acquittal set aside.

*The exercise of the powers conferred upon him, by section 78 of the Madras City Police Act, 1888, His Excellency the Governor in Council is pleased to make the following byelaw, and to direct that it shall come into force upon the expiration of one month from the date of its publication in English in the Fort St. George Gazette.

"No person riding a bicycle in any street or public place shall be permitted to carry any other person on the same bicycle either on the handle bar or on the back step or on the cross bar and no person shall ride bicycle in any street or public place in any other manner than on the saddle."

PARSHOTAMDAS M. SHAH, *In re*.**BOMBAY HIGH COURT.**CRIMINAL APPLICATIONS FOR REVISION
NOS. 333 TO 335 OF 1922.

February 7, 1923.

Present.—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.*In re* PARSHOTAMDAS M. SHAH.*Criminal Procedure Code (Act V of 1898), ss.*
439, 476—*Direction to prosecute—Revision.*

The High Court will not in revision interfere with a direction to prosecute under section 476 of the Criminal Procedure Code unless it is satisfied that the direction was given on merely fanciful grounds, or on grounds so empty and so obviously wrong that the Court giving the direction could not be said to have formed a serious judicial opinion.

In the matter of the petition of Alamdar Husain,
23 A 249; A. W. N. (1901) 59, followed.

Criminal application from an order passed by the District Magistrate, Panch Mahals.

Mr. G. N. Thakor, (with Mr. M. H. Mehta), for Shah.

Mr. H. C. Coyajee, (with Mr. Ratanlal Ranchhoddas), for Munshi.

Mr. N. M. Desai for Sukhdeo.

JUDGMENT.—We are asked to interfere in revision with an order passed by the District Magistrate under section 476, Criminal Procedure Code, on October 25, 1922, in which, after finding that there was a *prima facie* case against certain persons, he directed that the case should be sent for inquiry to the First Class Magistrate. The principles which the High Court should follow in dealing with an application in revision in such a case were considered in *In the matter of the petition of Alamdar Husain* (1). The Chief Justice said (page 251):

“Now it has been held by this Court that the High Court has power in revision to set aside an order passed by a Civil, Criminal or Revenue Court under section 476 of the Code; and I assume that this view is correct. Still, one must have regard to the nature of the revisional jurisdiction, and must not, in a case arising under section 476, any more than in any other case, allow what would virtually be an appeal from the order

of the Court below. It is necessary, as in all other cases, to see whether there has been any error of law, any irregularity, any abuse of, or failure to exercise judicial discretion, such as would justify interference in revision. Now, let us see whether there is any fault of that kind to be found in the Collector's proceedings. The condition of his acting under section 476 is his forming the opinion that there was ground for inquiring into any offence referred to in section 195. The test is his opinion, and not the opinion of any superior Court; and if he has formed a real opinion to the effect stated, he has power to act under the section, and he commits no error or irregularity in doing so, even though another Court may think the opinion erroneous. I say, if he forms a real opinion, because, no doubt, if a case arose in which the Court acted on merely fanciful grounds, on grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then this Court would probably hold in revision that there had been no such action as section 476 contemplates.”

With respect, we entirely agree with the learned Chief Justice. On a consideration of all the arguments addressed to us, we cannot say that any grounds have been put forward on which we can possibly interfere with the direction given by the District Magistrate. It cannot be said that he gave those directions on grounds merely fanciful, grounds so empty and so obviously wrong that he cannot be said to have formed a serious judicial opinion. We discharge the rules in these three applications. The only amendment we make in the order is that we set aside the amendment made by the District Magistrate himself on October 30, 1922, adding “195” after “193” in the original order.

W. C. A.

Rules discharged.

(1) 23 A. 249; A. W. N. (1901) 59.

AYDROOS V. EMPEROR.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 191 OF 1922.

July 24, 1922.

Present:—Mr. Justice Oldfield and
Mr. Justice Ramesam.AYDROOS AND ANOTHER—PRISONERS—
APPELLANTS*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 149—"Offence," if includes offence under special Act.**The definition of "offence" in section 149, Penal Code, does not include offences under special Acts.*

Appeal against an order of the Court of Special Judge, Malabar, Calicut, in Case No. 5 of the Calendar for 1922 (S. T. Case No. 101 of 1921).

Mr. P. Govinda Menon, for Appellants.*Mr. J. C. Adam*, Public Prosecutor, for the Crown.

JUDGMENT.—We see no reason for interference with the lower Court's findings of fact. The evidence against the second and eighth accused, appellants before us was, no doubt, given against the former only by first and third prosecution witnesses and against the latter only by first, third and fourth prosecution witnesses. We do not think that any sufficient reason of the nature of enmity or the like has been made out for rejecting this evidence. There was some delay in the giving of information to the authorities but that is an almost invariable feature of these cases and was probably inevitable in view of the state of the country. The defence evidence did not assist the accused.

Accepting the finding of facts, there is no reason for interference with the conviction of an offence punishable under section 143, Indian Penal Code. The objection at the conviction under section 126, Indian Railways Act, is that there is no evidence in the case of either of these accused of his having himself done or taken any immediate part in any act specified by the section. It is not possible to apply section 149, Indian Penal Code, because the definition of "offence" in section 149 does not for the present purpose include offences under Special Acts. The learned Public Prosecutor has suggested the application of section 34,

BHANGI DUBEY V. EMPEROR.

Indian Penal Code, but the evidence does not, in our opinion, justify the conclusion that the criminal action question, the removal of rails, sleepers, etc., was done by several persons, including these accused. The part these accused played is, in fact, unspecified, and we think that, in order to justify the application of the section, evidence of some distinct act by the accused which can be regarded as part of the criminal act in question must be required.

Taking this view, we allow this appeal to the extent that we set aside the conviction of an offence punishable under section 126 of the Indian Railways Act and the sentence of seven years' rigorous imprisonment. The accused must, therefore, be released when they have served their sentence of six months' rigorous imprisonment for the offence punishable under section 143, Indian Penal Code, and any sentence in default of payment of the fines which may be necessary.

V. N. V.

N. H.

*Appeal partly allowed.***PATNA HIGH COURT.**

CRIMINAL REVISION NO. 302 OF 1922.

June 15, 1922.

Present:—Mr. Justice Coutts and
Mr. Justice Das.

BHANGI DUBEY—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Practice—Criminal trial—Conviction on uncorroborated testimony of complainant.

In a case of grievous hurt the Magistrate disbelieved the whole of the prosecution evidence except the statement of the complainant. It was found that there was serious enmity between the complainant and the accused:

Held, that it was unsafe, under the circumstances, to base the conviction on the uncorroborated statement of the complainant.

SUGANCHAND V. CHUNNILAL.

Revision from a decision of the Magistrate, Shahabad.

Mr. S. P. Varma, for the Petitioner.

Assistant Government Advocate, for the Crown.

JUDGMENT.

Coutts, J.—The petitioner in this case, Bhangi Dubey, has been convicted under section 325 of the Indian Penal Code and has been sentenced to one year's rigorous imprisonment and a fine of Rs. 100.

The case for the prosecution was that on the evening of the 24th of February 1922, as Shah Ghulam Makhdum was on his way home he was assaulted by the petitioner and others, and Bhangi Dubey struck him with a *danda* on his left eye with the result that the sight of his eye was destroyed. The whole prosecution evidence in regard to the actual occurrence has been disbelieved except the evidence of Shah Ghulam Makhdum himself, and it is on his uncorroborated statement that the petitioner has been convicted. There is serious enmity between the accused and Shah Ghulam and, in my opinion, it is unsafe to convict the petitioner on the uncorroborated testimony of this witness. I would accordingly set aside the conviction and sentence and acquit the petitioner; the fine if paid must be refunded.

Das, J.—I agree.

Z. K.

Petition accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL, REVISION NO. 192 OF 1922.
December 22, 1922.

Present:—Mr. Prideaux, A. J. C.

SUGANCHAND—COMPLAINANT—
APPLICANT

versus

CHUNNILAL, AND OTHERS—ACCUSED—
NON-APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 494

(a)—*Order of withdrawal—Judicial order—Reasons, record of.*

In according or withholding consent to an application for withdrawal of a case by the Public Prosecutor under section 494 (a) of the Criminal Procedure Code the Court acts in a judicial capacity and for its order, as for every order judicially made, the Court must give and record its reasons, so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised. An order omitting to give such reasons is liable to be set aside in revision.

Revision of an order of the District Magistrate, Chanda, rejecting the Revision No. 5 of 1922, on the 21st June 1922, against the order passed by the Magistrate, Second Class, Chanda, dated the 21st June 1922, in Criminal Case No. 14 of 1922.

Mr. D. T. Mangalmurti, for the Applicant.

Mr. G. P. Dick, for the Non-Applicant.

ORDER.—The Police, at the instance of the present applicant, Suganchand, filed a case against the non-applicants under section 147, Indian Penal Code. This was on the 13th March 1922. On the 28th *idem*, after no less than 10 witnesses for the prosecution had been examined, the Prosecuting Inspector put in the following memorandum:—

"As ordered by the Deputy Superintendent Police, I beg to withdraw the case under section 147, Indian Penal Code, against Chunnilal and others, which is fixed for 28th March 1922 in your Court."

The Magistrate wrote in the order-sheet as follows:—

"Prosecuting Inspector puts up an application under the order of Deputy Superintendent Police for withdrawing the case. Prosecution evidence is not yet finished. Case is, therefore, permitted to be withdrawn under section 494, Criminal Procedure Code, and the accused are discharged."

Complainant files this application and it is contended for him that as no reasons are given in the order, for withdrawal of the charge the order is bad. Reliance is placed on *Umesh Chandra Roy v. Satis Chandra Roy* (1). That case lays down that "in according or withholding consent to an application by the Public Prosecutor for

(1) 41 Ind. Cas. 998; 22 C. W. N. 69; 26 C. L. J. 208; 18 Cr. L. J. 886.

TULSI TELINI v. EMPEROR.

withdrawal under section 494 (a), the Court acts in a judicial capacity and for its order, as for every order judicially made, the Court must give and record its reasons so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised." This case has been followed in *Rajani Kanta Shaha v. Idris Thakur* (2). The view of the Madras High Court as expressed in *In re Sadayan* (3) is the contrary.

I am inclined to follow the Calcutta view and as no reasons have been given for the discharge I set aside the order of the Magistrate granting consent to the Public Prosecutor's withdrawal from the prosecution in question and the consequent order of discharge. The accused will now be replaced upon their trial and the case against them heard and disposed of in accordance with law. There is nothing to prevent the Public Prosecutor again applying for a withdrawal of the prosecution or to prevent the Magistrate from granting it if good reasons exist for his doing so.

G. R. D. *Order accordingly.*

(2) 64 Ind. Cas. 280; 48 C. 1105; 25 C. W. N. 615; 34 C. L. J. 51; 22 Cr. L. J. 760.

(3) 4 Ind. Cas. 1126; 5 M. L. T. 216; 11 Cr. L. J. 193.

CALCUTTA HIGH COURT.

MISCELLANEOUS CASE NO. 25 OF 1923.

February 23, 1923.

Present.—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir Thomas Richardson, Kt.

TULSI TELINI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 498, scope of—Special leave to appeal to Privy Council—Bail, grant of, during pendency of application—High Court, jurisdiction of.

After a High Court has dealt with the case of an accused in revision it is *functus officio* and has no jurisdiction under section 498, Criminal Procedure Code, to grant bail in order that a petition for leave to appeal may be made to His Majesty in Council or until the petition for leave to appeal to His Majesty in Council is disposed of. [p. 365, col. 2.]

Queen-Empress v. Subrahmaniam Ayyar, 24 M. 161; 2 Weir 657, distinguished.

Diwan Chand v. Emperor, 8 Cr. L. J. 89 19 P. W. R. 1908 Cr.; 15 P. R. 1908 Cr. (F. B.), followed.

Mr. S. C. Chowdhury (with him Babu Phanindranath Dass), for the Petitioner:—Section 498 of the Code of Criminal Procedure gives the High Court jurisdiction to grant bail in such a case. The High Court can defer the execution of a sentence even if no appeal has been filed in any Court. In the case of *Queen-Empress v. Subrahmaniam Ayyar* (1) the Judicial Committee laid down that the bail application was to be made to the High Court. The petitioner was placed on her trial on a charge under section 380, Indian Penal Code, but she was convicted under section 54A of the Calcutta Police Act and sentenced to undergo rigorous imprisonment for three months. No charge under section 54A was framed and she was seriously prejudiced.

[SANDERSON, C. J.—What is the section about receiving the stolen property?]

Section 411, Indian Penal Code. The charge might have been added, but instead of that a procedure has been followed which is not warranted.

[SANDERSON, C. J.—What is the difference between section 411, Indian Penal Code, and section 54A of the Calcutta Police Act?]

The gold was found in a molten condition not in the house of the petitioner but in that of a goldsmith to whom it is said she had given it.

[SANDERSON, C. J.—Section 54A says "conveys."]

The petitioner could have been charged under section 411, Indian Penal Code, but not under section 54A of the Police Act. The case of *Manhari Chowdhury v. Emperor* (2) relied on by the learned Judges in support of this conviction has no bearing on the point in support of which it has been cited. The facts of that case were quite different.

The real grievance is that she has been estopped from giving the evidence which she would have given if she had known that there was the charge under section 54A of the Police Act against her. There has been an error in procedure by which she has been prejudiced.

(1) 24 M. 161; 2 Weir 657.

(2) 43 Ind. Cas. 614; 22 C. W. N. 199; 19 Cr. L. J. 198; 27 C. L. J. 434; 45 C. 727.

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[SANDERSON, C. J.—The Privy Council have held that they will not interfere unless there has been grave injustice. In the present case the petitioner might have been charged under section 411, Indian Penal Code, and in case of conviction she might have been liable to three years' rigorous imprisonment.]

But she has been shut out from giving evidence. She has been prejudiced.

[SANDERSON, C. J.—We cannot go behind the findings of the learned Judges who say that there has been no prejudice.]

I am not asking your Lordships to go behind those findings. I am simply asking you to defer the execution of the sentence for a short time.]

[SANDERSON, C. J.—You must satisfy us in what respect there has been miscarriage of justice.]

Even if the findings are correct a subject has a right to approach the Crown and the Privy Council will ultimately deliver whether the judgment is right or wrong.

[SANDERSON, C. J.—If it is assumed that the accused has not been prejudiced what ground is there to be urged before the Privy Council?]

My point before the Privy Council will be that there has been grave injustice on account of error in procedure. The latest date for filing the appeal before the Privy Council is the 28th March and I only ask for a postponement of the execution of the sentence for a time not very long.

[RICHARDSON, J.—Has the High Court jurisdiction to grant bail at the present stage?]

[SANDERSON, C. J.—Should this Court grant bail before special leave to appeal has been obtained from the Privy Council? Is there any case in which bail has been granted by the High Court before that?]

Even if there is no such case it is clear your Lordships have jurisdiction under section 498, Criminal Procedure Code. The question of jurisdiction has been settled by the Madras case *Queen-Empress v. Subrahmantha Aiyar* (1).

The Advocate-General (Mr. S. R. Das), for the Crown:—The Crown does not oppose the granting of bail till the special leave is obtained from the Privy Council. In the Madras case it was held that the High Court had jurisdiction but there special leave had

been granted by the Privy Council. If it is under section 498, Criminal Procedure Code, that the High Court has jurisdiction it makes no difference whether special leave has been granted or not. The Punjab Chief Court in a case reported as *Diwan Chand v. Emperor* (3) held that in such a case the High Court had no jurisdiction to grant bail. This was after the Madras decision. They say that the High Court is *functus officio* and section 498, Criminal Procedure Code, does not give jurisdiction. The Code of Criminal Procedure does not apply to appeals to the Privy Council.

If the decision in the case of *Queen-Empress v. Subrahmantha Aiyar* (1) is correct, it makes no difference whether appeal has been admitted or not because the jurisdiction, exercised will be under section 498, Criminal Procedure Code.

[SANDERSON, C. J.—Even if we have jurisdiction, it is our duty to see what there is on the merits. It has been laid down in *In re Abraham Mallory Dillet* (4) that His Majesty will not revise the order in a criminal case except on the ground of grave injustice.]

The sentence in the case is only three months and the Crown, therefore, does not oppose this application for bail. The plea in affidavit which has been filed shows that he had evidence to show that the property was the accused's and this evidence was shut out.

[SANDERSON, C. J.—The learned Judges say that the petitioner has not been prejudiced.]

It is just on that point that they are going up to the Privy Council.

[RICHARDSON, J.—The question of jurisdiction under section 498, Criminal Procedure Code, is very doubtful.]

Apart from what is in the Madras case, there does seem to be doubt as to the jurisdiction under section 498, Criminal Procedure Code. The section refers to "any case," that is, any case at which the Court can be in seisin.

[SANDERSON, C. J.—Any case of which the Court is or may in future be in seisin.]

If your Lordships have not got jurisdiction under section 498, Criminal Procedure

(3) 8 Cr. L. J. 89; 19 P. W. R. 1908 Cr.; 15 P. R. 1908 Cr. (F. B.)

(4) (1887) 12 A. C. 459 at p. 466; 56 L. T. 615; 36 W. R. 81; 16 Cox C. C. 241.

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dure Code, then I do not see how you have got it at all.

[SANDERSON, C. J.—Clause 41 of the Letters Patent contains a special provision for cases tried in the original jurisdiction of the High Court. That explains the whole thing. The Madras case was a case tried in the original jurisdiction of the Court.]

JUDGMENT.

Sanderson, C. J.—This is an application by the petitioner, one Tulsi Telini, praying that this Court, under section 498 of the Criminal Procedure Code, will stay execution of the sentence of imprisonment passed against her, until the petition which she alleges she is about to present to His Majesty in Council is disposed of. The application is really that the petitioner may be admitted to bail pending the application to the Privy Council.

It appears that the petitioner was charged under section 380 of the Indian Penal Code, in the Court of the Fourth Presidency Magistrate of Calcutta. The Magistrate came to the conclusion that he could not convict her on the charge of theft or of receiving stolen property. He then proceeded to say: "But at the same time I have good reasons to suspect that the money and the ornaments, especially the ornaments, were stolen property. And as the accused has not given satisfactory explanation of her possession of the same, I find her guilty under section 54A of the Calcutta Police Act of being in possession of property reasonably suspected to be stolen, and he sentenced her to three months imprisonment.

The petitioner obtained a Rule from this Court which was heard by my learned brothers Mr. Justice Newbould and Mr. Justice Suhrawardy.

The first ground upon which the Rule was granted was, that the conviction under section 54A of the Calcutta Police Act was illegal having regard to the facts that the only charge framed against the petitioner was one under section 380 of the Indian Penal Code, and the other ground was with regard to the legality of the conviction upon the facts of the case. The learned Judges discharged the Rule, and the petitioner proposes to apply to the Judicial Committee of the Privy Council for leave to

appeal to His Majesty in Council, on the ground that substantial and grave injustice has been done to her: and it has been stated in the petition, that the petitioner has already sent instructions to a firm of Solicitors in London to file a petition of appeal to His Majesty in Council forthwith.

The petitioner has now applied to this Court to grant her bail until that petition is disposed of and the learned Counsel has argued that this Court has jurisdiction to grant bail, and that, having regard to the facts of the case, bail ought to be granted in the discretion of the Court.

On the other hand, the learned Advocate-General on behalf of the Crown argued that this Court, under the circumstances of this case, had no jurisdiction, but he stated that if the Court had jurisdiction to grant bail the Crown would not oppose bail being granted having regard to the fact that he considered the point which was involved an important one.

The first point, therefore, to be considered is whether this Court has jurisdiction.

The learned Counsel for the petitioner has based his argument upon section 498 of the Code of Criminal Procedure which runs as follows: "The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive: and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a Police Officer or Magistrate be reduced" and he called in aid of his argument the case of *Queen-Empress v. Subrahmania Ayyar* (1) which is reported in I. L. R. 24 Madras 161. In my judgment, that case is no authority for the learned Counsel's argument. That was a case where the petitioner had been tried at the Criminal Sessions in the Madras High Court and found guilty on certain counts in the indictment. A certificate had then been granted by the Advocate-General under clause 26 of the Letters Patent for the Madras High Court. Thereupon, the High Court reviewed the case and determined that the conviction in respect of certain of the counts ought not to be upheld, but a majority of the Judges of the High

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Court upheld the conviction on one of the counts, and imposed a sentence of imprisonment and fine. The petitioner then obtained special leave from Her Majesty in Council to appeal against the sentence: and having obtained leave to appeal, the petitioner applied for bail to the Judicial Committee, and the Judicial Committee expressed an opinion that the matter should be decided by the Madras High Court. Thereupon, the petitioner applied to the Madras High Court for bail; the learned Advocate, who appeared for the petitioner relied upon section 498 of the Criminal Procedure Code, and the Crown Prosecutor in opposing the application argued that section 498 could not be construed without regard to the other sections of the Code, the principle underlying which was that only the Court to which an appeal was preferred could admit to bail. The judgment of the High Court was short. They dealt with the question of jurisdiction in one sentence, *viz.*, "In our judgment this Court has jurisdiction to make an order in this case releasing the accused on bail, pending the decision of the Privy Council." They then proceeded to discuss the question whether the petitioner ought to be admitted to bail. It seems to me that that case is no authority in favour of the petitioner in this case for two reasons. In the first place, the learned Judges of the Madras High Court did not state in their judgment whether it was by reason of the provisions of the Criminal Procedure Code or by reason of the provisions of the Letters Patent, that they had jurisdiction. It may be, as was pointed out in the case of *Diwan Chand v. Emperor* (3), that the decision may have been based upon the Charter.

Secondly, it is material to note that in a case, such as that with which the Madras High Court was concerned, this Court would have power to grant leave to appeal to the Privy Council if it thought that the case was a fit one for such appeal. I refer to clause 41 of the Letters Patent of this Court which provides: "We do further ordain, that from any judgment, order, or sentence of the said High Court of judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case, where any

point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us Our heirs or successors, in Council; provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as we may, with the advice of Our Privy Council, hereafter make in that behalf." In such a case it may be that this Court has jurisdiction to grant bail, especially when the High Court has declared the case to be a fit one for appeal or when the Privy Council has granted special leave, as in the Madras case. Nothing I say to-day must be taken as throwing any doubt upon the jurisdiction of this Court to grant bail in a case which comes within clause 41 of the Letters Patent. But the present case does not come within clause 41 of the Letters Patent. The petitioner in this case has no right to appeal to the Privy Council. In this case, this Court has no power to give leave to appeal to the Privy Council, and therein this case differs entirely from the case which the Madras High Court was considering in *Queen-Empress v. Subrahmania Ayyar* (1). Consequently, in this case the petitioner must rely upon section 498 of the Criminal Procedure Code and upon that section only, and the question is, whether this Court, under the circumstances of this case, has jurisdiction to grant bail.

In my judgment it has not. On the true construction of the provisions of section 498 it seems to me that this Court having dealt with the application of the petitioner by way of revision, *i.e.*, having granted a Rule and having heard the Rule and discharged it, this Court is *junctus officio*, and it has no jurisdiction under the provision of section 498 to grant bail, in order that a petition for leave to appeal may be made to His Majesty in Council or until the petition for leave to appeal to His Majesty in Council is disposed of.

The result is that, in my judgment, this petition must be refused on the ground

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that this Court has no jurisdiction to deal with it.

I express no opinion upon the facts of the case, nor do I express any opinion upon the questions of law which were argued on the hearing of the Rule.

The learned Counsel for the petitioner invited this Court to express an opinion upon the merits of the application, in order that our opinion might be placed before the Governor-General in Council or the Local Government. In my judgment, we ought not to express any opinion in that respect. By section 401 (1) of the Criminal Procedure Code it is provided that, "when any person has been sentenced to punishment for an offence, the Governor-General in Council or the Local Government may at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced." The learned Advocate-General at our request appeared in this case to assist the Court. He is fully cognizant of the facts of the case and of the points of law which were raised before my learned brothers on the hearing of the Rule and, if the Governor-General in Council or the Local Government desire any assistance in this respect from the learned Advocate-General I have no doubt such assistance will be forthcoming. In any event, in my judgment it is not for us to express any opinion upon the point.

Richardson, J.—I agree.

The present case differs in two respects from the case of *Queen-Empress v. Subrahmaniam Ayyar* (1), on which the learned Counsel for the applicant has relied.

Firstly, in that case the prisoner before applying to the High Court for bail had already been granted leave to appeal by their Lordships of the Judicial Committee. In the case before us no leave to appeal has yet been obtained from their Lordships. We are told that the applicant proposes to apply for such leave.

In the second place, it appears that in the case cited, application for leave to appeal to the Privy Council might have been made to the Madras High Court under the same clause 41 of the Letters Patent of

the Court [see *Reg. v. Pestanji Dinsha* (5).] The same clause 41 of the Letters Patent of this Court could have no application at all to the present case in any of its stages.

I mention these circumstances because there seems reason to suppose that they affected the decision of the learned Judges in Madras. It is true that section 498 of the Criminal Procedure Code was referred to in the argument before the learned Judges, but they made no express reference to that section in their judgment. They merely said that in their judgment they had jurisdiction to make the order for bail in that case, that is in the case then before them.

An express decision on the construction of section 498—a decision adverse to the present applicant—will be found in the case before the Punjab Chief Court of *Diwan Chand v. Emperor* (3). I do not regard the decision of the learned Judges of the Madras High Court as necessarily extending to such a case as that now before us and on the construction of section 498 I have come to the conclusion with respect that the view of the learned Judges of the Punjab Chief Court is the right one. In the present case, in my opinion, section 498 does not confer jurisdiction upon this Court to grant bail to the applicant pending the result of an application to be made by her to the Privy Council for leave to appeal.

So far as the present case is concerned, this Court is *functus officio*: it has no *seisin* of the case in any way: the case cannot again be brought before this Court for the purpose of leave being given to appeal to the Privy Council or for any other purpose. It will be observed that by the terms of section 498, if the power contended for is conferred on the High Court it is also conferred on the Court of Session. Some limitation, therefore, must be put on the words "in any case." They cannot include a case in which the Court has reached finality and has no further jurisdiction to exercise.

If the construction of section 498 which I adopt is correct, I fail to understand on what principle it can be suggested that this Court, in the absence of any statutory power, is competent, or has an inherent

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jurisdiction to liberate the applicant on bail. The learned Counsel has produced no authority which, in my opinion, would justify us in concluding that such a jurisdiction exists.

If any indulgence is to be sought for it is open to the applicant, if so advised, to move the Local Government to suspend the sentence under section 401 of the Criminal Procedure Code.

Without expressing any opinion on the merits of the case, I agree with my Lord that the application must be refused.

S. C.

Application rejected.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 1097 OF 1922.

February 1, 1923.

Present :—Mr. Justice Newbould and
Mr. Justice Suhrawardy.

HANIF SHEIKH *alias* HANIF MANDAL,
AND OTHERS—2ND PARTY—PETITIONERS
versus

JABANI MANDAL AND OTHERS—1ST
PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107, proceedings under—Proceedings by Subordinate Magistrate under order of District Magistrate, propriety of.

A District Magistrate should not direct a Subordinate Magistrate to draw up proceedings under section 107 of the Criminal Procedure Code. If he considers it necessary in order to prevent a breach of the peace to take proceedings under that section, he should himself draw up such proceedings, and may transfer the case to a Subordinate Magistrate for hearing. Proceedings drawn up by a Subordinate Magistrate merely because the District Magistrate has ordered him to do so are improper and will be set aside by the High Court.

Babu Dinesh Chandra Roy, for the Petitioners.

Babu Probodh Chandra Chatterjee, for the Opposite Party.

JUDGMENT.—The form of the order made by the District Magistrate in this case is improper. If he thought that it was necessary, in order to prevent a breach of the peace, to take proceedings under section 107, Criminal Procedure Code, against the petitioners he should have himself drawn up such proceedings and he might then have transferred the case to a Subordinate Magistrate for hearing. But he should not, as he has done, direct proceedings to be drawn up by a Subordinate Magistrate, nor should the Subordinate Magistrate draw up proceedings merely because the District Magistrate has ordered him to do so. He has full power under section 107, Criminal Procedure Code, to take action under that section when he thinks it is necessary to do so to prevent a breach of the peace. But in deciding as to the necessity for action he must come to a conclusion of his own accord on the materials before him and act accordingly.

We accordingly set aside the order of the District Magistrate passed on the 3rd of December 1922, directing proceedings under section 107, Criminal Procedure Code to be drawn up by the Sub-Divisional Magistrate against the petitioners. This order will be no bar to either the District Magistrate or the Sub-Divisional Magistrate drawing up proceedings against the petitioners should they think it necessary to do so in order to prevent a breach of the peace.

W. C. A.
N. H.

Order set aside.

U THIRI V. MA PWA YI.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 334 OF 1922.

May 30, 1922.

Present:—Mr. MacColl, J. C.

U THIRI—APPLICANT

versus

MA PWA YI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance of child—Buddhist monk—Able-bodied men—Means of subsistence—Presumption.

Under the Criminal Procedure Code a father cannot get rid of his statutory obligation to support his child, on the plea that he is a Buddhist monk.

The Criminal Procedure Code overrides the personal law where it conflicts with it.

The presumption is that an able-bodied man has sufficient means to support his child as well as himself and it is for him to prove the contrary.

Me Tha v. Nga San E, 13 Ind. Cas. 914, 1 U. B. R. (1911) 90; 13 Cr. L. J. 162, relied on.

Mr. N. M. Mukerjee, for the Applicant.

JUDGMENT.—This is an application to revise the order of the Head-quarters Magistrate of Monywa directing the applicant to pay the respondent Rs. 2 a month for the maintenance of his illegitimate child.

The applicant is a Buddhist monk and an enquiry into this matter was held by the Buddhist Ecclesiastical Authorities. The board of enquiry consisted of a *Gainggyok*, two *Gaingoks*, and two *Gaingdauks*. One of the *Gaingoks* declined to express any opinion. The other and the *Gainggyok* found that the applicant had had sexual intercourse with the respondent. The two *Gaingdauks* considered that this was not proved. Apparently nothing further was done and the applicant continues to wear the yellow robe. Of course, the Magistrate was not in any way bound by the result of this enquiry and on the evidence taken before him he found it proved that the applicant had had sexual intercourse with the respondent and was the father of her child. One of the grounds on which revision is sought is that it was not legally established that the applicant was the father of the respondent's child. It is not necessary for me to go into the evidence in detail, it suffices to say that no reasonable man after reading the evidence would come to any other conclusion than that the applicant had had sexual intercourse with the respondent a great many times. There is nothing whatever to suggest that the re-

spondent ever had sexual intercourse with any other man and the finding that the applicant was the father of the child was justified. The contention put forward by the applicant that the father of the respondent's child was another monk—a contention supported by totally irrelevant dispositions of a prostitute and her souteneur—was contemptible.

Next, it is contended that the applicant is not liable to support the child, even though it be his, because he is a Buddhist monk. He cannot get rid of his statutory obligation in that way; the Criminal Procedure Code must override his personal law, if it conflicts with it. As a matter of fact, his own witness U Wunna says that on a Buddhist monk having sexual intercourse he *ipso facto* becomes a layman.

Finally, it is contended that the applicant, being a Buddhist monk, himself lives on charity and consequently has not means with which to maintain a child. The amount which the applicant has been ordered to pay is Rs. 2 a month. He admits that he owns a camera worth Rs. 110 and that he is an able-bodied man. It was held in *Me Tha v. Nga San E* (1) that the presumption was that an able-bodied man had sufficient means to support his child as well as himself and that it was for him to prove the contrary, and the meaning of the word "means" was considered. There is no doubt that the applicant can pay Rs. 2 a month for the maintenance of his child if he chooses to do so. If he cannot do it in any other way, it is his duty to throw off the yellow robe and work.

The application is dismissed.

N. K.

Application dismissed.

(1) 13 Ind. Cas. 914; 1 U. B. R. (1911) 90; 13 Cr. L. J. 162.

KARAM CHAND V. MATHRA DAS.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 950
OF 1922.

October 7, 1922.

Present:—Mr. Justice Scott-Smith.

KARAM CHAND AND ANOTHER—ACCUSED
—PETITIONERS

versus

MATHRA DAS AND ANOTHER—COMPLAIN-
ANTS—RESPONDENTS.*Criminal Procedure Code (Act V of 1898), s. 437*

—Further enquiry—Magistrate, duty of.

When a Magistrate has passed an order discharging an accused person, further enquiry should not be directed unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. [p. 369, col. 2.]

Emperor v. Kiru, 11 Ind. Cas. 132; 10 P. R. 1911 Cr.; 24 P. W. R. 1911 Cr.; 12 Cr. L. J. 364; 205 P. L. R. 1911, followed.

Petition, under section 439 of the Criminal Procedure Code, for revision of an order of the District Magistrate, Attock, at Campbellpur, dated the 25th April 1922, directing re-trial of the accused, discharged by the Magistrate, Second Class, Attock, at Campbellpur, on 7th November 1921, by the Bench of the Honorary Magistrates at Campbellpur.

Mr. Mukand Lal Puri, for the Petitioners.

Lala Niamat Rai, for the Respondents.

JUDGMENT.—This is a petition for revision of an order of the District Magistrate, Attock, directing, under section 437, Criminal Procedure Code, a re-trial of the case under sections 323 and 448, Indian Penal Code, in which the petitioners were discharged. There were two cross-complaints under the same sections, the bone of contention being, according to the judgment of the Magistrate, a shop belonging to a joint Hindu family of which the parties are members. The Magistrate, after recording all the evidence produced by both parties, came to the conclusion that the parties had grappled with each other, that they had fallen on to the ground and that the trivial injuries sustained by them were due to the fall. As to the dispute about the shop, he held that undisputed possession was not established by either party and that the dispute might more appropriately be settled by

a Civil Court. From this order Mathra Das and Kanshi Ram, the complainants in one case, applied for revision to the District Magistrate. He thought that there was a strong proof that the shop belonged to and was in possession of the complainants because in the schedule filed by Karam Chand in a petition of insolvency he made no mention of having any share in it. He accordingly directed further enquiry but did not expressly set aside the order of discharge. The Magistrate then went to the spot and made some further enquiries and submitted a report to the District Magistrate in which he said he was satisfied that the complainants were in possession of the disputed shop. Upon this the learned District Magistrate recorded an order to the effect that he had made a mistake in simply calling for a report previously. He then directed a re-trial and sent the case to the Bench of Honorary Magistrates, Campbellpur, for hearing. From this order the accused persons have come up to this Court on revision.

It was held by a Full Bench of the Chief Court in the case reported as *Emperor v. Kiru* (1) that when a Magistrate has passed an order discharging an accused person generally speaking further enquiry should not be directed unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. Now, in the present case, the record shows that at the original trial the parties produced all their evidence. The record of evidence was, therefore, not an incomplete one, and I do not see how it can be said that the order of discharge is manifestly perverse or foolish. The mere fact that Karam Chand in the schedule filed by him in the insolvency petition did not mention that he had any share in the shop in dispute is not in itself conclusive proof that he owned no such share. As pointed out in the report of the Magistrate, Karam Chand omitted certain other properties also in that schedule; and it is notorious that persons who file petitions of insolvency do not always put in a complete schedule

(1) 11 Ind. Cas. 132; 10 P. R. 1911 Cr.; 24 P. W. R. 1911 Cr.; 12 Cr. L. J. 364; 205 P. L. R. 1911.

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of their property. Counsel for the complainant says that after the first order of the District Magistrate dated the 14th January 1922, the petitioners submitted to the jurisdiction of the Trying Magistrate and on the 4th March 1922 made an application to the District Magistrate that the case should not be transferred from the Tahsildar's Court. The Tahsildar, however, was not re-trying the case, he was merely making a local enquiry with a view to reporting the result to the District Magistrate. The order of which revision is now sought is one of a date subsequent to the 4th March 1922. I do not think that Karam Chand, by reason of his application of the 4th March 1922, can be debarred from questioning the District Magistrate's order of the 25th April. The dispute is as to the possession of property which is, or previously was, the property of a joint Hindu family of which both the parties are members. *Prima facie*, the dispute is of a civil nature. The case has been going on for a long time now, and after a full enquiry the Trying Magistrate discharged the accused in both the cross-cases. I do not think it is right that the petitioners should be put to such a lot of trouble in the Criminal Courts when the case is really one of a civil nature, and, having regard to the Full Bench decision above referred to, I do not think that the order of discharge should have been set aside.

I, therefore, allow the petition and set aside the order of the District Magistrate directing a re-trial.

Z. K.

Petition allowed.

A Magistrate having once issued process against a witness for the defence is bound to enforce his attendance and grant an adjournment of the trial for that purpose.

Babus Monmotha Nath Mukherjee and Satindra Nath Mukherjee, for the Petitioners.

JUDGMENT.—In this case the petitioner, who was accused of an offence under the Excise Act, cited certain defence witnesses who were summoned. On the date fixed for hearing one of these witnesses did not attend and the accused informed the Court that the witness was ill and asked for a postponement in order to enable him to produce the witness. The application was refused on the ground that the petitioner had not produced a medical certificate to show that the witness was actually ill. We hold that the Magistrate, having once issued process against the defence witness, was bound to enforce his attendance. If he did not believe the story of the accused that the witness was ill he should have issued a warrant to enforce his attendance. The accused having obtained summons from the Court against this witness was entitled to have his attendance enforced. Had he come to Court and said the witness was not present and given no reason for his absence the Court would have no ground for refusing an adjournment to enforce the attendance of the witness. We see no reason why the petitioner should be in a worse position because he informed the Court of the fact of the witness being ill. We accordingly set aside the conviction and sentence passed on the petitioner and direct that the case be re-tried from the point it had reached when the application for adjournment for the production of this witness was refused.

S. C.

Conviction & Sentence set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1102 OF 1922.

February 1, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

MIHIR LAL ROY—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Practice—Witness for defence—Attendance, enforcement of—Magistrate, duty of.

MAHAN SINGH. v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION CASE NO. 313

OF 1922.

June 26, 1922.

Present:—Mr. Justice Abdul Qadir.

MAHAN SINGH AND ANOTHER—ACCUSED

—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 256
 —Provision, whether imperative—Failure to comply
 with section—Illegality.

The provisions of section 256 of the Criminal Procedure Code are imperative and the failure to ask an accused person, after a charge has been framed against him, whether he desires to re-call any of the prosecution witnesses for cross-examination, involves a re-trial of the case from the point of drawing up of the charge. [p. 372, col. 1.]

Moola v. Emperor, 27 Ind. Cas. 210; 11 P. R. 1914 Cr.; 16 Cr. L. J. 146; 205 P. L. R. 1915; 61 P. W. R. 1913 Cr., followed.

Munian Chetty v. Emperor, 26 Ind. Cas. 309; 16 Cr. L. J. 5, not followed.

Case reported by the Sessions Judge, Hoshiarpur, with his No. 267 dated the 23rd February 1922.

FACTS.—Accused No. 1 is the own brother of the complainant Taloka while accused No. 2 *Musammatt Shabdo* is the aunt of the complainant and accused No. 1. The allegation is that accused No. 1 being on visiting terms with his aunt *Musammatt Shabdo* has been excommunicated by the brotherhood and that the complainant has maliciously been imputed as having illicit connection with one *Musammatt Mainan* a weaver by caste in consequence of which he has also been excommunicated by the brotherhood since 25th March 1921.

GROUND.—A law point has been taken before me by petitioner's Counsel in which there is certainly force. This was in connection with section 256 of the Criminal Procedure Code and was to the effect that the petitioners were not asked by the Honorary Magistrate whether they wished to cross-examine prosecution witnesses whose evidence had been taken. The Honorary Magistrate's record shows that the petitioners were given no such opportunity.

Moola v. Emperor (1) and the remarks in the last paragraph of page 34* and at the top of page 35* are clearly to the effect that the provisions of section 256 are imperative and in that case there was a remand to the District Magistrate.

For these reasons I forward the proceedings to the High Court with a recommendation that there should be a remand to the Honorary Magistrate or a re-trial before a different Magistrate.

Mr. T. D. Khanna, for the Petitioners.

ORDER.—This case has been reported by the Sessions Judge of Hoshiarpur. Two persons, Mahan Singh and *Musammatt Shabdo*, were prosecuted by one Taloka, under section 500, Indian Penal Code. They were tried by an Honorary Magistrate, First Class, who framed charges against them but omitted to ask them at that stage if they wanted to re-call any witnesses for cross-examination. They produced their witnesses in defence and were fined Rs. 10 each. They applied to the Sessions Judge on the revision side attacking their convictions. Their grounds for revision were confined to objections to the case for the prosecution on the merits; and the legal ground that the provisions of section 256, Criminal Procedure Code, were not carried out, was not expressly taken by them. It appears, however, that it was argued before the learned Sessions Judge, and he has forwarded the proceedings to this Court with a recommendation that the case should be remanded to the Honorary Magistrate or a re-trial before a different Magistrate ordered.

Mr. Trilochan Das Khanna appears before me to support the petition and relies on *Moola v. Emperor* (1), where it is laid down that the omission to follow section 256 usually involves remand and re-trial of the case from the point of drawing up of the charge. A different view has been taken by the Madras High Court in a case published as *Munian Chetty v. Em-*

(1) 27 Ind. Cas. 210; 11 P. R. 1914 Cr.; 16 Cr. L. J. 146; 205 P. L. R. 1915; 61 P. W. R. 1913 Cr.

*Pages of 11 P. R. 1914 Cr.—[Ed.]

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peror (2), which says that the omission to ask the accused whether he wants to cross-examine the prosecution witnesses again or not is a mere irregularity and does not vitiate a conviction.

But I am inclined, on the whole, to agree with the learned Sessions Judge that the provisions of section 256, Criminal Procedure Code, are imperative, and the petitioners have a right to be given an opportunity of further cross-examining the prosecution witnesses, if they so desire.

I, therefore, remand this case to the Honorary Magistrate concerned, with the direction that he should re-try it from the stage at which the charges were framed, and dispose of it according to law, after giving the petitioners a chance of re-calling the prosecution witnesses and further cross-examining them.

Z. K.

Case remanded.

(2) 26 Ind. Cas. 309; 16 Cr. L. J. 5.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 1076 OF 1922.

February 6, 1923.

Present:—Mr. Justice Newbould and Mr. Justice Suhrawardy.

TULSI TOLINI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 237, 236—Charge under s. 380, Penal Code—Conviction under s. 54A, Calcutta Police Act, legality of.

An accused person can be tried under the provisions of section 236 of the Code of Criminal Procedure on charges of offences punishable under section 380 of the Penal Code and section 54A of the Calcutta Police Act, and under section 237 of the Criminal Procedure Code he can be convicted of the offence punishable under the latter section, although no charge under that section was framed against him. [p. 375, col. 1.]

Manhari Chowdhury v. Emperor, 43 Ind. Cas. 614; 22 C. W. N. 199; 19 Cr. L. J. 198; 27 C. L. J. 434; 45 C. 727, followed.

Mr. Dasarath Sanyal, for the Crown:—It was not necessary to frame a charge under section 54A of the Police Act. On the charge under section 380, Indian Penal Code, the accused could have been convicted under section 411 by reason of section 237, Criminal Procedure Code. The illustration makes it clear. An offence means an offence under any law for the time being in force—section 4, Criminal Procedure Code. An offence under section 54A is an offence under a special law and it should be taken to be a minor offence within the meaning of section 238, Criminal Procedure Code. So by the double operation of sections 237, 238 the accused could be convicted under section 54A of the Police Act even if no charge was framed.

It is to be noted that an offence under section 54A is triable as a summons-case and it is not necessary to frame a charge.

[SUHRAWARDY, J.—You argue that an offence under section 54A of the Police Act is minor to an offence under section 411, Indian Penal Code, and a conviction could be had under section 411, Indian Penal Code, by the operation of sections 237, 238, Criminal Procedure Code, and, therefore, a conviction could be had also under section 54A of the Police Act although an offence under section 54A is not minor to an offence under section 380, Indian Penal Code.]

Yes.

On a comparison of section 411, Indian Penal Code, with section 54A of the Calcutta Police Act it appears that the former section contains ingredients in addition to those contained in the latter. "Minor offence" has not been defined in the Code but it has been explained in *Queen-Empress v. Sitanath Mandal* (1). See also *Reg. v. Ramajirav Jivbajirav* (2). The point has been set at rest by a recent decision in *Manhari Chowdhury v. Emperor* (3) which holds that section 54A of the Calcutta Police Act is minor to section 411, Indian Penal Code, and also that a conviction under section 54A is proper without a charge being framed.

(1) 22 C. 1006; 11 Ind. Dec. (N. S.) 668.

(2) 12 Bom. H. C. R. 1.

(3) 43 Ind. Cas. 614; 22 C. W. N. 199; 19 Cr. L. J. 198; 27 C. L. J. 434; 45 C. 727.

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The conviction in this case was by a Presidency Magistrate who has submitted an explanation. Additional facts may be stated by Presidency Magistrates in explanations which the High Court is bound to consider—Section 441, Criminal Procedure Code.

Mr. *Manmatha Nath Mukerjee* (with him Mr. *Satindra Nath Mukherjee*), for the Petitioner:—The Magistrate was bound to frame a charge under section 54A of the Police Act if at the end of the trial under section 380, Indian Penal Code, he thought that the case should end in a conviction under section 54A. The argument on the other side is based on a fallacy. Sections 236, 237, 238 are the only sections to be considered. In considering section 236 you will have to remember the point of time when a charge is framed. If at that time there is any doubt as to the offences then the provision of the section is to be followed. Section 237 refers to cases covered by section 236. Section 238 relates to minor offences. It is a mistake to say that section 54A of the Police Act is minor to section 411, Indian Penal Code. The combination of circumstances which made up section 54A do not at all form a part of section 411, Indian Penal Code. *Queen-Empress v. Sitanath Mandal* (1) does not stand in my way. There the question was whether section 365, Indian Penal Code is minor to section 366, Indian Penal Code. That is quite clear.

[NEWBOULD, J.—Section 365, Indian Penal Code, is kidnapping with one intention and section 366, Indian Penal Code, is kidnapping with another intention.]

It is kidnapping all the same.

The argument on the other side is that section 54A of the Police Act is minor to section 411, Indian Penal Code, which is cognate to section 380, Indian Penal Code, but that section 54A is minor to section 380, Indian Penal Code. By establishing a relationship between the offences the difficulty cannot be got over. *Manhari Chowdhury v. Emperor* (3) is not an authority for the proposition which it is claimed to lay down. In this case there was an alternative charge under section 411, Indian Penal Code, besides a charge under section 380, Indian Penal Code. The facts of that case were also peculiar.

[NEWBOULD, J.—If the accused could be charged under section 236, Criminal Procedure Code, for an offence under section 54A could she not be convicted under section 237 for that offence without a charge being framed?]

Not necessarily.

[SUHRAWARDY, J.—Your argument seems to be that if there was a charge under section 411, Indian Penal Code, she could be convicted under section 54A of the Police Act but that cannot be done where the charge framed was only under section 380, Indian Penal Code.]

That is so.

The facts in *Manhari Chowdhury v. Emperor* (3) were peculiar and the decision in that case cannot be applied to the facts of this case. A case is only an authority for the proposition which it decides and every judgment must be read as applicable to the facts of that case. *Quinn v. Leathem* (4).

[SUHRAWARDY, J.—The *ratio decidendi* of that case was that the same evidence was to be adduced in both trials. Is not that the case here?]

That is not so.

Section 236 of the Code has no application whatever to the facts of this case and that being so the whole argument on the other side fails.

JUDGMENT.—The petitioner, Tulsi Tolini, has been convicted of an offence punishable under section 54A of Act IV of 1866 Calcutta Police Act. That section runs as follows: "Whoever has in his possession, or conveys in any manner, or offers for sale or pawn, anything which there is reason to believe to have been stolen or fraudulently obtained, shall, if he fails to account for such possession or act to the satisfaction of the Magistrate be liable to fine, etc." At the trial the only charge framed against her was that she committed theft in respect of gold and silver ornaments, cloths and cash Rs. 13,410 in G. C. notes, sovereigns and coins valued in all about Rs. 18,000 from the room of one Khelwan Ahir and thereby committed an offence punishable under section 380, Indian Penal Code. This

(4) (1901) A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

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rule has been granted on two grounds. The first relates to the legality of the conviction under section 54A of the Calcutta Police Act, on the charge framed, the other, to the legality of the conviction under this section on the facts found.

As regards the first ground, it is contended on behalf of the Crown that sections 237 and 238, Criminal Procedure Code, render the conviction legal. We are of opinion the provisions of section 237, Criminal Procedure Code, alone are sufficient and it is, therefore, unnecessary to consider whether the offence punishable under section 54A of the Calcutta Police Act is a minor offence to that of retaining stolen property, punishable under section 411, Indian Penal Code. Nor need we consider whether the double operation of sections 237 and 238 can be invoked to support the contention that, since section 237 would render an accused liable to conviction under section 411 on a charge of theft, he could also on such a charge be convicted of an offence that is minor to one punishable under section 411, Indian Penal Code.

Clause (1), section 237, Criminal Procedure Code, runs as follows:—"If in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it." The illustration to this section is, "A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of, criminal breach of trust, or of receiving stolen goods (as the case may be) though he was not charged with such offence." It thus appears that the legality of a conviction for an offence not charged depends, when reliance is placed on section 237, on whether the different offence of which the accused has been convicted is one for which he might have been charged under the provisions of section 236, Criminal Procedure Code, which is in the following terms. "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the

accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences." In the present case the prosecution, based their case on a series of acts of a suspicious nature and asked the Court to draw an inference from those acts that the accused had herself committed theft of the articles mentioned in the charge from the room of Khelwan Ahir. But if from the facts proved in support of this charge of theft it was doubtful whether the Court could draw this inference and the Court might draw the inference that an offence punishable under section 54A of the Calcutta Police Act had been committed, the accused might have been charged at the trial with both those offences under section 236 and this conviction would be in accordance with the provisions of section 237, Criminal Procedure Code.

In addition to the evidence of the theft, evidence of suspicious acts is set out at length in the judgment of the Trying Magistrate and classified under four heads; stated shortly, the first is evidence of the complainant's daughter-in-law that the accused obtained possession of the key and padlock of the door which separated her rooms from the room of the complainant in which the theft was committed. The second is evidence of large payments by the accused to the creditors about the time of the theft. The third is evidence of the accused pledging ornaments and attempting to change notes for Rs. 1,000. The fourth is evidence that the accused gave a goldsmith old ornaments to be melted down under suspicious circumstances. The evidence as to the first and third series of these suspicious acts has been disbelieved and that as to the second and fourth believed by the Magistrate. This being the case for the prosecution, we hold that section 236 was clearly applicable. In the words of that section, the series of acts was of such a nature that it was doubtful which of several offences the facts which could be proved would constitute. If all the acts alleged had been proved facts, the Court might have convicted the accused of theft or might even in that case have refused to draw the inference that the accused was the actual

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thief. That a charge under section 54A of the Calcutta Police Act might have been joined with a charge of theft under the provisions of section 236, Criminal Procedure Code, was held by this Court in the case of *Manhari Chowdhury v. Emperor* (3). It is true, as contended on behalf of the petitioner, that in that case the point decided was the applicability of section 403, Criminal Procedure Code, and that the facts are distinguishable in one important particular. But, regarded as an *obiter dictum*, this judgment read as a whole shows that another Divisional Bench of this Court interpreted sections 236 and 237, Criminal Procedure Code, in the same way that we do. For the above reasons we hold that the accused could have been tried under the provisions of section 236 on charges of offences punishable under section 380, Indian Penal Code, and section 54A of the Calcutta Police Act and that, therefore, under section 237 she could be convicted of the offences punishable under the latter section though she was not charged with it.

It is also contended that the power of the Magistrate to apply section 237, Criminal Procedure Code, is discretionary and that it should not have been applied in the present case since the result has been to prejudice the accused in her defence. We hold that she has not been prejudiced. On the charge framed she was required to account for the possession of the ornaments which she gave to the goldsmith to be melted. Whether these were stolen property and whether she could account for their possession were as important issues on the charge framed as they are on the charge of which she has been convicted. We, therefore, hold that the first ground on which this Rule was granted has not been established.

The Rule was granted on the second ground to enable us to examine whether the conviction was in accordance with the principle laid down in *Queen-Empress v. Dhanjibhai Edulji* (5) *Sukhu Kalwar v.*

Emperor (6) and *Bai Das v. Ali Bux Khan* (7) that there must be reason to believe that the property found in the accused's possession was stolen as a preliminary condition before the accused can be called on to account for that possession. In the present case the accused's conduct in making over the 67½ tolas of gold ornaments to be melted is sufficient to give reason to believe that she was in possession of stolen property. This preliminary condition was, therefore, fulfilled in the present case and, with the Magistrate's finding that she has not given a satisfactory explanation of the possession of these ornaments, is sufficient to support the conviction.

We, therefore, discharge this Rule. The petitioner must surrender to her bail and undergo the unexpired portion of her sentence.

S.C.

Rule discharged.

(6) 47 Ind. Cas. 657; 22 C. W. N. 936; 28 C. L. J. 262; 19 Cr. L. J. 933.

(7) 59 Ind. Cas. 554; 23 C. W. N. 1053; 22 Cr. L. J. 122.

PATNA HIGH COURT.

GOVERNMENT APPEAL NO. 7 OF 1922.

January 11, 1923.

Present.—Justice Sir B. K. Mullick,
Kt., and Justice Sir John Bucknill, Kt.

EMPEROR—APPELLANT

versus

BHOLA BHAGAT AND OTHERS—

RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 54, 202—Complaint filed before Magistrate—Police, power of, to investigate.

The Criminal Procedure Code draws a clear distinction between jurisdiction to try and jurisdiction to investigate a case, and it is possible to conceive of cases where, although a Magistrate may distrust a complaint or delay in passing orders, the Police would be failing in their duty, if they did not arrest an offender against whom a cognizable offence had been made out. Much more so would this be the case where the Magistrate after recording the complaint finds that a regular Police investigation would be more suitable and intentionally keeps the complaint pending in order

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that the Police may exercise their powers of investigation and arrest independently of the Magistrate. [p. 377, col. 1.]

In practice, the Police will not ordinarily take independent action in respect of a complaint which has already been distrusted by a Magistrate, but it is neither correct nor expedient to lay down the general proposition that an order made by a Magistrate under section 202 of the Criminal Procedure Code, debars the Police from exercising their power of arrest and investigation. [p. 377, col. 2.]

Appeal from a decision of the Sessions Judge, Purnea, dated the 8th September 1922, reversing an order of the Sub-Divisional Magistrate, Arraria, dated the 25th July 1922.

The Government Advocate, for the Appellants.

Mr. G. C. Pal, for the Respondents.

JUDGMENT.

Mullick, J.—This is an appeal by the Local Government against an order of acquittal passed by the Sessions Judge of Purnea in Criminal Appeal No. 6 of 1922. The material facts are as follows:—

On the 30th January 1922 one Ali Beg lodged a complaint before the Sub-Divisional Magistrate of Arraria stating that three persons, Bhola Bhagat, Abdul and Jan Mohammad had forcibly snatched away a bottle of liquor and robbed him of a purse containing Rs. 10. The Sub-Divisional Magistrate recorded the complaint and passed the following order upon it. "Police to take cognizance under section 379, Indian Penal Code, make a quick enquiry and report by 8th February 1922."

That order reached the Sub-Inspector of Arraria Thana on the 4th February and as he was ill he deputed the officer next in seniority to him to proceed to the place of occurrence and to hold an inquiry. The writer Head Constable Mahesh Narain accordingly arrived at Joki Hat on the 5th February and, after making some investigation, he arrested Bhola, Abdul and Jan Mohammad. It is alleged that, while he was bringing these three persons to the Police Station a mob of 2,000 persons forcibly rescued the prisoners and assaulted two Constables who attempted to resist.

Thereafter Bhola, Abdul and Jan Mohammad were placed upon their trial for the offences enumerated in Ali Beg's complaint and were convicted under sections 352, 426

and 379, Indian Penal Code, and sentenced as follows:—Bhola to rigorous imprisonment for one month under section 379, Indian Penal Code, and one month under section 426, Indian Penal Code; Abdul and Jan Mohammad to rigorous imprisonment for one month under section 426, Indian Penal Code. Against that order there was a reference to the High Court and on the 22nd May 1922 Mr. Justice Adami set aside the convictions and directed a re-trial. That re-trial has not yet been concluded.

Meanwhile, the Police had instituted an inquiry against the persons who had been engaged in the rescue of the prisoners, and in regard to that occurrence, they, on the 5th February, sent up 20 persons for trial to the Sub-Divisional Magistrate of Arraria. The result was that nine out of these 20 were acquitted and the remaining eleven, who are respondents in the present appeal, were convicted and sentenced as follows: Bhola, Abdul and Jan Mohammad to one month's rigorous imprisonment and to a fine of Rs. 20 each under section 224, Indian Penal Code; Ramchariter, Rajkumar, Rashid Mian, Makhru Sahu, Bunsu Chamari, Phul Mohammad, Kutubuddin and Mohammad Irfan to one month's rigorous imprisonment and to a fine of Rs. 20 each under section 225, Indian Penal Code; all the eleven accused to six months' rigorous imprisonment each under sections 147, 225 and 332, Indian Penal Code. The sentences of imprisonment in all cases to run concurrently.

An appeal was then preferred to the Sessions Judge of Purnea and he, on the 8th September 1922, reversed the conviction holding that the arrest of the 3 prisoners was illegal, and that the appellants had committed no offence.

The present appeal has been preferred by the Local Government against that order of acquittal and the 11 appellants before the Sessions Judge are now respondents before us.

Mr. Gour Chandra Pal on behalf of the respondents contends that the learned Magistrate distrusted the truth of Ali Beg's complaint and, acting under section 202, Criminal Procedure Code, sent it to the Police for enquiry and report, that the Police had no jurisdiction to do anything more than to hold a local inquiry and to

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send their report to the Sub-Divisional Magistrate, and that they were incompetent to exercise any of the powers which they may have possessed under the general provisions of the Criminal Procedure Code, either under section 54, Criminal Procedure Code or under the Chapter relating to the investigations of cognizable cases. In other words, it is contended that the arrest of the 5th February was not an act done in excess of jurisdiction but with complete absence of jurisdiction.

It is necessary, therefore, to see what was the meaning of the order of the 30th January. Reading that order it is impossible to say that it was an order made under section 202, Criminal Procedure Code. In my opinion it was an order directing the Police to exercise the independent powers conferred upon them by the law. The learned Deputy Magistrate nowhere says that he is proceeding under section 202, Criminal Procedure Code, or that he distrusts the truth of the complaint; and, in these circumstances, the question is whether the Police were entitled to proceed with the investigation independently of the Magistrate, even though a complaint was pending before the Magistrate in regard to the same matter. In my opinion there was nothing in the law to prevent such a course.

The Criminal Procedure Code draws a clear difference between jurisdiction to try and jurisdiction to investigate and it is possible to conceive of cases where, although the Magistrate may distrust a complaint or delay in passing orders, the Police would be failing in their duty, if they did not arrest an offender against whom a cognizable offence has been made out. Much more so would this be the case where the Magistrate after recording the complaint finds that a regular Police investigation would be more suitable and intentionally keeps the complaint pending in order that the Police may exercise their powers of investigation and arrest independently of the Magistrate. In my opinion this is what he did in the present case.

But even if the order of the Magistrate was an order under section 202, Criminal Procedure Code, I cannot see why the jurisdiction of the Police to arrest and to

send up a charge-sheet was ousted. In practice, of course, the Police would not ordinarily take independent action in respect of a complaint which had already been distrusted by the Magistrate, but to lay down the general proposition that a Magistrate's order under section 202, Criminal Procedure Code, debars the Police from exercising their powers of arrest and investigation, would, in my opinion, be neither expedient nor correct.

Therefore, from any point of view, the Police had in this case jurisdiction to take cognizance of the information which was given to them.

Mr. Pal next contends that in fact there was no information upon which the Police could act. The reply to this is that the Police had the complaint which had been recorded by the Magistrate. His reply to that again is that if he was not acting under section 202, Criminal Procedure Code, then the Magistrate had no authority under the Code to send the complaint at all to the Police. Assuming that this was so, and assuming that the Magistrate acted extra-judicially, the fact remains that the Police got information upon which they could proceed. At its lowest, the communication was a request from a private person that investigation should be made and I fail to see how the Police were precluded from taking cognizance of the subject-matter of that communication. But, in my opinion, the Magistrate's order stands on a higher footing. As the executive head of the Police he had power to send that complaint to the Police and to direct them to investigate, in either case the jurisdiction of the Police could not have been ousted.

The next question is whether the Writer Head Constable had authority to make the investigation. Now, section 4, clause (p), of the Criminal Procedure Code, clearly shows that the Writer Head Constable in this case was qualified to do so. The Sub-Inspector in charge was ill and although the Writer Head Constable admits that he has not been generally empowered to investigate cognizable cases, he being the officer in charge of the Police Station on that day, it was his duty to make the investigation.

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The only question that remains is, whether the arrest which followed on the 5th February was lawful. Now section 54 of the Criminal Procedure Code is clear and the first clause of that section says that if a Police Officer finds that reasonable complaint has been made or credible information has been given or a reasonable suspicion exists he is competent to arrest the accused person. It is contended by Mr. Pal that in this case there was no reasonable complaint or credible information or reasonable suspicion. To this the reply is that there was, first of all, the complaint which had been recorded by the Sub-Divisional Magistrate. It is, however, urged that in the complaint before the Magistrate was a charge of a cognizable offence against Bhola only, and that against Abdul and Jan Mohammad there was only a charge of assault and mischief. Now, although the vernacular complaint states that Bhola was the person who snatched away the purse in the English statement recorded by the Magistrate there is no qualification or discrimination and all the three men are charged with the robbery. Again, when the Writer Head Constable arrived at Joki Hat Ali Beg repeated the accusation, and in these circumstances it seems impossible to say that the Writer Head Constable had not credible information against all the three accused. In my opinion it was his duty to arrest all three and to leave it to the Court to decide which, if any, were guilty.

It is, however, contended that, inasmuch as the Magistrate himself had not thought it necessary to issue process in the first instance, the Police Officer was put upon his guard and that he did not in fact believe that there was any cognizable case against the three men. In my opinion, this was not the position. There was nothing before the Writer Head Constable to indicate that the Magistrate did not believe the charge, and, as I have said before, even if he had known that the Magistrate was doubtful, his jurisdiction would not have been ousted.

In these circumstances, the view taken by the learned Judge seems to be wrong. The arrest was lawful, there was no absence of jurisdiction and, therefore, any assembly which had for its object the rescue of the

prisoners or the commission of an assault upon the Police while engaged in the lawful exercise of their duties, was an unlawful assembly within the meaning of the Indian Penal Code.

Our attention has been drawn to "*In the matter of Charu Chandra Majumdar*" (1) in which a learned Judge of the Calcutta High Court held that, a letter, written by the Criminal Investigation Department in Bombay to the Police Commissioner in Calcutta asking for the arrest of a certain person, was not sufficient information to justify resort to the provisions of section 54 of the Criminal Procedure Code. That case, however, is of no real assistance, for it must surely be a question of pure fact whether or not in the present case the materials before the Police Officer were sufficient to set section 54 in motion. If he should be so unfortunate as to be unable to establish those facts, the arrest must of course be pronounced illegal. In my opinion he has discharged the onus and his proceedings were perfectly legal.

In this view of the case, it is unnecessary to examine the arguments addressed to us as to the scope of section 99, Indian Penal Code. There are observations in *Queen-Empress v. Dalip* (2) in *Nowrangti Singh v. Queen-Empress* (3) and in *Queen-Empress v. Pukot Kotu* (4) which may lead to the inference that, even though the arrest is illegal, resistance is unlawful if the Police acted in good faith and under colour of their office. Mr. Pal asks us to distinguish these cases and hold that they cover irregularities and not illegalities. I agree that it is often said that section 99 extends not to cases where there is complete absence of jurisdiction but only to cases where there is jurisdiction and something has been done in excess of jurisdiction. It is unnecessary for us to examine the authorities dealing with this part of the case because, in my opinion, there was no illegality or irregularity whatsoever in the arrest.

(1) 37 Ind. Cas. 57; 44 C. 76; 20 C.W. N. 1233; 18 Cr. L. J. 73.

(2) 18 A. 246; A. W. N. (1895) 48; 8 Ind. Dec. (N. S.) 871.

(3) 5 C. W. N. 134; 28 C. 411.

(4) 19 M. 349; 1 Weir 45 and 631; 6 Ind. Dec. (N. S.) 948.

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The order, therefore, that we shall make is, that the appeal be allowed and that the case be remanded to the Sessions Judge of Purnea for re-hearing. He will decide the questions of fact which arise upon the evidence. We only decide the question whether the arrest was legal.

The District Magistrate, upon receiving this judgment, will call upon the respondents to surrender and will then inform the Sessions Judge of the fact of his having done so in order that he may fix a day for the re-hearing of the appeal. As the respondents were on bail in the Court of the Sessions Judge, the District Magistrate will be competent to release them on adequate bail to appear before the Sessions Judge for the hearing of the appeal.

Bucknill, J.—I agree.

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

ORIGINAL CRIMINAL.

February 20, 1922.

Present :—Sir Lancelot Sanderson, Kt.,
Chief Justice.

EMPEROR—PROSECUTOR

versus

SAFDAR REZA—ACCUSED.

*Penal Code (Act XLV of 1860), s. 366,
offence under—Consent of woman, effect of.*

In a prosecution under section 366 of the Penal Code the fact that the girl concerned, at the time she was enticed away from her home by the accused, had the intention of having illicit intercourse with him, is no defence to the charge under that section. The intention of the accused (and not that of the girl) is the material matter in the case. [p 380, col. 2.]

Mr. H. S. Suhrawardy, for the Prisoner.

Mr. B. L. Mitter, for the Crown.

JUDGMENT.—In this case the accused Safdar Reza was convicted by the Jury of an offence under section 363 and of an offence under section 366 of the Indian Penal Code by a majority of 7 to 2, which verdict I accepted, and the matter which is

now for consideration arises with regard to the offence under section 366. The offence under section 363, in this case, consists of kidnapping from lawful guardianship—no question arises with regard to that matter. But with regard to section 366, the material part which applies to this case, is kidnapping a woman "in order that she may be forced or seduced to illicit intercourse."

In this case there was no suggestion of any force being used by the accused, and I left it to the Jury to say whether the girls Matabia and Bhagbania or either of them, were kidnapped by the accused in order that they or either of them might be seduced to illicit intercourse. The Jury by their verdict found that the accused kidnapped the two girls with that object and intention, and found him guilty under section 366 by a majority of 7 to 2, as well as under section 363.

The evidence was that after the accused had kidnapped the two girls he did in fact have sexual intercourse with both the girls at Goberdanga. It was, however, argued on behalf of the accused that at the time the girls left Doman's house they had the intention of having illicit intercourse with the accused and that, if that were their intention, the accused could not be convicted under section 366.

In order that this question might be argued before me, I directed the Jury to give a special finding upon this question, and they found that the girls intended, at the time they left Doman's house, to have illicit intercourse with the accused.

The question, therefore, arises whether that fact is sufficient to prevent the accused being convicted under section 366.

On the evidence it appears that neither of the girls had been seduced until their illicit intercourse with the accused at Goberdanga, which took place after the kidnapping by him. The material facts in this respect, stated shortly, are that both the girls were under 16 years of age. They lived in Calcutta with Doman, who is the father of Matabia and the uncle of Bhagbania, whose parents were dead, and he was, therefore, the lawful guardian of both girls. They had been married some four years before this occurrence, but it was proved that neither of them had lived

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with their husbands. They had come back to Calcutta immediately after the marriage ceremony.

The evidence of Matabia on the question of seduction was as follows:—"I had no connection with any one else." With regard to Bhagbania it seems to me that the Doctor's evidence was important: he found that in her case the hymen had not been ruptured: he said that there could be sexual connection without the rupture of the hymen, and especially, having regard to the fact that the hymen in this girl was situated far up in the passage, that it would be possible to allow a certain amount of penetration without injuring the hymen. Bhagbania said that the accused cohabited with her at Goberdanaga. The Doctor's evidence shows this may have been possible; but the Doctor's evidence, in my opinion, is inconsistent with Bhagbania having been in the habit of cohabiting with other men.

It is admitted that with regard to the offence under section 363, that is, kidnapping from lawful guardianship, the girls being under 16 years of age, their consent is immaterial. It is further conceded that the offence dealt with by section 366 is merely an aggravated form of the offence created by section 363; and it would, therefore, seem to follow that when the matter under consideration in relation to section 366, is the seduction to illicit intercourse of a girl under 16 years of age, as in this case, her consent or intention would be just as immaterial as it would be in connection with the offence dealt with under section 363.

One object of the sections under consideration is not only to protect the rights of parents and others having the lawful guardianship of girls under the age of sixteen, but also to protect the girls themselves and to prevent persons taking improper advantage of their youth and inexperience, and it is obvious that, on the facts of this case, however willing the girls may have been, the accused was the cause of their being seduced from the path of virtue and having illicit intercourse with him.

In my judgment, therefore, the fact that the girls, at the time they were enticed away from their home by the accused, had the intention of having illicit inter-

course with him, is no defence to the charge under section 366.

On the facts of this case the consent of the girls, who were under the age of sixteen and who had not had any illicit intercourse with any man before the accused, is not inconsistent with their having been seduced to illicit intercourse by him.

In my judgment, the intention of the accused is the material matter, and on the findings of the Jury and the facts of this case, there can be no doubt that he kidnapped the girls in order that they might be seduced to illicit intercourse with him. In my judgment, therefore, on the facts of this case the point which has been raised constitutes no defence to the charge under section 366 of the Indian Penal Code. There is no question as to the propriety of the verdict of the Jury or the liability of the accused to be convicted in respect of the charge under section 363 of the Indian Penal Code. But inasmuch as the greater offence under section 366 includes the lesser offence under section 363, the accused should not be convicted under both. I, therefore, convict him under section 366.

The offence, in my judgment, is a serious one, the conduct of the accused was calculated to ruin the two girls for life; fortunately they were discovered and brought back to their home, and I hope that the damage done to them by the accused may not be irremediable.

The chance which they now have, however, was in no way due to any action or repentance on the part of the accused. He took advantage of the girls, who were in a humble walk of life, kept them in an out of the way village for over two months, and acted in such a way as was calculated to ruin their lives.

I sentence the accused to two years' rigorous imprisonment.

B. N.

Accused convicted.

KISHEN SINGH v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 865
OF 1922.

October, 5, 1922.

Present:—Mr. Justice Scott-Smith.

KISHEN SINGH AND ANOTHER—

CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Punjab Excise Act (I of 1914), s. 61 (1) (a),
(2) (a)—Possession and sale of liquor.

Accused No. 1, a licensee for liquor, brought a certain quantity of liquor to the house of accused No. 2 who was his father. On a purchaser asking for liquor accused No. 2 called to accused No. 1 to bring the liquor. The price for the liquor was handed over to accused No. 2:

Held, that it could not be said, either that accused No. 2 was in joint possession of the liquor with accused No. 1, or that he had joined in the sale of the liquor within the meaning of section 61 (1) (a) and (2) (a) of the Punjab Excise Act.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Gujranwala, dated the 22nd March 1922, affirming that of the Magistrate, First Class, Gujranwala, dated the 8th February 1922.

Mr. Anant Ram, for the Petitioners.

JUDGMENT.—The evidence for the prosecution has been believed by the two lower Courts and I see no sufficient reason for rejecting it in revision. At the same time, I do not think the difference between the cases of Kishen Singh and his son Khushal Singh has been sufficiently considered.

Khushal Singh was a licensee for sale of liquor at Gakhar and he it was, according to Attar Singh witness, who brought the 8 bottles of liquor to Gujranawala. The possession, therefore, was his exclusively and the mere fact that he brought the liquor to Kishen Singh's house does not make the possession joint of himself and Kishen Singh. Further, I do not think it can be held that the latter joined in the sale merely because he called to his son to bring 2 bottles and because the money was handed to him. I, therefore, accept the petition so far as Kishen Singh is concerned, and setting aside his conviction and sentence acquit him. Fine if paid to be refunded. As far as

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Khushal Singh is concerned the petition is rejected.

Z. K.

Petition partly accepted.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 1070 OF 1922.

December 22, 1922.

Present:—Mr. Justice Oldfield and

Mr. Justice Ramesam.

KOTTITHOTI HAMED HAJI AND OTHERS

—PRISONERS—APPELLANTS

versus

EMPEROR.

Malabar (Restoration of Order) Ordinance (I of 1922), s. 4 (2) (b)—Special Magistrate—Retired Magistrate, appointment of—Trial by such Magistrate—Illegality—Criminal Procedure Code (Act V of 1898), ss. 12, 26, 41.

Under section 4 (2) (b) of the Malabar (Restoration of Order) Ordinance only a person who is already a Magistrate is eligible for appointment as "Special Magistrate." The powers of a Magistrate terminate on his retirement from service and a retired Magistrate is, therefore, incompetent to be appointed a Special Magistrate under the Ordinance. A conviction on trial by such a Magistrate is illegal and must be set aside.

(Case-law discussed.)

Appeal against the order of the Court of the Special Magistrate, Manjeri, in S. C. No. 6 of 1922.

Mr. B. Pocker, for the Appellants.

The Public Prosecutor, for the Crown.

JUDGMENT.—We have to deal first with an objection to the competence of the Special Magistrate by whom the appellants Nos. 1 to 6 accused, have been convicted. The only persons who, under Ordinance I of 1922, section 4 (2) (b), can legally be appointed Special Magistrates are "Magistrates who have exercised the powers of a First Class Magistrate for not less than two years." M. R. Ry. Dewan Bahadur C. Gopalan Nayar, the Special Magistrate here in question, was, as the order appointing him, dated 1st July 1922, shows on that date a retired Deputy Collector. It is not disputed by Mr. Pocker for the accused that

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he had before and up to his retirement exercised first class powers for not less than 2 years. The objection to his appointment is that he was not on 1st July 1922 a Magistrate, because his retirement had determined his Magisterial powers.

The learned Public Prosecutor hardly disputes that only a person who is already a Magistrate is eligible for appointment as Special Magistrate, and that is clearly entailed by the wording of the section. He contends that, as M. R. Ry. C. Gopalan Nayar was a Magistrate on the date of his retirement and was never deprived of his Magisterial powers, he continued to be one, those powers being merely in abeyance in the absence of any local jurisdiction, wherein they could be exercised, and that he was one for the purpose of the section.

The definition of "Magistrate" in the General Clauses Act (X of 1897) section 3 (31) is applicable to the interpretation only of Acts and Regulations, not of an Ordinance, and is statedly not exhaustive, and there is no definition in the Criminal Procedure Code. The only references in that Code to the terminations of the powers of a person, who has been made a Magistrate are in section 26 to the removal of such persons from office, and in section 41 to the withdrawal of the powers conferred on him by the Local Government or the District Magistrate, and it is not alleged that any such action has been taken in the case of M. R. Ry C. Gopalan Nayar. But under section 12 Sub-Divisional Magistrates can be appointed only as Magistrates in a District, their powers, if they are in Government service, being continued under section 40 in the case of transfer to a different local area. This is inconsistent with the view for which the learned Public Prosecutor contends, since it follows from it that the Magisterial powers are recognised by the Code as subsisting only so long as the district or local area in which they can be exercised, although not necessarily that for which they were originally conferred, can be ascertained. The suggestion that, where no such district or area is ascertainable, the powers are in abeyance is not, so far as we have been shown, supported affirmatively by any provision of the Code

and it can hardly claim even negative support from the absence of any provision for the lapse of powers, where, except in the events to be referred to, no necessity for such provision will ordinarily arise. As regards one of such events, the temporary absence of a Magistrate on leave, authority is available. For *In the matter of Pursooram Boroah* (1) the learned Judge who dealt with the point, referred to the possibility that "what really vacated an office was not the going on leave, but the appointment of another person to it," although he held on other grounds that the section of the Code in force, corresponding with the present section 40 was not applicable to the case under decision; and in *Bai Harku v. Sitaram Kalian* (2) it was held explicitly that a Magistrate's absence on leave made no difference to his right under section 40 to exercise the powers conferred on him in the local areas to which on his return from various periods of leave he was transferred. The latter decision was reached with reference to the fact, also referred to in the former, that an officer on leave under the Civil Service Regulations retains a lien either on his appointment or on one of similar character, and the conclusion suggested in the one case and reached in the other is by this construction reconcilable with the principle, which, sections 12 and 41 entail, that Magisterial powers continue, as long as connection with a district or a local area can be regarded as maintained. Another class of cases, more similar to that under our consideration, consists of those, in which the officer is appointed permanently to the other duties in the Secretariat or elsewhere, dissociated from Magisterial work and retains no sort of connection with a district or local area, in which he can exercise powers, authority regarding the necessity for again conferring powers on him on his return to a district is wanting. But we have ascertained that in each of these classes of cases the practice of Government is in accordance with the principle just referred to. That is to say, powers are not conferred again, where an officer has left a district

(1) 2 C. 117; 1 Ind. Jur. 312; 1 Ind. Dec. (N. S.) 371.

(2) 21 Bom. L. R. 536.

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on leave and returns to the same district or another, whilst they are, if his absence on other duty has entailed his dissociation from the work of a Magistrate and he returns to it, his appointment to that duty involving an implicit withdrawal of his powers. Such an implicit withdrawal is contemplated in *Bai Harku v. Sitaram Kalia* (2) in the reference to the contingency that the Magistrate there in question had by absence without leave or after the end of leave lost his appointment. And such a withdrawal must follow from the resignation of an appointment or its termination, such as occurred in the case of M. R. Ry. C. Gopalan Nayar, inasmuch as his connection with any district or local area in respect of which his powers could with reference to section 12 be regarded as subsisting, then came to an end. The conclusion must be that M. R. Ry. C. Gopalan Nayar had ceased to be a Magistrate and was not one, when he was appointed a Special Magistrate under the Ordinance. His appointment was, therefore, invalid.

The result is that the appellants have not been tried by a legally constituted Court; that their convictions must be set aside and that they must be re-tried by the Special Magistrate of Malapuram.

V. N. V.

*Conviction set aside;
Re-trial directed.*

LAHORE HIGH COURT.

MISCELLANEOUS CRIMINAL CASE NO. 31 OF 1922.

May 23, 1922.

Present.—Mr. Justice Martineau and Mr. Justice Harrison.

M. FAZAL ILAHI—PETITIONER

versus

MOHAN LAL AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195—Penal Code (Act XLV of 1860), s. 471—Using forged document—Offence, when complete—Sanction to prosecute—Court empowered to grant sanction.

The offence of using as genuine a forged document is complete once the document is produced or given in evidence. [p. 384, col. 2.]

The words "or of some other Court to which such Court is subordinate" as used in section 195 of the Criminal Procedure Code and read with sub-section (7) of that section do not cover and include the High Court where the case has been tried in any Court other than that of a District and Sessions Judge or an Additional District and Sessions Judge. [p. 384, col. 1.]

Dina Nath Gautam v. Muhammad Abdulla, 61 Ind. Cas. 53; 2 L. 57; 22 Cr. L. J. 325, followed.

Under section 195 (c) of the Criminal Procedure Code it is either the Court of first instance or the Court to which it is immediately subordinate in the sense given in sub-section (7) of that section, that can grant sanction. The High Court is not empowered to grant sanction by virtue merely of having heard the appeal in the case. [p. 384, col. 2.]

Petition, under section 195 of the Criminal Procedure Code, for sanction to prosecute the respondents under sections 471 and 193, Indian Penal Code.

Mr. Oertel and Sheikh Azim Ullah, for the Petitioner.

Lala Moti Sagar, R. S., Bakshi Tek Chand, Kanwar Dalip Singh and Sheikh Niaz Ali, for the Respondents.

ORDER.—Mohammad Fazal Ilahi applies under section 195, Criminal Procedure Code, for the sanction of this Court to the prosecution of the respondents under various sections including sections 471 and 193, Indian Penal Code, these respondents being one Mohan Lal, who was a defendant in an important civil case, and various persons who appeared as witnesses. The respondents take a preliminary objection that sanction cannot be granted by this Court inasmuch as a Senior Sub-Judge tried the case and the Court to which he is immediately subordinate in the sense in which the words are used in section 195, Criminal Procedure Code, is that of the District Judge of Lahore.

Counsel for the petitioner relies on *Miran Bakhsh v. Beli Ram* (1), *Bhadesar Tewari v. Kamta Prasad* (2), *Gudala Suriah v. Jamal Bee Bee* (3), while the respondents

(1) 34 Ind. Cas. 654; 67 P. L. R. 1916; 17 Cr. L. J. 238; 49 P. W. R. 1915 Cr.

(2) 18 Ind. Cas. 271; 35 A. 90; 11 A. L. J. 11; 14 Cr. L. J. 47.

(3) 31 Ind. Cas. 340; 16 Cr. L. J. 740.

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rely mainly upon *Kompella Anantaramayya v. Chikkatla Tukkadu* (4). It is quite clear as explained in *Dina Nath Gautam v. Muhammad Abdulla* (5), that the words "or of some other Court to which such Court is subordinate" as used in section 195, Criminal Procedure Code, and read with sub-section (7) of that section, do not cover and include the High Court where the case has been tried in any Court other than that of a District and Sessions Judge or Additional District and Sessions Judge. It is contended and the ruling of Banerji, J., in *Bhadesar Tewari v. Kamta Prasad* (2), supports this view, that the proceedings continue and are the same proceedings from the time of the institution in the First Court until the decision of the final appeal, and that it can be said that an offence committed while a case is being dealt with by the Trial Court on the original side is committed at an earlier stage of the proceedings which are still alive at the time of the hearing of the appeal, and, therefore, the Court which actually hears the appeal, and in this case the High Court, can grant sanction under section 195, Criminal Procedure Code. It is also pointed out that, so far as section 195 (b) is concerned an offence committed during an enquiry held by a Munsif, may form the subject-matter of the sanction by a High Court, provided the enquiry is related to or ancillary to the proceedings which are pending in that High Court [*Gudala Suriah v. Jamal Bee Bee* (3)] and this it is urged provides a valuable analogy. However this may be, in section 195 (c) the words "or in relation to" do not appear and in the case which is before us there is no question of anything which happened during an enquiry but of an offence alleged to have been committed in the course of the trial of a civil suit and in the Court of the Sub-Judge. Sub-section (c) lays down that when the offence has been committed in any Court, "such Court" or the Court to which it is immediately subordinate can give the sanction. Even if it be conceded

that there is one proceeding from first to last in the trial of a civil case and that this includes all the stages of that trial and the hearing of the appeal, the question still remains whether the words "such Court" in sub-section (c) read together with the preceding words "in any Court in respect of, etc." can cover and include any but the actual Court, before which the offence is alleged to have been committed, it being remembered that the offence is complete once the document is produced or given in evidence. It is not quite clear whether the ruling reported as *Miran Bakhsh v. Beli Ram* (1) dealt with a case which had arisen after the alteration of 1914 had been made in the designation of the Civil Courts in this Province. The point was certainly not raised in that case whether the words "such Court" could include the Appellate Court and it is not clear whether the District Judge whose action was called in question was acting under the first or second clause of section 195 (c). We are of opinion, that the only interpretation which can be placed upon section 195 (c) is that either the Court of first instance or the Court to which it is immediately subordinate in the sense given in paragraph 7 of that section, that is the Court to which appeals ordinarily lie, can give sanction, and that, in virtue merely of having heard the appeal, the High Court is not empowered to do so.

We, therefore, direct the application to be returned to the petitioner to be presented by him to any Court having jurisdiction to dispose of it.

Z. K.

Application returned.

(4) 45 Ind. Cas. 147; 41 M. 787; 34 M. L. J. 404; (1918) M. W. N. 280; 23 M. L. T. 235; 7 L. W. 533; 19 Cr. L. J. 483.

(5) 61 Ind. Cas. 53; 2 L. 57; 22 Cr. L. J. 325.

WALAITI RAM v. RAM KISHEN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1121 OF 1917.

May 8, 1922.

Present:—Mr. Justice Abdul Raoof and
Mr. Justice Abdul Qadir.

WALAITI RAM AND OTHERS—DEFENDANTS

—APPELLANTS

versus

RAM KISHEN AND OTHERS—PLAINTIFFS

—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 61—
Partnership—Debt paid by one partner—Contribution,
suit for—Limitation.*

A suit for contribution by a partner of a firm who has paid the whole or more than his share of the amount of a debt due from all the partners is governed by Art. 61 of Schedule I to the Limitation Act.

Sri Raman Lalji Maharaj v. Gopal Lalji Maharaj, 19 A. 244; A. W. N. (1897) 43; 9 Ind. Dec. (N. S.) 160, relied upon.

Second appeal from an order of the District Judge, Amritsar, dated the 4th April 1917, reversing that of the Sub-Judge Second Class, Amritsar, dated the 15th May 1916.

Pandit Sheo Narain, R. B., for the Appellants.

Dr. G. C. Narang, for the Respondents.

JUDGMENT.—This is a second appeal arising out of the following facts. Khairati Mal, defendant No. 1, and Kidar Nath, defendant No. 6, started a firm on the 4th April 1906, under the style of "Khairati Mal-Kidar Nath" in which they had equal shares. This firm was dissolved on the 2nd April 1909 when a deed of release was executed. Kidar Nath then started another firm under the name of Kidar Nath-Durga Dass. This second firm continued up to the 17th of December 1909, when by an agreement between the creditors of the firm and the owners thereof one Raja Ram was appointed a trustee to administer its assets. On the 14th September 1914 Raja Ram sold the outstanding debts of the firm Kidar Nath-Durga Dass to the plaintiffs for Rs. 550, under the deed of release relating to the firm "Khairati Mal-Kidar Nath" the assets of the dissolved firm were handed over to Kidar Nath and he was made liable to pay all the debts with the exception of Rs. 3,000 which was made payable by Khairati Mal. It was provided that Khair-

ati Mal was to pay to the creditors of the firm Rs. 3,000 or to Kidar Nath. Liberty was also given to him to either pay to the creditors in cash or adjust the debt by executing in their favour singly or jointly with Kidar Nath a document in favour of the creditors. Khairati Mal neither paid the sum to the creditors nor to Kidar Nath, nor did he compound the debt with the creditors by executing any document. Kidar Nath, therefore, had to meet the claims of the creditors of the firm singly and had to pay off the debts. He paid off the debts in the year 1909. The first payment was made by him on the 11th April 1909, and the last item was paid on the 24th July 1909. At page 5 of the record is to be found a list of these payments which was filed by the plaintiffs in this case as directed by Court. Under ordinary conditions Kidar Nath would be entitled to claim contribution from Khairati Mal in respect of all the debts paid by him, but it appears by arrangement arrived at in the deed of dissolution or release dated the 2nd of April 1909, the liability of Khairati Mal was limited to the payment of Rs. 3,000 only. It further appears that Khairati Mal was indebted to the firm to the extent of Rs. 3,000 and apparently he was made liable to pay the debts of the creditors to the extent of Rs. 3,000 for this very reason. One of the conditions entered in the deed of dissolution was that if Khairati Mal paid Rs. 3,000 within eleven months he would be entitled to realize interest for the period from the 2nd April 1909 at the rate of ten annas per cent. per mensem from Kidar Nath, but if Khairati Mal did not pay this sum within eleven months he would have to pay subsequent interest at the same rate, i.e., ten annas per cent. per mensem. As stated above, Khairati Mal failed to pay this sum to the creditors and Kidar Nath had to clear off all the debts. Thus, Khairati Mal failed to contribute towards the payment of the debts of the firm even to the limited extent provided in the deed. Kidar Nath, therefore, became entitled to recover this amount from him. It is an admitted fact that this sum was entered in the account-books of the firm of Kidar Nath-Durga Dass as being due to Kidar Nath from Khairati Mal. While administering the affairs of this latter firm the trustee along

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with other outstanding debts due to Kidar Nath and Durga Dass transferred this item of Rs. 3,000 also to the plaintiffs. The present suit was instituted by the plaintiffs on the 1st April 1915. After giving a summary of the facts as above stated, the plaintiffs claimed Rs. 4,143-12 from the defendants on account of principal and interest and put their cause of action in the plaint thus: "Kidar Nath's business failed, and Raja Ram was appointed a trustee to settle his debts, etc., Raja Ram sold the outstanding debts, including the claim in suit, to the plaintiffs who are entitled to realize Rs. 3,000 principal and Rs. 1,143 interest, viz., Rs. 4,143-12 in all, from defendants Nos. 1 to 5 who are members of a joint Hindu family, of which Khairati Mal was the manager."

The suit was resisted by defendants Nos. 1 to 5 upon various grounds which are summarised in the judgment of the Trial Court. It was pleaded (i) that the suit was barred by time; (ii) that Khairati Mal was not liable to pay Rs. 3,000 to Kidar Nath but to the creditors of the firm and that Khairati Mal had never authorised Kidar Nath to pay to the creditors on his behalf; (iii) that the plaintiffs, being the purchasers of the outstanding debts of the firm of Kidar Nath-Durga Dass only, had no *locus standi* to make the present claim which relates to the dealings of the firm "Khairati Mal-Kidar Nath"; (iv) that Khairati Mal had discharged his liability, if any, by paying off debts for more than Rs. 3,000.

On the question of *locus standi* of the plaintiffs to maintain the suit the Trial Court found in favour of the plaintiffs. The question of limitation was left undetermined. On the merits, however, the Court found against the plaintiffs and dismissed their suit.

An appeal was preferred to the lower Appellate Court with the result that their claim was partially allowed and a decree for Rs. 2,504-2-9 with proportionate costs was passed in their favour against the defendants Nos. 1 to 5.

These defendants have accordingly preferred this second appeal. The principal question to be decided in this appeal is as to the nature of the claim. Upon this will depend the decision of the question

of limitation and as well as that of the *locus standi* of the plaintiffs to maintain the suit. The lower Appellate Court has treated the suit as one for money payable for money lent and has applied Art. 57 of the Limitation Act, and has expressed an opinion that the debt became due by Khairati Mal to Kidar Nath when the partnership between them was dissolved. The suit being within six years from that date the Court held that it was within time having regard to the provisions of the Punjab Limitation Act. We are not inclined to agree with the learned Judge of the Court below as to the applicability of Art. 57. This was not a claim for money payable for money lent. The money was borrowed by Khairati Mal from the firm of Khairati Mal-Kidar Nath. The suit has not been brought by the plaintiffs as the assignees of the debt due from Khairati Mal. Khairati Mal has been sued as a partner of the dissolved firm for contribution on the ground that his partner Kidar Nath had paid off all the debts. It is merely a coincidence that he is not liable to contribute to the whole extent of the debts discharged by Kidar Nath, and this is due to the circumstance that by mutual agreement his liability to pay the debts had been limited to Rs. 3,000 only, but nonetheless the claim of Kidar Nath to recover the sum from Khairati Mal was based on his right to demand contribution. The plaintiff's suit, therefore, as the assignees of the claim of Kidar Nath must be treated as a suit for contribution. Various Articles of the Limitation Act have been suggested at the argument as being applicable to the suit. Pandit Sheo Narain has contended that either this is a suit upon a contract to indemnify and is governed by Art. 83 or it is one for compensation for the breach of a contract not in writing registered and comes under Art. 115. He has also suggested Art. 99 which is applicable to a suit for contribution. The two first mentioned Articles cannot apply, because the suit is neither based upon a contract to indemnify, nor is it a suit for compensation for the breach of a contract. The last mentioned Article cannot apply, because it is not a suit by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a

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sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-sharers. No Article has been pointed out which may be specifically applicable to a suit for contribution by a partner of a firm who has paid the whole or more than his share of the amount due from all the partners. In our opinion Art. 61 would apply to a suit for contribution between co-debtors and must be applied to this case. See *Sri Raman Lalji Maharaj v. Gopal Lalji Maharaj* (1). This Article is among those in respect of which the period of limitation has been extended to six years under the Punjab Limitation Act. All the payments made by Kidar Nath being within six years, the suit is clearly within time.

The argument relating to the question of the plaintiff's *locus standi* to maintain the suit put forward on behalf of the appellants is that the plaintiffs, having purchased the outstanding debts of the firm "Kidar Nath-Durga Dass," are not entitled to claim the amount of Rs. 3,000 together with interest, because the claim related to the dissolved firm "Khairati Mal-Kidar Nath," but we have already indicated above that this sum had been brought into the account books of the firm "Kidar Nath-Durga Dass", and had been entered as being due from Khairati Mal to Kidar Nath. The plaintiffs being the assignees of the outstanding debts due to Kidar Nath were entitled to claim the amount. It was further contended in the alternative that the plaintiffs' claim cannot succeed, because Khairati Mal had discharged his liability by paying off certain debts, the aggregate amount of which is more than the amount claimed. In support of this argument it has been pointed out that the firm "Daulat Ram-Kishore Chand" had a claim of Rs. 4,541-1-6 against the firm of "Khairati Mal-Kidar Nath" in the settlement of which Khairati Mal had taken part and that he was, therefore, entitled to receive credit for half of that amount. It has, however, been found that the claim of Daulat Ram and Kishore Chand was settled by a compromise under which Khairati Mal and Kidar Nath had to pay Rs. 1,000 each. Thus,

it is clear that the only amount contributed by Khairati Mal in respect of this debt was Rs. 1,000 and he has been allowed credit for this sum. Khairati Mal claimed credit for another sum of Rs. 1,300 which he claimed to have paid for the redemption of certain pawned ornaments belonging both to Kidar Nath and to himself. On this account he has been held to be entitled to be credited with Rs. 608-6-0 and in this finding both the Courts below have concurred. There is no force in the appeal, and it must be dismissed.

The plaintiffs-respondents have filed certain cross-objections, objecting to the deductions allowed in favour of the defendants. In the first place, it has been contended on their behalf that the claim of Daulat Ram and Kishore Chand was not on account of any debt due from the firm of "Khairati Mal-Kidar Nath," and that, therefore, the sum of Rs. 1,000 paid by Khairati Mal on account of this independent debt ought not to have been deducted from the amount claimed. It has, however, been found as a fact by the lower Appellate Court that the claim was brought by Daulat Ram and Kishore Chand for a debt due by the firm and this finding cannot be questioned in second appeal.

The second contention put forward on behalf of the respondents was that the debt of Rs. 1,300 had been liquidated by the sale of the ornaments and that Khairati Mal had not paid anything out of his own pocket for the redemption thereof, and that, therefore, he was not entitled to be credited with the sum of Rs. 608-6. It was, however, admitted by the plaintiffs in the Court below that Khairati Mal was entitled to be credited with Rs. 589-14 on this account and the only dispute was as to interest to which Khairati Mal was clearly entitled, as Kidar Nath had failed to redeem the ornaments which, under the terms of the deed of dissolution, he had undertaken to do. The cross-objections also, therefore, have no force.

The result is that both the appeal and the cross-objections fail and are dismissed with costs.

Z. K.

Appeal dismissed.

(1) 19 A. 244; A. W. N. (1897) 43; 9 Ind. Dec. N. S. 160.

DHANUSINGH v. KESHEOPRASHAD.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL, NO. 56 OF 1922.

February 7, 1923.

Present:—Mr. Batten, J. C.

DHANUSINGH—PLAINTIFF NO. 2

—APPELLANT

versus

KESHEOPRASHAD AND OTHERS—

DEFENDANTS—RESPONDENTS.

Execution of decree—Decree directing payment during fixed period—Court closed on last date—Payment into Court on re-opening day, validity of—General Clauses Act (X of 1897), s. 10, applicability of—Limitation Act (IX of 1908), s. 4, applicability of.

Where a person is required under a decree to make a payment in favour of another, a payment into Court is a valid compliance with the decree.

Wana Raji v. Natu Murha, 7 Ind. Cas. 992; 35 B. 35; 12 Bom. L. R. 818, followed.

The law does not compel a man to do that which he cannot possibly perform and the closing of a Court cannot prejudice a man in doing an act required to be done in Court.

A decree for joint possession was passed subject to the payment of a fixed sum by one decree-holder to the other by a certain date. The period expired while the Court was closed and the money was deposited into Court on the day it re-opened. The question was whether the payment was good:

Held, (1) that the payment under the decree could validly be made into Court;

(2) that the Court being closed on the last day of payment, the payment was in time, on the general principle that the law does not compel a man to do that which he cannot possibly perform;

(3) that the fact that the payment could be made out of Court would not affect the case;

Balkrishna v. Tima, 12 Ind. Cas. 810; 7 N. L. R. 176, followed.

Sheodas Daulatram v. Narayan Asaji, 12 Ind. Cas. 811; 36 B. 268; 13 Bom. L. R. 1153, not followed.

(4) that section 10 of the General Clauses Act or section 4 of the Limitation Act had no application to the case.

Wana Raji v. Natu Murha, 7 Ind. Cas. 992; 35 B. 35; 12 Bom. L. R. 818, not followed.

Appeal from a decree of the District Judge, Saugore, in Civil Appeal No. 83 of 1921, decided on the 20th September 1921.

Mr. G. L. Subhedar, for the Appellant.

Dr. H. S. Gour, for the Respondents.

JUDGMENT.—The following are the facts of the case: The parties are co-sharers. The appellant-plaintiff sued the respondents-defendants for joint possession of a plot of land acquired by the defendants. On the 29th November 1920 a decree of joint possession was passed in the plaintiff's favour subject to his paying one hundred rupees as contribution within six months

from the date of the decree. The period of six months expired in the vacation when the Courts were closed, and the appellant deposited his money in Court on the day that the Court re-opened. Both the lower Courts have held that the appellant deposited the money too late and that the decree could not be executed. The learned District Judge observed that section 4 of the Limitation Act does not apply when the time for payment is fixed by a decree and not by the Limitation Act. He also says that the appellant must have known that the six months would expire when the Courts would be closed and that it was open to him to have sent the money to the respondents by money order before that date.

It is agreed on behalf of both parties in this Court that the Limitation Act does not apply, but for the appellant it is argued that section 10 of the General Clauses Act, 1897, does apply and that the section does not mean that the time must be prescribed by an Act, but includes time prescribed by an order passed under an Act, that is by a decree. It is also argued that under r. 1 of O. XXI of the First Schedule of the Civil Procedure Code money payable under a decree may be paid into the Court, even though the decree directs that the money should be paid to the decree-holder, so that the appellant had the option of paying the money in Court.

In *Wana Raji v. Natu Murha* (1) the facts were precisely analogous to those of the present case. The learned Judges held that even where the decree directs payment to the decree-holder, payment into Court is a valid compliance with the decree unless perhaps the Court directed that payment should be to the decree-holder and not otherwise. They also considered that section 10 of the General Clauses Act, 1897, came into play and that, therefore, the payment into Court on the day it re-opened was as good a payment as if the payment had been made on the last day allowed by the decree if the Court had been open on that day. With the first part of this decision I am in entire agreement, but I venture to doubt the correctness of the view that section 10 of the General Clauses Act applies, and the correct view appears to be, as accepted in *Hirdey Narain*

(1) 7 Ind. Cas. 992; 35 B. 35; 12 Bom. L. R. 818.

UDHE RAM V. NARAIN SINGH.

v. *Alam Singh* (2), that section 10 of that Act only applies to the cases in which a period of limitation has been prescribed as mentioned in the section, and not to a condition prescribed in the decree.

In *Balkrishna v. Tima* (3) Drake-Brockman, J. C., held that the period of two years allowed by section 31 (1) of the Indian Limitation Act, 1908, for the institution of certain suits was not affected by section 10 of the General Clauses Act. He, nevertheless, held that the law does not compel a man to do that which he cannot possibly perform and that the closing of the Court cannot prejudice a man in doing an act required to be done in Court. He also held that the fact that these principles are embodied in section 4 of the Limitation Act and section 10 of the General Clauses Act did not prevent their application to the case before him. For the respondents it is pointed out that a different view was taken in *Sheodas Daulatram v. Narayan Asaji* (4), but I prefer to follow the ruling of Drake-Brockman, J. C.

For the respondents, it is further argued that while a suit can be filed only in a Court, the appellant had the option of payment to the respondents, so that the ruling of Drake-Brockman, J. C., is inapplicable. But, as I have already said, I agree that a payment into Court is a valid compliance with the decree, and I am of opinion that the Court could not by being closed shorten the time allowed by the decree.

For these reasons I hold that the hundred rupees were paid in time, I set aside the order of the lower Courts, and direct the Executing Court to proceed with the execution proceedings. Costs will be costs in the proceedings.

N. H.

Order set aside.

(2) 48 Ind. Cas. 353; 41 A. 47; 16 A. L. J. 892.

(3) 12 Ind. Cas. 810; 7 N. L. R. 176.

(4) 12 Ind. Cas. 811; 36 B. 268; 13 Bom. L. R. 1153.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 109 OF 1922.

October 23, 1922.

Present:—Mr. Justice Martineau and
Mr. Justice Moti Sagar.

UDHE RAM—PLAINTIFF—APPELLANT
*versus*NARAIN SINGH—DEFENDANT—
RESPONDENT.*Jurisdiction—Redemption suit—Valuation—*

Forum of appeal—*Punjab Courts Act (VI of 1918)*, s. 39 (1) (a).

The question of jurisdiction to hear an appeal in a redemption suit has to be determined with reference to the claim made and not to the decision on the claim.

Muhammad Khan v. Ashak Muhammad Khan, 106 P. R. 1895 (F. B.) and *Chuni Lal v. Beli Ram*, 20 Ind. Cas. 473; 229 P. L. R. 1913; 196 P. W. R. 1913, followed.

Kishan Chand v. Taj-ud-din, 1 Ind. Cas. 870; 23 P. R. 1909; 37 P. W. R. 1909 and *Dyal Singh v. Ram Rakha*, 14 Ind. Cas. 78; 54 P. R. 1912; 122 P. W. R. 1912, distinguished.

Plaintiff sued to redeem a bungalow on payment of Rs. 3,550. The defendant claimed Rs. 20,894. The suit was decreed on payment of Rs. 13,419. Plaintiff appealed to the High Court:

Held, that under section 39 (1) (a) of the Punjab Courts Act the appeal lay to the District Judge.

First appeal from the decree of the Subordinate Judge, 1st Class, Multan, dated the 28th November 1921.

Mr. Mukand Lal Puri, for the Appellant.

JUDGMENT.—In this case the plaintiff sued for redemption on payment of Rs. 3,550, the defendant pleaded that the amount due to him was Rs. 20,894-15-6, and the finding of the Subordinate Judge is that the amount due is Rs. 13,419-3-0. The plaintiff has filed his appeal in this Court, whilst the defendant filed his in the District Court. The District Judge has referred the question of jurisdiction to this Court. In *Muhammad Khan v. Ashak Muhammad Khan* (1) it was held by a Full Bench that the question of jurisdiction had to be determined with reference to the claim made and not to the decision on the claim, and that ruling was followed in *Chuni Lal v. Beli Ram* (2). Mr. Mukand Lal Puri, who appears for the plaintiff relies on *Kishan Chand v. Taj-ud-din* (3) and *Dyal Singh v. Ram Rakha* (4), but the points which arose for determination in those cases were different. Following the Full Bench ruling of 1895 we hold that the appeals lie to the District Judge. This is our answer to the reference from the District Judge, and we direct that the appeal filed by the plaintiff in this Court be returned to him for presentation to the proper Court.

Z. K.

Appeal returned.

(1) 106 P. R. 1895 (F. B.).

(2) 20 Ind. Cas. 473; 229 P. L. R. 1913; 196 P. W. R. 1913.

(3) 1 Ind. Cas. 870; 23 P. R. 1909; 37 P. W. R. 1909.

(4) 14 Ind. Cas. 78; 54 P. R. 1912; 122 P. W. R. 1912.

HAYAT MUHAMAD V. NAGESHWARI PRASAD.

ODDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION DECREE APPEAL, NO. 17
OF 1922.

February 23, 1923.

Present :—Mr. Dalal, A. J. C.

HAYAT MUHAMAD—APPLICANT—
APPELLANT

versus

NAGESHWARI PRASAD—OPPOSITE
PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 69, 89, O. XXXIV, rr. 7, 8 (4)—Decree, preliminary, for redemption—Mortgage-money not paid within time allowed—Decree absolute for sale—Deposit of money before sale, effect of.

A mortgagor who fails to deposit the mortgage-money within the time allowed by the decree for redemption in his favour is entitled to pay off the money and redeem the property even after the mortgagee has obtained a decree absolute for sale under O. XXXIV, r. 8, cl. (4) of the Civil Procedure Code and the sale has been ordered in pursuance thereof. Nor can this right of the mortgagor be deferred till the mortgagee chooses to take action and bring the property to sale.

Vallabha Valiya Rajah v. Vedapuratti, 19 M. 40; 5 M. L. J. 282; 6 Ind. Dec. (N. S.) 733 (F. B.), distinguished.

The provisions of O. XXI of the Code of Civil Procedure apply to sales after the passing of the decree absolute for sale under O. XXXIV, r. 8, of the Code.

Jai Kishori v. Mohammad Ali Mohammad Khan, 60 Ind. Cas. 560; 7 O. L. J. 620, referred to.

Appeal against a decree of the District Judge, Fyzabad, dated the 21st March 1922, confirming an order of the Sub-Judge, Fyzabad, dated the 15th January 1921.

Messrs. Wasi Hasan and Wasim, for the Appellant.

Mr. Bisheshar Nath, for the Respondent.

JUDGMENT.—The facts of the second appeal are as follows: A usufructuary mortgage was effected by Asil Din and Musammat Chandar Dei to Haji Badullah on 28th June, 1894. The mortgagors obtained a preliminary decree for redemption under O. XXXIV, r. 7 on 21st of August 1917, and the date fixed for payment was 21st February 1918. No payment was made, so, on the application of the mortgagee, a decree absolute for sale under O. XXXIV, r. 8 (4) was passed by the Court on 26th October 1918. No action to get the property sold was continued by the mortgagee.

On 6th August, Nageshwari Prasad, re-presenting the interest of the original mortgagors, deposited in Court the entire amount due for which sale was ordered under the decree absolute. The mortgagee thereupon objected that, after the passing of the decree for sale, the mortgagors had no right to deposit the money and redeem the property. Both the lower Courts disallowed the objection, so the mortgagee, Hayat Muhammad, has come here in second appeal.

The objection of the mortgagee does not appear to be tenable. It was held by a Full Bench of the Madras High Court in *Vallabha Valiya Rajah v. Vedapuratti* (1) that a mortgagor, who had made default in payment of the mortgage-money within the time limited by the decree in a suit for redemption, was not entitled to apply for execution of the decree after the time limited. This ruling had reference to the provisions of sections 92 and 93 of the Transfer of Property Act which are now replaced by rr. 7 and 8 of O. XXXIV of the Code of Civil Procedure. In section 93 there was a provision that, on the passing of an order under that section, that is, an order for sale on non-deposit of the money by the mortgagor, the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished. There is no corresponding provision of that nature in r. 8 of O. XXXIV. When the provisions relating to procedure in the Transfer of Property Act are included in the general Code of Civil Procedure, the intention appears to be, that the provisions of O. XXI will govern execution proceedings in sale, subsequent to the passing of the final decree for sale. The decree for execution at present before the Court is, that the property be sold for a certain sum to satisfy the claim of the mortgagee. That is a decree in favour of the mortgagee and the mortgagor is entitled to satisfy it within the period of limitation. It is difficult to understand how the mortgagor can be prevented from satisfying the decree passed against him, In *Jai Kishori v. Mohammad Ali Moham-*

(1) 19 M. 40; 5 M. L. J. 282; 6 Ind. Dec. (N. S.) 733 (F. B.).

HIRA RAUT V. FAKIRCHAND MAHTON;

mad Khan (2), a learned Judge of this Court observed: "It is now generally agreed that the provisions of O. XXI would also apply to sales ordered under O. XXXIV of the Code" (page 629* of the report). It was conceded by the appellant's learned Counsel here, that if the property in suit were actually put up to auction, the respondent could pay the money and save the sale under r. 69, and that even after sale, he could get the sale set aside on deposit of the purchase-money under r. 89 of O. XXI. His contention was that, until the mortgagee chose to take action and bring the property to sale, the mortgagor judgment-debtor of the decree absolute had no right to move in the matter. If this were true, the procedure would be devoid of any reason. Rules of procedure are to be liberally construed in order to do justice between judgment-creditor and judgment-debtor. The intention of r. 8 is that an end should be put to the mortgage once a suit for redemption is brought, and such an intention would be defeated if the mortgagee after obtaining the decree absolute for sale is permitted not to proceed with the sale, and to prevent the mortgagor from satisfying the decree. I think, that in this case what the mortgagor proposes to do is to pay off the decree passed against him, and, in my opinion, he is entitled to do so.

For these reasons, I dismiss this appeal with costs.

G. H.

Appeal dismissed.

(2) 60 Ind. Cas. 560; 7 O. L. J. 620.

*Page of 7 O. L. J.—[Ed.]

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 250 OF 1921.

January 29, 1923.

Present:—Mr. Justice ROSS.

HIRA RAUT—PLAINTIFF—APPELLANT
versusFAKIRCHAND MAHTON AND OTHERS—
DEFENDANTS—RESPONDENTS.

Transfer of Property Act (I V of 1882), s. 72 (b)
—Mortgage with possession—Rent of mortgaged land to be paid by mortgagee—Covenant to pay rent along with principal—Redemption, suit for—Mortgagee, right of.

Apart from any express contract, it is incumbent on a mortgagee in possession to pay arrears of rent in respect of the mortgaged property, in default of payment of which the property is liable to be sold. When he has made such payment he has a statutory right, in the absence of any contract to the contrary, to add it to the principal.

In a mortgage-deed the property was stated to be hypothecated for the principal sum but the mortgagee was authorised to pay arrears of rent and the mortgagor covenanted to pay any such amount paid by the mortgagee along with the principal at the time of redemption. It was urged that the stipulation as to the repayment of rent was a separate contract independent of the mortgage security and that if it was an integral part of the agreement, it was a clog on redemption:

Held, (1) that it was the statutory right of the mortgagee to add the amount of the arrears of rent paid by him to the principal, and the mortgagor was bound to pay the same at the time of redemption;

(2) that there was nothing in the contract to take the case out of the Statute; it merely acknowledged the statutory right and gave effect to it.

Appeal from a decision of the Subordinate Judge, Muzaffarpur, dated the 9th June 1920, affirming a decision of the Munsif of Hajipur, dated the 31st July, 1919.

Mr. S. N. Bose, for the Appellant.

Mr. Janak Kishore, for the Respondents.

JUDGMENT.—On the 14th of November 1896, 17 *kathas* and 8 *dhurs* of land were mortgaged by defendant third party to defendants second party in the name of defendants first party in consideration of an advance of Rs. 61. On the 26th of May 1916 the defendants third party sold the premises to the plaintiff who brought this suit for redemption. The defence was that, besides the principal sum advanced, the plaintiff was liable to pay rent from 1304 to 1325 with interest thereon which

BALLA MAL v. JAGAN NATH.

had been paid by defendants second party while in possession of the mortgaged property. The only question in this appeal is as to the liability of the plaintiff to pay the rent when redeeming the property. Both the Courts below have held that he is liable and he appeals against that decision. The question is one of the construction and effect of that portion of the *Sudbharna* deed which relates to the payment of rent. That passage has been translated as follows: "The payment of *Zemindari* rent shall rest with the *Bharnadar*. I, the executant, neither have nor shall have any concern therewith. The *Bharnadar* shall himself obtain receipt on my behalf. At the time of payment of the said principal amount, I shall pay the rent with interest at Rs. 2 per cent. per mensem." Mr. S. N. Bose in an interesting argument contended that the land was hypothecated for the principal sum only. The words in the deed are "As security for the said amount of debt I hypothecate the mortgaged property." It is argued that the stipulation as to the repayment of the rent is a separate contract independent of the mortgage security; that it contains only a personal covenant by the mortgagor which will not run with the land so as to affect it in the hands of a purchaser from the mortgagor; and that if it is an integral part of the agreement it is a clog on the equity of redemption and, therefore, the Court will not give effect to it. Now, even apart from the express contract, it would have been incumbent on the mortgagee in possession to pay arrears of rent in default of payment of which the property might have been sold. When he makes such payment he has a statutory right, in the absence of any contract to the contrary, to add it to the principal. The question, therefore, is whether the contract expressed in the deed is a contract which takes away this statutory right. It does not do so in express words. Does it do so by necessary implication? On reading the deed I cannot so hold. On the contrary, it seems clear from the undertaking to repay the rent with interest at the time of paying the principal, that the statutory right was acknowledged and given effect to. It is true that the property was hypothecated for the principal sum, but the Statute increases that principal sum by

the amount of rent paid to save the property, unless it is contracted out of, and I can find nothing in the words here used to take the case out of the Statute. The words may not add anything to the rights of the mortgagee but they certainly take nothing away from them. The appeal, therefore, fails and must be dismissed with costs.

Z. K.

N. H.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL

NO. 2843 OF 1921.

June 7, 1922.

Present:—Mr. Justice Abdul Raoof.BALLA MAL—PLAINTIFF—APPELLANT
versusJAGAN NATH AND OTHERS—DEFENDANTS
—RESPONDENTS.*Civil Procedure Code (Act V of 1908), s. 20 (c)*
—Place of suing—Suit to set aside collusive decree—*Cause of action.*

Plaintiff obtained a decree against N. and attached certain properties belonging to the latter at Amritsar. J. obtained another decree against N. at Ferozepore and got it transferred for execution to Amritsar where he applied for rateable distribution of the assets under plaintiff's decree. Plaintiff brought a suit at Amritsar for a declaration that J.'s decree was collusive and fraudulent.

Held, that the cause of action for the suit had arisen at Amritsar and the Amritsar Court therefore, had jurisdiction to hear the suit.

Banke Behari Lal v. Pokhe Ram, 25 A. 48; A. W. N. (1902) 179, *Jawahir v. Nehi Ram*, 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190, *Khushali Ram v. Gokul Chand*, 41 Ind. Cas. 352; 39 A. 607; 15 A. L. J. 638 and *Ram Lal-Ishar Das v. Saig Ram*, 59 Ind. Cas. 2; 7 P. W. R. 1921, relied upon.

Umrao Singh v. Hardeo, 29 A. 418; 4 A. L. J. 392; A. W. N. (1907) 112, *Dau Dial v. Munna Lal*, 24 Ind. Cas. 978; 36 A. 564; 12 A. L. J. 555, distinguished.

Miscellaneous first appeal from the order of the Junior Subordinate Judge, 1st Class, Amritsar, dated the 16th November 1921, returning the plaint for presentation to a competent Court.

Mr. D. C. Ralli, for the Appellant.

Lala Jagan Nath for the Respondents.

JUDGMENT.—The following facts will disclose the nature of the question which is to be decided in this appeal:—

BALLA MALL V. JAGAN NATH.

In 1908 one Balla Mall sued Nasir-ud-Din for the recovery of Rs. 1,22,000 odd. A decree was granted in his favour on the 31st July 1911. There were subsequent proceedings in appeal which need not be mentioned. Jagan Nath and Nasir-ud-Din in consequence of a claim, real or unreal made a reference to arbitration on the 2nd July 1913. An award was given on the 6th July 1913 and in terms of the award a decree was passed by a Ferozepore Court in favour of Jagan Nath on the 11th July 1913 for the sum of Rs. 56,208 with future interest at six per cent. The decree in favour of Balla Mall had been passed by a Court at Amritsar. Balla Mall applied for the execution of his decree at Amritsar and attached certain properties belonging to the judgment-debtor and situate in the District of Amritsar. Jagan Nath applied for execution of his decree to the Court at Ferozepore and asked for a certificate transferring the decree to be executed at Amritsar. When the decree had been transferred for execution at Amritsar Jagan Nath applied under section 73, Civil Procedure Code, for a rateable distribution of the assets. Balla Mall objected to the application of Jagan Nath, alleging that he was not entitled to a *pro rata* share in the assets, as the decree on the award had been obtained fraudulently and without consideration in order to deprive him of the assets obtained in execution of his decree. Those objections were disallowed.

Thereupon the present suit was instituted by Balla Mall for the following relief:—

“That a decree with costs may be passed in his favour against defendants to the effect that the decree in favour of defendant No. 1 against Nasir-ud-Din dated the 11th July 1913 for Rs. 56,208 passed by the Court of the District Judge, Ferozepore, according to the award is fictitious without consideration and collusive and it has no value against plaintiff's decree and is not liable for execution, neither any property of Nasir-ud-Din is liable to be attached and sold in that decree nor any application for *pro rata* share by defendant No. 1 could lie against plaintiff.”

One of the pleas raised in defence was that the suit being for the cancellation of a decree passed by the Ferozepore

Court was not cognizable by the Court at Amritsar. This plea found favour with the learned Judge of the Court below and the plaint was returned for presentation to the Court competent to try it.

Balla Mall has come up in appeal to this Court and it has been contended on his behalf by Mr. Ralli that, inasmuch as a material portion of the cause of action had taken place at Amritsar, the plaintiff was entitled to institute his suit either at Amritsar or at Ferozepur. In support of his contention the learned Counsel has relied on the following cases which fully support his argument:—

Banke Behari Lal v. Pokhe Ram (1), *Jawahir v. Neki Ram* (2), *Khushali Ram v. Gokul Chand* (3) and *Ram Lal-Ishar Das v. Salig Ram* (4).

The learned Judge of the Court below has held that inasmuch as the decree sought to be set aside was obtained in Ferozepur that was the cause of action for this case. In my opinion this view is incorrect. Balla Mall was not a party to the suit of Jagan Nath and the decree in no way affected him. He, therefore, had no cause of action to sue for the setting aside of that decree on any ground. It was only when the decree was transferred for execution to Amritsar and an application was made for a *pro rata* share in the assets, that a cause of action arose entitling the plaintiff to prefer the claim. On the facts it is clear that the main cause of action did take place at Amritsar. Mr. Jagan Nath, the learned Vakil for the respondent, has relied on *Umrao Singh v. Hardeo* (5) and *Dau Dial v. Munna Lal* (6) and has contended that the passing of the fraudulent decree must be taken to be the cause of action for the suit; but in both these cases the decree had been passed against the plaintiffs in the suits, and, therefore, their only cause of action was the passing of the decree. Those cases are, therefore, clearly distinguishable from the present case.

I accordingly set aside the order of the lower Court and remand the case to that

(1) 25 A. 48; A. W. N. (1902) 179.

(2) 28 Ind. Cas. 502; 37 A. 189; 13 A. L. J. 190.

(3) 41 Ind. Cas. 352; 39 A. 607; 15 A. L. J. 638.

(4) 59 Ind. Cas. 2; 7 P. W. R. 1921.

(5) 29 A. 418; 4 A. L. J. 392; A. W. N. (1907) 112.

(6) 24 Ind. Cas. 978; 36 A. 564; 12 A. L. J. 955.

CHAUHARJA BAKHSH V. KALKA PANDE.

Court with the direction that it should receive back the plaint and dispose of the suit on the merits. Costs will abide the result.

Z. K.

*Order set aside;
Case remanded.*

OUDH JUDICIAL COMMISSIONER'S COURT.

Civil Revision No. 77 OF 1922.

September 14, 1922.

Present.—Mr. Simpson, A. J. C., and
Syed Wazir Hasan, A. J. C.

CHAUHARJA BAKHSH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

KALKA PANDE—DEFENDANT—OPPOSITE
PARTY.

Civil Procedure Code (Act V of 1908), s. 115
—*Oudh Rent Act (XXI of 1886), s. 119, suit*
under—Assistant Collector, whether subordinate
to High Court.

The Court of an Assistant Collector, when exercising jurisdiction under the Oudh Rent Act, over the class of cases in which the course of appeal lies to the High Court, is a Court subordinate to the High Court, within the meaning of section 115 of the Civil Procedure Code. [p. 394, col. 2.]

Maheshur v. Bhikh Chand, 68 R. A. R. 1893;
Babu Udres Singh v. Ram Bharos, 63 R. A. R. 1892;
Indar Parshad v. Babu Fateh Chand, 9 Ind. Cas. 747; 14 O. C. 38 and *Debi Bakhsh Singh v. Habib Shah*, 19 Ind. Cas. 526; 16 O. C. 194; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 35 A. 331; 40 I. A. 151 (P. C.), referred to.

Application against an order of the Assistant Collector of the First Class, Sultanpur, dated the 4th April 1922.

Messrs. *Haider Husain* and *Niamat Ullah*, for the Applicants.

Mr. *Ishri Prasad*, for the Opposite Party.

JUDGMENT.—This is an application in revision under section 115 of the Code of Civil Procedure. The application in the first instance came up for hearing before one of us sitting as a single Judge of this Court but in view of the importance of the question raised in the preliminary objection by the Pleader for the opposite party, the matter was referred to a Bench of two Judges. The application has come before us for decision.

The application arises out of a suit for the recovery of rent brought by the applicants

against the defendant, opposite party, in the Court of an Assistant Collector of the First Class of Sultanpur. The defendant filed his written statement in due course and issues were settled on the 19th October, 1921. Afterwards the case was taken up on several dates for hearing in the presence of the parties but was always adjourned for one reason or another till the 4th March 1922 on which date it was disposed of. On the last-mentioned date the defendant failed to appear and in his absence some evidence was produced on behalf of the plaintiffs and finally the Court decreed the suit remarking in the judgment that it was to be an *ex parte* decree. The defendant thereafter applied to the same Court asking for the said decree to be set aside. The Court accepted the application and passed an order setting aside the decree. This application impugns the validity of that order. A preliminary objection is taken on behalf of the defendant, opposite party, that no revision lies to this Court under section 115 of the Code of Civil Procedure from the order passed by the Assistant Collector in this case. It is argued that the Court of an Assistant Collector exercising jurisdiction under the Oudh Rent Act, is not a "Court subordinate" to this Court within the meaning of section 115 of the Code of Civil Procedure.

It is admitted that the case out of which this application arises falls within the class of cases in which the course of appeal lies to the Court of the District Judge and to this Court under section 119 of the Oudh Rent Act. The chief function of a Court of Appeal is to redress the error of the Court from whose decision it has jurisdiction to entertain an appeal. *Prima facie*, therefore, the Court of the Assistant Collector, when exercising jurisdiction over the class of cases in which the course of appeal lies to this Court, is a Court subordinate to this Court. Whatever might have been our own opinion on the subject, if the matter were *res integra*, the precise question now raised was raised and considered so far back as the year 1893. In the case of *Maheshur v. Bhikh Chand* (1), Dr. Howell, with reference to an earlier decision of two

(1) 68 R. A. R. 1893.

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Judges of this Court in the case of *Babu Udres Singh v. Ram Bharos* (2), decided as follows:—"I am of opinion that the revisional jurisdiction of this Court under section 622, Civil Procedure Code, read with section 135 of the Rent Act, is restricted to those cases in which the course of appeal lies to this Court under sections 119 and 119-B of the latter Act, and does not extend to cases in which the course of appeal lies to the Board." The matter was again considered in the case of *Indar Parshad v. Babu Fateh Chand* (3) by a Bench of two Judges of this Court and the view expressed in *Maheshur v. Bhikkh Chand* (1) was affirmed. These decisions have consistently been acted upon in this Court as we have ascertained from the office and other instances were also quoted before us. A matter which eventually went in appeal to His Majesty's Privy Council from a decision of this Court was heard by this Court under an application in revision arising out of a suit for recovery of rent decided by an Assistant Collector of the First Class and will be found reported as *Debi Bakhsh Singh v. Habib Shah* (4). The decision of this Court is reported as *Debi Bakhsh Singh v. Habib Shah* (5). On these grounds we are not disposed to give effect to the preliminary objection and accordingly reject it.

On the merits of the case, it is argued on behalf of the applicants that the Assistant Collector had no jurisdiction to set aside the *ex parte* decree because that decree, in the circumstances of the case, could not be deemed to have been passed under the provisions of O. IX, r. 6, of the Code of Civil Procedure. It is true that the proper procedure for the Assistant Collector to have adopted in deciding the suit was one which is provided by r. 3 of O. XVII of the Code, but as the order which he has passed in the case is manifestly a just and sensible order we are not disposed to interfere with it in the exercise of our revisional jurisdiction.

The application is, therefore, dismissed with costs.

N. K.

Revision rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL PETITION No. 13 OF 1922.

January 30, 1923.

Present.—Mr. Batten, J. C., and Mr. Hallifax, A. J. C.

Seth MAGAN MAL, AND ANOTHER—
PLAINTIFFS—APPLICANTS

versus

DARBARILAL CHOWDHARY—

DEFENDANT—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 110
—Amount and nature of suit—Interest decreed,
whether to be considered—Valuation of property
—Date of valuation.

In determining whether or not a case fulfils the requirements of section 110 of the Civil Procedure Code, as regards amount and nature, interest awarded on the amount decreed should be taken into consideration.

Dalgleish v. Damodar Narain Chowdhury, 33 C. 1286, *Moti Chand v. Ganga Prasad Singh*, 24 A. 174 at p. 177; 6 C. W. N. 362; 29 I. A. 40; 4 Bom. L. R. 159; 8 Sar. P. C. J. 247 (P. C.), referred to.

Subramania Aiyar v. Sellammal, 31 Ind. Cas. 296; 39 M. 843; 2 L. W. 1057; 18 M. L. T. 450; (1915) M. W. N. 941; 30 M. L. J. 317, distinguished.

The point of time to be considered, as to the value of the property under the second paragraph of section 110 of the Civil Procedure Code, is the date of the judgment under appeal to the Privy Council.

Mahabir Prasad Singh v. Anup Narain Singh, 46 Ind. Cas. 137; 3 P. L. J. 377; (1918) Pat. 246; 5 P. L. W. 327, followed.

Application for leave to appeal to His Majesty in Council against the decree passed in First Appeal No. 15 of 1920, on the 21st December 1921.

Sir B. K. Bose, R. B., Messrs. N. G. Bose, S. C. D. Chowdhury and P. N. Rudra, for the Applicant.

Mr. G. L. Subhedar, for the Non-Applicants.

ORDER.—In First Appeal No. 15 of 1920 a single Judge of this Court dismissed the suit of the plaintiffs, the present applicants, thereby reversing the judgment and decree

(2) 63 R. A. R. 1892.

(3) 9 Ind. Cas. 747; 14 O. C. 38.

(4) 19 Ind. Cas. 526; 16 O. C. 194; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 35 A. 331; 40 I. A. 151 (P. C.).

(5) 4 Ind. Cas. 711.

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of the Subordinate Judge. Damoh. The plaintiffs now apply for a certificate granting them leave to appeal to His Majesty in Council.

The suit was based on a mortgage-deed for Rs. 7,000 and the amount claimed was Rs. 9,776 together with interest to the date of the decree and further interest to the date of payment. The plaint was presented on the 11th December 1916, and was returned to be signed by the plaintiffs personally. It was again presented to the Subordinate Judge on the 2nd February 1917. The first hearing was on the 16th January 1917, and the suit was decided on the 17th November 1919, when a preliminary decree for sale was granted. The decree was for Rs. 9,776 and Rs. 3,451-6-3 compound interest at 9 per cent. per annum up to the 17th May 1920, the day fixed for payment, together with interest on the total amount at 6 per cent. per annum up to the date of actual payment. The appeal was filed on the 26th February 1920, and decided on the 21st December 1921.

For the applicants it is contended that as the value of the subject-matter of the decree passed by the Subordinate Judge and of the decree on appeal to His Majesty in Council is upwards of Rs. 10,000 the case as regards amount and nature fulfils the requirements of section 110, Civil Procedure Code. For the non-applicant it is objected that the amount claimed in the suit in the Court of first instance being Rs. 9,776, the case does not fulfil the requirements of the section. The learned Advocate for the applicants points out that in the tenth paragraph of the plaint not only it is stated that the amount due on the date of the suit is Rs. 9,776, but interest up to the date of the decree and further interest to the date of payment is also claimed. The amount by which the amount said to be due on the date of the suit falls short of Rs. 10,000 is Rs. 224, and this amount represents the interest for about three and a half months. It is represented that there was no possibility of a decree being granted within three and a half months, so that the amount for which a decree was asked amounted to Rs. 10,000.

In *Dalgleish v. Damodar Narain Chowdhury* (1) the plaintiffs were allowed to take

into account in this connection mesne profits to be ascertained in execution proceedings. In *Surendra Nath Roy v. Dwarka Nath* (2) it was held that the point of time to be considered, as to the value of the property, under the second paragraph of section 110 is the date of the judgment under appeal to the Privy Council. In *Mahabir Prasad Singh v. Anup Narain Singh* (3) the Patna High Court followed the practice of the Calcutta High Court in including mesne profits up to the date of the Appellate Court's decree.

On the other hand, in *Subramania Aiyar v. Sellammal* (4) mesne profits up to the date of the High Court's decree were not taken into consideration. That case differs from the present in that in the present case on the date of the lower Court's decree the amount decreed had amounted to more than Rs. 10,000. The question before us cannot, we think, be said to have been decided by their Lordships of the Privy Council in *Moti Chand v. Ganga Prasad Singh* (5) for their Lordships say: "The amount or value of the subject-matter of the suit in the Court of first instance, construing that in the manner most favourable to the proposed appellant, was at the outside the amount for which he recovered his decree which was below Rs. 10,000." The facts in *Kesho Prasad Singh v. Shiva Saran Lal* (6) are hardly such as to afford any guide in the present case.

On the whole, we are of opinion that the case does satisfy the requirements of section 110 as to amount and nature, since on the date of the decree the amount to be paid on the date fixed already included together with interest an amount exceeding Rs. 10,000 and a decree including interest up to the date of the decree had been asked for in the plaint.

(2) 35 Ind. Cas. 605; 44 C. 119; 24 C. L. J. 350; 21 C. W. N. 530.

(3) 46 Ind. Cas. 137; 3 P. L. J. 377; (1918) P. L. 246; 5 P. L. W. 327.

(4) 31 Ind. Cas. 296; 39 M. 843; 2 L. W. 1057; 18 M. L. T. 450; (1915) M. W. N. 941; 30 M. L. J. 317.

(5) 24 A. 174 at p. 177; 6 C. W. N. 362; 29 I. A. 40; 4 Bom. L. R. 159; 8 Sar. P. C. J. 247 (P. C.).

(6) 44 Ind. Cas. 475; 3 P. L. J. 317; 4 P. L. W. 240.

(1) 33 C. 1286.

JAGDIP PANDEY v. TAIBUNNISSA. PALANCHERI GOVINDA v. POOKOTE KUNTI KRISHNA.

We may observe further that the appeal involves a substantial question of law of general interest, namely, whether the consideration of the mortgage was illegal in the circumstances found by this Court.

A certificate will be granted.

W. C. A.

Certificate granted.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 296 OF 1921.

February 1, 1923.

Present:—Mr. Justice Ross.

JAGDIP PANDEY AND OTHERS—

DEFENDANTS—APPELLANTS

versus

Musammât TAIBUNNISSA AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XIII, rr. 11, 2—Admission of documents at late stage—Discretion of Court—Refusal to admit documents—Appeal, second, competency of.

It is matter for the discretion of the Trial Court to admit a document produced at a late stage, but in such matters of procedure the Court should lean to an interpretation which advances justice rather than to a contrary interpretation.

Ranchhod Hirabhai v. Secretary of State for India, 22 B. 173; 11 Ind. Dec. (N. S.) 637, referred to.

Where the documents sought to be put in evidence; have an important bearing on the question at issue in the trial and there is no ground for supposing that they have been fabricated the Court should not reject them.

The refusal to admit a document produced at a late stage of the case is a ground for second appeal.

Talewar Singh v. Bhagwan Das, 12 C. W. N. 312; 8 C. L. J. 147, referred to.

Appeal from a decision of the District Judge, Darbhanga, dated the 18th November 1920, confirming a decision of the Munsif, Samastipur, dated the 31st May 1920.

Mr. Jank Kishor, for the Appellants.

Mr. Sd. Md. Tahir, for the Respondents.

JUDGMENT.—The only point argued in this appeal is that the Munsif was wrong in refusing to admit in evidence a letter written by Mr. Mackenzie and certain *jama-*

bandis which were tendered late. The District Judge agreed with the Munsif and held that these documents were rightly rejected.

That this is a ground in second appeal has been held in *Talewar Singh v. Bhagwan Das* (1). It is true that it is a matter for the discretion of the Trial Court; but as was pointed in *Ranchhod Hirabhai v. Secretary of State for India* (2), in such matters of procedure the Court should lean to an interpretation which advances justice rather than to a contrary interpretation. Now in this case these documents had been exhibited in a case under O. XXI, r. 100 between the parties to the present litigation. There was, therefore, no ground for supposing that they had been fabricated and they evidently had an important bearing on the question at issue in the trial. The Court below, in my opinion, erred in the exercise of its discretion in rejecting these documents. I, therefore, decree this appeal, set aside the decrees of the Courts below and direct that the case be remanded for re-trial by the Munsif after taking in evidence the *jama-bandis* and the letter written by Mr. Mackenzie. Costs will abide the result.

Z. K.

Appeal allowed.

(1) 12 C. W. N. 312; 8 C. L. J. 147.

(2) 22 B. 173; 11 Ind. Dec. (N. S.) 637.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 20 OF 1922.

January 10, 1923.

Present:—Mr. Justice Spencer and

Mr. Justice Venkatasubba Rao.

PALANCHERI GOVINDA MENON—

DEFENDANT—APPELLANT

versus

POOKOTE KUNTI KRISHNA MUNNA-

DIAR AND ANOTHER—RESPONDENTS.

Res judicata—Execution proceedings—Mortgage—Redemption decree—Final decree not passed—Sale of certain items allowed without objection—Application for sale of other item—Objection as to non-existence of final decree, maintainability of.

In a suit for redemption, pending an appeal against the preliminary decree, a final decree was

PALANCHERI GOVINDA V. POOKOTE KUNTI KRISHNA.

passed. The Appellate Court varied the preliminary decree by enhancing the amount to be paid to the mortgagee. After the variation, no fresh final decree was passed. The decree-holder, however, applied for sale of certain items of property, which was ordered without objection by the judgment-debtor. On a later application to sell certain other items of property, on objection being taken by the judgment-debtor to the executability of the decree on the ground that there was no subsisting final decree:

Held, that though the Executing Court did not, on the prior occasion, expressly hold that the decree was executable, in spite of the absence of a final decree, yet as that objection should have been taken, and as the sale was ordered in execution of the decree as it stood, the effect of the order was to decide in favour of the executability of the decree and that the judgment-debtor was barred by the rule of *res judicata* from raising the objection that there was no final decree in respect of the items now sought to be sold, and the mere fact that the previous application was for the sale of other items did not make any difference. [p. 399, col. 2.]

Epoor Ramasamy Reddy v. Kandadai Ranganamannar Iyengar, 23 Ind. Cas. 390; 26 M. L. J. 255; (1914) M. W. N. 622; 15 M. L. T. 246. *Subba Chariar v. Muthuveeram, Pillai* 14 Ind. Cas. 264; 36 M. 553; 24 M. L. J. 545. *Mungul Pershad Ditchi v. Grija Kant Lahiri*, 8 C. 51; 8 I. A. 123; 11 C. L. R. 113; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.). *Raja of Ramnad v. Velusami Tevar*, 59 Ind. Cas. 880; 40 M. L. J. 197; 19 A. L. J. 168; 13 L. W. 290; (1921) M. W. N. 51; 33 C. L. J. 218; 25 C. W. N. 581; 23 Bom. L. R. 701; 29 M. L. T. 345 (P. C.), relied on.

Appeal against the order of the District Court of South Malabar, dated 20th August 1921, in Appeal Suit No. 178 of 1921, preferred against the order of the Court of the Subordinate Judge of Ottapalam, dated 11th November 1920, in E. P. No. 14 of 1919 in Original Suit No. 24 of 1922 (Palghat Sub Court).

Messrs. C. V. Ananta Krishna Iyer and C. Unikanda Menon, for the Appellant.

Mr. K. P. M. Menon; for the Respondents.

JUDGMENT.

Spencer, J.—This second appeal arises out of the orders passed in execution of the decree in a suit for redemption of a mortgage of a number of items of property in Malabar. The decree of the Original Court was passed on 24th February 1913, and there was a final decree of that Court on 22nd April 1913. Meanwhile, an appeal was brought against the preliminary decree, and that appeal was decided on 27th December 1913. The present application is one made by the mortgagor to sell items

11 to 120. There was a previous application to sell items 1 to 10, upon which an order for sale was passed on 23rd July 1915. The present application was made on 20th January 1919.

Two questions arise for our decision. The first is, whether the present application is barred by limitation, as more than 3 years have elapsed from the date of the Appellate Court's decree. The second question is, whether the application for sale is valid when no final decree has been passed, since the Appellate Court's decree varied the First Court's preliminary decree by enhancing the amount to be paid to the mortgagee.

On the first point I feel no difficulty in holding that the present is an application in execution, and it is made within three years of previous applications in execution of the same decree under Art. 182 clause 5 of the Limitation Act. It is, therefore, within time.

The second question is one of some difficulty. The order of the Executing Court on 23rd July 1915 was that the items 1 to 10 should be sold as prayed for. At first, the decree-holder asked for the sale of all the items 1 to 120. The petitioner's final prayer was to sell the items 1 to 10, and they were accordingly sold. No objection was then raised by the mortgagee-judgment-debtor that the application was not admissible in the absence of a final decree. On the authority of *Govinda Tharagan v. Veeran* (1) it was open to a mortgagor to apply for the sale of the mortgaged property and accordingly items 1 to 10 were sold.

It is argued for the respondents that at the time when that order was passed the executability of the decree was in question. The appellant's learned Vakil seeks to distinguish the present application from the previous one on the ground that that was only an application for selling items 1 to 10 and he contends that the order does not operate as *res judicata* in an application to sell different items. He also points out that the application then made purported to be made under O. XXXIV, r. 8, Civil Procedure Code (1908), as well as under the

(1) 12 Ind. Cas. 432; 36 M. 32; 21 M. L. J. 941; 10 M. L. T. 322; (1911) 2 M. W. N. 323.

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Execution Chapter, so that if an objection had then been taken that there was no final decree, the decree-holder might have asked the Court to treat that application as one for a final decree as he was then in time under Art. 181 for applying to the Court to pass a final decree.

In *Epoor Ramasamy Reddy v. Kandadai Rangamannar Iyengar* (2) a similar objection was raised that an order absolute had not been made before executing a mortgage-decree, and it was held that the objection could not prevail when an order for execution had already been made after notice, and that order had not been set aside. An attempt is made to distinguish that case on the ground that there the property was the same in both the applications for execution, whereas here the items are different. But here, as in that case, the decree was the same, and the objection to the executability of the decree is an objection, which, if raised, would be common to the present application and to the previous one. In *Subba Chariar v. Muthuvceram Pillai* (3), it was held that, where in the course of a second application for execution of a money-decree an objection was raised that the application was barred by limitation, not being within 3 years of the date of attachment, the judgment-debtor was estopped from contending that the attachment was not subsisting. The items appear to have been partly the same as in the previous petition, and partly fresh items, but the attachment was the same. In *Mungul Pershad Ditchit v. Grija Kant Lahiri* (4) the Privy Council held that if an order for execution had been made by a Court which had jurisdiction to decide whether the decree was barred by time or not, even though such an order might be erroneous, if it was not reversed, it would operate as *res judicata* in a subsequent application to execute the same decree. In *Raja of Ramnad v. Velusami Tevar* (5),

a similar objection as to limitation arose. The appellant was the assignee of a decree, and on a previous application to execute the decree, a plea of limitation was raised. Their Lordships observed that it was not necessary to decide whether or not the plea would have succeeded if an appeal had been brought against the order for execution. As the defendants did not appeal from the order then made, it was not competent for the Executing Court in subsequent proceedings to allow the plea to be raised a second time. Applying the reasonings of those decisions, *mutatis mutandis*, to the present case we may say that, even though the Executing Court did not, on a previous occasion, pronounce in so many words that the decree was executable in spite of their being no final decree passed after the Appellate Court's decree, yet as that objection should have been taken then and as sale was ordered in execution of the decree as it stood, the effect of that order was to decide in favour of the executability of the decree and it is not open now to the appellant to raise the objection that there is no final decree in respect of the items now involved. No doubt, the items are different, but the question that should have been raised on the previous occasion and that is sought to be raised in the present case relates to the executability of the decree as a whole and that is a question common to all the items. I am, therefore, of opinion that the appellant is barred by *res judicata* from raising this objection in the present case and that the appeal must be dismissed with costs.

Both parties agree that, before the final execution is made, a Commissioner should be appointed and there should be a valuation of the improvements effected since the last valuation was made.

I consider it unnecessary to express an opinion whether, as was held by two learned Judges in *Nanu Nair v. Kundan Ashtamurthi* (6), there should be only one decree in mortgage suits in Malabar.

Venkatasubba Rao, J.—I entirely agree and have nothing to add.

V. N. V.

Appeal dismissed.

(6) 47 Ind. Cas. 914; (1918) M. W. N. 551; 8 L. W. 275.

(2) 23 Ind. Cas. 390; 26 M. L. J. 255; (1914) M. W. N. 622; 15 M. L. T. 246.

(3) 14 Ind. Cas. 264; 36 M. 553; 24 M. L. J. 545.

(4) 8 C. 51; 8 L. A. 123; 11 C. L. R. 113; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

(5) 59 Ind. Cas. 880; 40 M. L. J. 197; 19 A. L. J. 168; 13 L. W. 290; (1921) M. W. N. 51; 33 C. L. J. 218; 25 C. W. N. 581; 23 Bom. L. R. 701; 29 M. L. T. 345 (P. C.).

MOTI LALL V. RAMKHELAWAN DAS.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE

NO. 928 OF 1921.

February 8, 1923.

Present :—Mr. Justice Ross.

MOTI LALL AND ANOTHER—DEFENDANTS
—APPELLANTS

versus

RAMKHELAWAN DAS—PLAINTIFF

AND OTHERS—DEFENDANTS—RESPONDENTS.

Will, construction of—Property devised for performance of sradh ceremony—Ceremony performed by volunteer, effect of.

A testator devised certain property to the defendants for the purpose of defraying the expenses of the performance of his *sradh* ceremony. The defendants being minors, the *sradh* ceremony of the testator was performed by a volunteer :

Held, that, under the circumstances, the defendants took the property free from the burden and that it could not be said that there was an intestacy with regard to the devised property.

Appeal from a decision of the Subordinate Judge, Patna, dated the 6th October 1920, modifying a decision of the Munsif, First Court, Patna, dated the 28th February 1920.

Mr. Sundar Lall, for the Appellants.

Mr. Janak Kishor, for the Respondents.

JUDGMENT.—This appeal raises a question of the construction of the Will of one Kandhai. The plaintiff and defendant No. 4 are the nearest agnates. The defendants Nos. 1 and 2 are the sons of a daughter of a brother of the testator. One of the provisions of the Will related to 1 *bigha* and 5 *kathas* of land and it is this property which is the subject-matter of the suit. The plaintiff claimed to be jointly entitled to this property along with defendant No. 4 on the ground that it had not been disposed of by Kandhai in his Will.

The Munsif held that the property had been disposed of in favour of defendants Nos. 1 and 2; but this decision was reversed by the Subordinate Judge. The Will recites that these defendants Nos. 1 and 2 lived with the testator as his own children. After other dispositions of property the testator goes on to say that he has kept the remaining 1 *bigha* 5 *kathas* *raiyaal kashat* for the purpose of performing the *sradh* ceremony of the executant. After the death of the executant, Moti Lall and Debi Lall, sons of Jaggu Mahto, who are the own maternal

grandsons of Hossaini Mahto, the executant's brother, and who are the *Chachera* grandsons of the executant, will obtain possession over the same and sell it and perform the *sradh* ceremonies of the executant from the consideration money and the cremation ceremony and *sradh* of the executant may be performed by one of the two *Chachera* grandsons only. "And I give to Moti Lall and Debi Lall mentioned above after my death all the properties." In the schedule annexed to the Will there is a further reference to this piece of land as follows: "This land the executant has kept for performing his funeral ceremonies and Moti Lall and Debi Lall are hereby authorised to perform the funeral ceremonies after my death by one of the above-mentioned persons and sell the land as described below and spend the same in my *sradh*." The two legatees being minors the funeral ceremonies were actually performed by defendant No. 4. The contention of the plaintiff is that the result of this has been that there is an intestacy with regard to 1 *bigha* and 5 *kathas*. I am wholly unable to see why this result should follow. The testator willed that this 1 *bigha* 5 *kathas* should come to the possession of defendants Nos. 1 and 2 and he directed them to sell it and perform his *sradh* ceremonies with the proceeds; but, if the *sradh* ceremonies were validly performed by a volunteer, the plain result was that they took the property free from the burden. I see absolutely no reason why, because a volunteer stepped in and performed the *sradh* ceremonies, this property which was specifically devised should go off to the agnates as intestate.

The appeal is decreed with costs and the decree of the Subordinate Judge is set aside and the decree of the Munsif is restored.

Z. K.

Appeal allowed.

ELIAS HAJI AHMED V. HAJI ESMAIL SAIT.

BOMBAY HIGH COURT.ORIGINAL, CIVIL, JURISDICTION APPEAL
No. 76 OF 1921.

January 16, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

ELIAS HAJI AHMED—APPELLANT

versus

K. B. HAJI ESMAIL SAIT—RESPONDENT.

Procedure—Commissioner's report, appeal against—Application for further directions—Trial Court, jurisdiction of.

While the hearing of exceptions to the report of a Commissioner are pending in an Appellate Court, the Trial Court is not competent to hear any application for further directions on the Commissioner's report, but if it does hear such an application and pass a decree, the plaintiff's remedy is to get rid of the decree by an appeal.

Mr. Bahadurji, for the Plaintiff.

Mr. Kamdar, for the Defendant.

JUDGMENT.—This case has been set down before us in a somewhat informal manner owing to an extraordinary series of errors of procedure which have been committed. Originally, there was a reference to the Commissioner and on that reference to the Commissioner, a report was made. The plaintiff filed exceptions to the Commissioner's report which were heard by Mr. Justice Kajiji. The plaintiff, dissatisfied with the decision of Mr. Justice Kajiji, filed an appeal, and to a certain extent succeeded in this Court, but while the appeal proceedings were pending, it seems that the case was set down before the Judge for directions and costs on the Commissioner's report. That could only properly be done after the exceptions had been dealt with and finally disposed of. While the hearing of the exceptions was pending in this Court, the lower Court was not competent to hear any application for further directions on the Commissioner's report which had not been finally settled. The Court having made an order on further directions a decree was drawn up. Then the decision was given by this Court on the exceptions, but it was incumbent on the plaintiff, as there was a final decree on the record, to appeal from that decree.

The plaintiff, instead of appealing against the decree, made an application to the Commissioner to amend his report in accordance

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with the decision of the Appeal Court, and the series of errors was completed by the Commissioner amending his report and the defendants filing exceptions to it. The whole of the proceedings in the lower Court while the appeal was pending were incompetent, but as a decree has been passed, the only way that the plaintiff can get rid of it is by an appeal. At present he is out of time, but he can make an application to have the delay excused. The defendant has asked for time and, therefore, we will hear the application next Monday. All costs to be reserved.

Order accordingly.

W. C. A.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 551 OF 1921.

February 26, 1923.

Present:—Mr. Justice Ross.JAG SAH AND ANOTHER—PLAINTIFFS—
APPELLANTS*versus*SRIKANTA PRASAD AND OTHERS—
DEFENDANTS—RESPONDENTS.*Escheat—Burden of proof—Tenure—Death of grantee—Reversion to landlord.*

The burden of establishing title by escheat is on the person who asserts it. Where a tenure granted by a *Zemindar* is anything less than a permanent and heritable tenure, the property reverts to the *Zemindar* on the failure of the heirs of the grantee. [p. 402, col. 2.]

Sonet Koor v. Himmat Bahadur, 1 C. 391; 25 W. R. 239; 3 I. A. 92; 3 Sar. P. C. J. 608; 3 Suth. P. C. J. 257; 1 Ind. Dec. (N. S.) 245 (P. C.), *Nil Madhab Sikdar v. Narattam Sikdar*, 17 C. 826; 8 Ind. Dec. (N. S.) 1095, referred to.

Appeal from a decision of the Additional Subordinate Judge of Chapra, dated the 9th December 1920, affirming a decision of the Munsif, Third Court of Chapra, dated the 27th November 1919.

Messrs. K. P. Jayaswal and Sunder Lal, for the Appellants.

Messrs. L. N. Singh and Harnarain Prasad, for the Respondents.

JUDGMENT.—This is a suit by some of the owners of the *shamilat patti* of Mouza Repura in which is situated a plot of land

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4 *bighas* 11 *kathas* 15 *dhurs* in area. The plaintiffs claim to redeem this property. They alleged that the land was originally the occupancy holding of one Kunj Behari Das, a *Sadhu*, who was succeeded by several heirs who are now dead without heirs. In 1852 Kunj Behari Das gave the land in suit in *Zarpeshgi* lease to the ancestor of the defendants.

The substantive defence was that the land was not the occupancy holding of Kunj Behari Das but a *Lakhiraj Brit* tenure and that the plaintiffs have no right to redeem. It was also pleaded that they were not all the proprietors and, therefore, could not maintain the suit.

The Munsif held that the land was *Lakhiraj Brit* and that the plaintiffs as co-sharers in some of the *Touzis* had no right or interest in the land and consequently no right to redeem. The Subordinate Judge also held that the land was a *Lakhiraj Brit* tenure and that as a tenure it passed by escheat to the Crown and not to the *Maliks* of the village and that the plaintiffs, therefore, had no equity of redemption. He also held that there was a defect of parties, but that nevertheless the suit was not liable to dismissal on that ground. He dismissed the appeal.

With regard to the point of defect of parties, it is sufficient to say that the plaintiffs put in a petition on the 23rd of August 1919 to add the other co-sharer landlords as parties to the suit. The defendant objected to this addition and the Munsif refused to allow it. Consequently, the respondents are not entitled to raise this point now.

The principal question in the case is, whether the plaintiffs are entitled to redeem. On this question the respondents relied on *Sonet Koor v. Himmat Bahadoor* (1) where it was held that lands belonging to *Zemindary* granted by the *Zemindar* under an absolute hereditary *Mukarrari* tenure, do not, on the death of the grantee without heirs, revert to the *Zemindar*; but the Crown by the general prerogative will take the property by escheat. In that case it was held

that the *Mukarrari* was an absolute interest and that there was no ground for saying that the land had reverted, in the proper sense of the term, to the *Zemindar*. In *Nil Madhab Sikdar v. Narattam Sikdar* (2) all that was said was that it seemed doubtful whether, when a landlord grants a permanent and heritable tenure in land, he has any estate left in him, and the decision in *Sonet Koor's case* (1) was referred to. Whatever may be the result, where the tenure is permanent and heritable, it seems clear that if it is anything less than this there must be a reversion to the proprietor.

Now, the burden of establishing title by escheat is on him who asserts it; *Secretary of State for India v. Haibat Rao Hari* (3). Consequently, if the defence was to succeed in the present case, it had at least to be shown that the tenure was permanent as well as heritable. All that is found is that the tenure was rent-free and heritable. It is argued that there is nothing to show that it was not for an unlimited period and that the possession of the tenure for several generations shows that it was permanent. It is not suggested that there is any evidence of permanency except this inferential evidence and that, in my opinion, is no evidence at all. The result is that there can be no escheat. The property must revert to the proprietor on the failure of the heir of the grantee, and the plaintiffs are entitled to redeem this mortgage.

The appeal is decreed with costs and the decrees of the Courts below are set aside and there will be a decree for redemption on payment of Rs. 78-14-0 within three months from this date. If the plaintiffs fail to redeem within that period, their right to redeem will be foreclosed. The plaintiffs are entitled to mesne profits from the date of suit. The amount will be ascertained by the Court of first instance. The plaintiffs will get their costs throughout.

Z. K.

Appeal allowed.

(2) 17 C. 826; 8 Ind. Dec. (N. S.) 1095.

(3) 28 B. 276; 6 Bom. L. R. 43.

(1) 1 C. 391; 25 W. R. 239; 3 I. A. 92; 3 Sar. P. C. J. 608; 3 Suth. P. C. J. 257; 1 Ind. Dec. (N. S.) 245 (P. C.).

JITA v. HAR CHAND.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 567 OF 1920.

February 23, 1923.

Present:—Mr. Justice Broadway and
Mr. Justice Moti Sagar.JITA AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

HAR CHAND AND OTHERS—DEFENDANTS—
RESPONDENTS.*Punjab Courts Act (VI of 1918), s. 41 (3)—
Erroneous decision on custom—Appeal, second—
Certificate, whether necessary.*

Where a question of custom is involved, a second appeal is not competent without a certificate under section 41 (3) of the Punjab Courts Act notwithstanding that the view taken by the lower Court of the case was erroneous.

Chintli v. Ishar, 43 Ind. Cas. 299; 100 P. R. 1917; 171 P. W. R. 1917, followed.

Second appeal from the decree of the District Judge, Hissar, dated the 21st August 1919, affirming that of the Subordinate Judge, First Class, Hissar, dated the 25th March 1918.

Mr. Nanak Chand Pandit and Lala Gobind Ram Khanna, for the Appellants.

Mr. Shamair Chand, for the Respondents.

JUDGMENT.—One Chetan, son of Lakha, appointed as his heir one Nandu, son of Lala. Nandu succeeded to Chetan's estate and on his demise was succeeded by his son Kheta. Kheta left him surviving two widows, Musammât Uman and Mussammât Jiwani, a son Mangla, and two daughters Musammât Ghoti and Mussammât Bhaddo. Mangla died without issue and the two ladies, Musammât Uman and Mussammât Jiwani, gifted the entire property to Har Chand, son of Ganga Ram, a collateral of Chetan. The other collaterals of the said Chetan instituted a suit against the two ladies, Har Chand, and his father Ganga Ram, asking for a declaration that this gift in favour of Har Chand would not affect their reversionary rights on the death of the two ladies. The suit was based on custom and the defence set up was (1) an adoption of Har Chand by the two ladies, and (2) it was pleaded that in the presence of Kheta's two daughters the plaintiffs had no *locus standi*. The Trial Court dismissed the suit on the ground that the lineal descendants

of Nandu being in existence the plaintiffs could not sue. An appeal to the learned District Judge proving abortive the plaintiffs have come up to this Court in second appeal through Mr. Nanak Chand Pandit, while the respondents have been represented by Mr. Shamair Chand.

Mr. Shamair Chand has raised two preliminary points, firstly, that in the absence of a certificate a second appeal was not competent inasmuch as the question involved was one of custom, and, secondly, that the appeal was barred by time. It appears that an application for a certificate was made to the lower Appellate Court but was dismissed on the ground that there was no material on the record on which any decision as to the custom alleged could be arrived at. Mr. Nanak Chand has contended that, as a matter of fact, no question of custom was involved at all and that the appellants were ill advised to try and obtain one. It appears to us, however, that a question of custom is involved in this appeal and that, even if the decision of the learned District Judge on the merits of the case be erroneous, a second appeal is not competent. The plaintiffs sought to obtain a declaration in their favour and based their claim on custom. The defendants contested the suit also setting up a plea of custom. It has been found that Nandu was originally appointed an heir by Chetan and that by custom the collaterals of Chetan have no *locus standi*, so long as any of Nandu's lineal descendants, male or female, are in existence. Mr. Nanak Chand contended that this question was not strictly before the learned District Judge who has fallen into an error in regarding succession to an appointed heir as being the same as succession to a donee. It may be that the learned District Judge was entirely wrong, but it seems to us that, this case is very similar to that reported as *Chintli v. Ishar* (1), where it was held that, although the District Judge's view was erroneous, nevertheless, inasmuch as it was a decision on custom no second appeal was competent without the necessary certificate. We are of opinion that, before we can go into the question involved in the

(1) 43 Ind. Cas. 299; 100 P. R. 1917; 171 P. W. R. 1917.

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present case, a certificate is necessary, and as the certificate has been refused this second appeal is not competent.

In this view of the case, it is not necessary for us to consider the question of limitation. We dismiss the appeal but, in the circumstances, leave the parties to bear their own costs in this Court.

N. H.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL, No. 572 OF 1921.

January 12, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

RANGAPPA KONDAPPA KORPE—

PLAINTIFF—APPELLANT

versus

VITHU KRISHNAJI WAIKAR—

DEFENDANT—RESPONDENT.

Mortgage, simple—Possession obtained by mortgagee—Right to remain in possession.

Once a simple mortgagee gets into possession of the property mortgaged to him, the property is security for his debt, and he is entitled to remain in possession, until the mortgage money is paid off though, as a matter of fact, if he endeavoured to recover the mortgage-money by suit, he might find himself barred by the Statute of Limitation.

Second appeal from the decision of the District Judge of Poona, in Appeal No. 15 of 1920, confirming the decree passed by the Subordinate Judge at Khed, in Civil Suit No. 232 of 1917.

Mr. P. B. Shingne, for the Appellant.

Mr. K. V. Joshi, for Respondent No. 6.

JUDGMENT.—This is a suit filed by the plaintiff to eject the defendants, and recover possession of the plaint property, the defendants being in possession under a rent-note of June 1, 1904, executed in plaintiff's favour on an annual rent of Rs. 18-12-0. The plaintiff is a mortgagee, the defendant having executed four mortgages with regard to the plaint property. They are set out at page 6 of the print. The first three are simple mortgages and the fourth one was a mortgage with possession; and this is a suit really by a mortgagee in possession against his tenant. The Courts,

however, have dealt with the case as if it was a suit filed under section 3 (y) of the Dekkhan Agriculturists' Relief Act, and have entertained a claim by the defendants to be allowed to redeem. The defendants then claimed that they were entitled to redeem the mortgaged property on paying off the mortgage-money under Exhibit 23 only, and that as the plaintiff-mortgagee could not sue to recover on the simple mortgages, the defendants were entitled to redeem without paying those amounts. The defendants obtained a decree on those terms in the Trial Court, and again in the Appeal Court. But we are of opinion that both those decisions were wrong. Once the mortgagee got into possession of the property mortgaged to him, then the property was security for his debt. He was entitled to remain in possession, though, as a matter of fact, if he endeavoured to recover the mortgage-money by suit he might find himself barred by the Statute of Limitation. If this decision were to stand, it would follow that the mortgagee in possession, though he could not sue for the mortgage-debt, would still be liable to be redeemed without receiving any of the mortgage-money. We think, therefore, that the decree must be set aside, and the case remanded to the Trial Court to take an account of what is due to the plaintiff under the mortgages, Exhibits 21, 22 and 23. As the mortgage, Exhibit 33, refers to other properties, the plaintiff's Pleader does not ask an account to be taken of the money due thereunder. The plaintiff is entitled to his costs throughout.

W. C. A.

*Decree set aside.
Case remanded.*

BHUNESHWARI PRASAD V. KISHEN DAYAL.

PATNA HIGH COURT.MISCELLANEOUS JUDICIAL CASE NO. 155
OF 1922.

February 15, 1923.

Present.—Justice Sir Jwala Prasad, Kt.,
and Mr. Justice Adami.BHUNESHWARI PRASAD SINGH AND
OTHERS—APPELLANTS*versus*

KISHEN DAYAL, BHAGAT AND OTHERS

—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 151—
Appeal returned as not properly stamped—
Certificate of renewal or refund of stamp—Inherent
power of High Court—Practice.*

The High Court has inherent power under section 151 of the Civil Procedure Code to grant a certificate for renewal or refund of the value of stamps used on a memorandum of appeal which has been returned to the appellant on the ground that it is not properly stamped.

Hari Har Guru v. Ananda Mahanty, 20 Ind. Cas. 498; 40 C. 365 and *Chaudra Hari Singh v. Tipan Prosad Singh*, 46 Ind. Cas. 271; 3 P. L. J. 452; (1918) Pat. 273, followed.

ORDER.—This is an application on behalf of the appellants for the grant of a certificate for renewal or refund of the value of stamps worth Rs. 1,627-8-0 used on a memorandum of appeal which was returned to the appellants by the order of this Court dated 22nd November 1922, because the memorandum of appeal was not properly stamped.

An application was made to the Collector of Patna for renewal or refund of the stamps used on the memorandum of appeal, but he refused the application by his order of the 6th of December 1922.

The appellants then moved the Commissioner, who by his order of the 11th of January 1923 directed the petitioners to obtain a necessary certificate for renewal from the Taxing Officer of this Court. Hence the application to this Court, and the matter has been referred to us by the Taxing Officer.

According to the view of the Stamp Reporter the case is not governed by any rule, and that rule 23 does not apply inasmuch as that rule is applicable only to fees chargeable under section 3 of the Act and the memorandum of appeal in the present case does not come under that section. Even if there be no rule, this Court has inherent power under section 151 of the Code

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of Civil Procedure to grant the certificate asked for, as was held in the case of *Chaudra Hari Singh v. Tipan Prosad Singh* (1). That decision was based upon the decision of the Calcutta High Court in the case of *Hari Har Guru v. Ananda Mahanty* (2). No doubt, a different view has been taken in the Allahabad High Court, but, in our opinion, we should follow the decision of this Court and the Calcutta High Court where the practice seems to have grown up from the earliest time: *vide In re Grant* (3).

We, therefore, direct that the certificate asked for be granted by the Taxing Officer of this Court.

P. D.

Certificate granted.

(1) 46 Ind. Cas. 271; 3 P. L. J. 452; (1918) Pat. 273.

(2) 20 Ind. Cas. 498; 40 C. 365.

(3) 14 W. R. 47.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 67 OF 1923.

February 28, 1923.

Present.—Mr. Justice Broadway and
Mr. Justice LeRossignol.FATEH CHAND *alias* DAROGHA MAL—
DEFENDANT—APPELLANT*versus*

Musammat JOWAHAR DEI—PLAINTIFF

—RESPONDENT.

*Punjab Courts Act (VI of 1918), s. 39 (1) (a)—
Redemption suit—Forum of appeal—Jurisdiction.*
The value of a redemption suit is the amount of the charge on the property.

The value of a redemption suit as stated in the plaint cannot be altered by the plea of the defendant whether it be true or false.

The forum of appeal in a redemption suit must be determined with reference to the claim made and not to the decision upon it.

In a suit to redeem certain property on payment of Rs. 3,000, the Trial Court decreed redemption on payment of Rs. 8,620. Defendant appealed claiming a further sum of Rs. 1,860:

Held, that the appeal lay to the District Judge and not to the High Court.

BAI KASHIBAI v. PURSHOTTAM KESHAVJI.

Muhammad Khan v. Ashaq Muhammad Khan, 106 P. R. 1885 (F. B.), followed.

Dyal Singh v. Ram Rakha, 14 Ind. Cas. 78; 54 P. R. 1912; 122 P. W. R. 1912, referred to.

First appeal from a decree of the Subordinate Judge, First Class, Delhi, dated the 24th April 1922.

Mr. Shamair Chand, for the Appellant.

Lala Sardha Ram, for the Respondent.

JUDGMENT.—This appeal was first presented to the District Judge, Delhi, who has returned it for presentation to this Court on the ground that it was beyond his jurisdiction. His decision reposes on certain *dicta* in *Dyal Singh v. Ram Rakha* (1).

For the appellant it is contended that the District Judge of Delhi had jurisdiction and we hold this contention to be correct.

The suit was to redeem property on payment of Rs. 3,000 but the Trial Court found that the charge was Rs. 8,620 and decreed redemption on those terms.

The appeal was by defendant who claimed a further sum of Rs. 1,860 and there are cross-objections. The problem for solution is: What was the proper valuation of the suit?

If the proper valuation was Rs. 3,000 the appeal lay to the District Judge, if it exceeded Rs. 5,000 this Court is the *forum* of appeal.

The value of the original suit was *ex facie* Rs. 3,000 but the learned District Judge holds that when the Trial Court found that the charge was Rs. 8,620 that figure represented the true value of the suit and he bases his conclusion on a phrase occurring in *Dyal Singh v. Ram Rakha* (1): "The decision of the First Court was that the charge on the land was Rs. 3,770 and an appeal lay to the Divisional Court."

In that case, however, the point for decision was not identical with that in this case; the contention was that, as the Divisional Court found that the real charge on the mortgaged property exceeded Rs. 5,000, it had no jurisdiction to hear the appeal, and the ruling is authority for no more than the proposition that an Appellate Court

has jurisdiction to pass a decree for any amount, if the decree appealed against is within its jurisdiction.

It is not, however, authority for the proposition that the course of appeal is determined by the amount of the charge ascertained by the Trial Court, and the sentence above quoted is a mere *obiter dictum*.

Muhammad Khan v. Ashaq Muhammad Khan (2) is a Full Bench judgment in a redemption suit and therein three propositions are affirmed; first, that in a redemption suit, the value of the suit is the amount of the charge on the property; second, the value of the suit as stated in the plaint cannot be altered by the plea of the defendant, whether it be true or false; third, that the jurisdiction is to be determined with reference to the claim made, and not to the decision upon it.

These propositions furnish a rule which is clear and easy of observance and we see no reason why it should not be generally followed.

We accordingly hold that the District Judge's Court is the proper *forum* for this appeal and we accept the appeal and, setting aside the order of the learned Judge, remand the case for a decision on the merits. Costs to be costs in the case.

Z. K.

Appeal accepted.

(2) 106 P. R. 1895 (F. B.).

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL.

NO. 97 OF 1922.

January 17, 1923.

Present:—SIR NORMAN MACLEOD, Kt.,
Chief Justice, and Mr. Justice CRUMP.

BAI KASHIBAI—DEFENDANT—APPELLANT
versus

PURSHOTTAM KESHAVJI

—PLAINTIFF—OPONENT.

Easement—Quia timet action—Decree for injunction—Form of decree—Easements Act (V of 1882), s. 33—Civil Procedure Code (Act V of 1908), Appendix D, Form 15.

(1) 14 Ind. Cas. 78; 54 P. R. 1912; 122 P. W. R. 1912.

BAI KASHIBAI V. PURSHOTTAM KESHAVJI.

Having regard to section 33 of the Easements Act, Form 15 of Appendix D of the Civil Procedure Code, although the prescribed Form, is not the proper Form for a decree for an injunction in a *quia timet* action against a building higher than old level. The decree should restrain the defendant from *disturbing* the easements to which the plaintiff is entitled in respect of his windows and not ask him not to *darken, injure or obstruct* those windows, for a darkening, injuring, or obstructing of the windows might or might not, according to its intensity, amount to an actionable *disturbance* of the easement which alone would give a cause of action to the plaintiff under section 33 of the Easements Act.

Appeal from the decision of Mr. Justice Kemp.

Sr Thomas Strangman (with him Messrs. Kanga, Advocate-General, and Petigara), for the Appellant.

Mr. Inverarity (with him Mr. Colman), for the Respondent.

JUDGMENT.—This is a *quia timet* action filed by the plaintiff as owner of a property in Lalwady, Old Hanuman Cross Lane, Kalbadevi, asking for an injunction against the defendant from erecting or maintaining erected any building or erection on her premises mentioned in the plaint so as to cause a disturbance of the plaintiffs' easements of light and air across the defendant's premises enjoyed by the ancient windows referred to in the plaint. The Trial Court granted a decree and declared that the windows in the South walls of the plaintiff's premises mentioned in the plaint and shown in the plan annexed as Exhibit C to the plaint were ancient windows and that the plaintiff was entitled to an easement of light and air for his premises over and across the defendant's premises mentioned in the plaint save so far as the same were obstructed by the defendant's old building also mentioned in the plaint and showed by a white broken line in the said plan. Then an injunction was granted against the defendant from erecting or continuing to erect or maintaining erected upon her premises mentioned in the plaint any house, building or erection of a greater height than the building which formerly stood upon her premises and which had been recently pulled down, so or in such manner as to darken, injure or obstruct the windows of the plaintiff marked 6, 7, 8, 10, 11, 12, 13 and 14 in the said plan save

and so far as the same were obstructed by the defendant's old building.

The defendant has appealed against the decision of the learned Judge who found against her on all the issues. It has not been contended before us that the plaintiff's windows were not ancient; it was only suggested that the easement of light and air enjoyed previously by some of the windows might not be materially affected if the defendant built according to the proposed plan. It is not necessary, however, to enter upon such details in this case, for once the plaintiff establishes that his windows are ancient and the defendant by the proposed buildings threatens to disturb his easements, then he is entitled to an injunction with regard to the windows which have been held to be ancient and it will depend upon the future action of the defendant whether the injunction has been disobeyed. The defendant does not mention in the memorandum of appeal that she objects to the form of the decree, but we think there is considerable substance in the objection which has now been raised. It is quite true that Form 15 of Appendix D of the Code of Civil Procedure is the form prescribed for a decree in a *quia timet* action asking for an injunction against a building higher than the old level. That form is the common form of injunction which has been used in England ever since the case of *Yates v. Jack* (1), but it is obvious, when reference is made to the Indian Easements Act, that this form is not appropriate as expressing what the Court should direct if the plaintiff succeeds in a *quia timet* action. Though the plaintiff may have an easement of light and air for all the windows which obtained light over the defendant's old buildings, he has no cause of action against the defendant unless she threatens to disturb his enjoyment of his easement. Therefore, if he succeeds in proving that, he is entitled to an injunction restraining the defendant from disturbing the easement, to the enjoyment of which he has been held to be entitled. By section 32 of this Act the owner of a dominant heritage is entitled to enjoy an easement without disturbance by any other person. What amounts

(1) (1866) 1 Ch. 295; 12 Jur. (N. S.) 355; 14 L. T. 151; 14 W. R. 618; 35 L. J. Ch. 539.

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to an actionable disturbance is defined in section 33 of the Act. When the defendant is so enjoined, it will depend upon the future character of his building whether he has disobeyed the injunction in such a way as to give rise to a right of action. In the case of *Colls v. Home and Colonial Stores, Limited* (2) Lord Macnaghten pointed out that the common form of injunction which had been in use since the case of *Yates v. Jack* (1) was not altogether free from objection. Their Lordships thought it better that the order when expressed in general terms should restrain the defendant from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows as the same existed previously to the taking down of the house which formerly stood on the site of the defendant's new buildings. If the decree stood as it has been drawn up, it might follow that if the plaintiff's ancient windows were in the slightest degree darkened, injured or obstructed by the defendant's new buildings, that would constitute a disobedience of the injunction, though it might obviously be no disturbance according to the provisions of the Indian Easements Act. The decree 'will, therefore, be amended by 'perpetually restraining the defendant from disturbing the easements to which the plaintiff is entitled in respect of the windows on the south walls of his premises mentioned in the plaint which were held to be ancient windows save in so far as they were obstructed by the defendant's old building.' There was no necessity to mention particular windows of those found to be ancient. They are all equally entitled to protection.

The appellant must pay the costs of the appeal.

Decree amended.

N. H.

(2) (1904) A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687; 53 W. R. 30; 20 T. L. R. 475.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 836 OF 1921.

December 22, 1922.

Present :—Mr. Justice Krishnan.

SUBRAHMANIA CHETTY AND AN-

OTHER—PLAINTIFFS—PETITIONERS

versus

THE BRITISH INDIAN STEAM NAVIGATION COMPANY, LTD., BY THEIR MANAGING AGENT, MACKINNON MACKENZIE

—DEFENDANTS—RESPONDENTS.

Construction of document—Bill of lading—Shortage—Burden of proof.

Where a bill of lading expressly states "weight, contents and value when shipped unknown," the onus of proving shortage in the goods shipped is on the person asserting it.

In re Anglo-Russian Merchant Traders and John Batt & Co., London, (1917) 2 K. B. 679 at p. 684; 86 L. J. K. B. 1360; 116 L. T. 805; 61 S. J. 591, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Cuddalore in Small Causes Suit No. 133 of 1921.

Messrs. C. Padmanabha Aiyangar and T. D. Srinivasachari, for the Petitioners.

Mr. O. T. Govindan Nambiar (with him Messrs. Brightwell and Moresby), for the Respondents.

JUDGMENT.—In this case the burden was on the plaintiff to prove shortage as the bill of lading expressly says "that weight, contents and value when shipped unknown;" see *In re Anglo-Russian Merchant Traders and John Batt & Co., London* (1). No attempt has been made by plaintiff to prove this though about a month's time seems to have been given to him by the learned District Munsif. It is urged that I should give him a further opportunity of proving his case. I am unable to do so, as I think he had ample opportunity already. The civil revision petition fails and is dismissed with costs.

V. N. V.

W. C. A.

Petition dismissed.

(1) (1917) 2 K. B. 679 at p. 684; 86 L. J. K. B. 1360; 116 L. T. 805; 61 S. J. 591.

JAGNARYAN DUBEY v. BIDAPAT DUBEY.

PATNA HIGH COURT.APPEAL FROM ORIGINAL DECREE NO. 139
OF 1920.

January 29, 1923.

Present:—Mr. Justice Das and Mr. Justice
Kulwant Sahay.JAGNARYAN DUBEY—PLAINTIFF—
APPELLANT

versus

BIDAPAT DUBEY—DEFENDANT—
RESPONDENT.*Malicious prosecution—Conviction in first instance—Acquitted on appeal—Presumption—Reasonable and probable cause.*

Where it is found that a plaintiff in a suit for damages for malicious prosecution was convicted in the first instance and was ultimately acquitted on appeal, the presumption is against the absence of reasonable and probable cause for the prosecution unless the original conviction is proved to have proceeded on evidence known by the defendant to be false or on the wilful suppression by him of material information. For this purpose, the plaintiff is entitled to produce evidence, and a dismissal of his suit, without giving him the opportunity to produce such evidence, is liable to be set aside in appeal. [p. 410, col. 1.]

Shama Bibi v. Chairman of Baranagore Municipality, 6 Ind. Cas. 675; 12 C. L. J. 410, relied upon;

The question in every case of a suit for malicious prosecution as to who was the real prosecutor must depend upon all the circumstances of the case. [p. 410, col. 2.]

Gaya Prasad v. Bhagat Singh, 30 A. 525; 10 Bom. L. R. 1080; 4 M. L. T. 204; 18 M. L. J. 394; 5 A. L. J. 665; 14 Bur. L. R. 318; 11 O. C. 371; 8 C. L. J. 337; 35 I. A. 189; 12 C. W. N. 1017 (P.C.), followed.

Appeal from a decision of the Subordinate Judge, Second Court of Arrah, dated the 23rd April 1920.

Messrs. S. M. Mullick, Kailashpatti and Danesh Ch. Varma, for the Appellant.

Messrs. N. C. Sinha and N. C. Ghosh, for the Respondent.

JUDGMENT.

Das, J.—This appeal arises out of a suit instituted by the appellant for recovery of Rs. 10,900 as damages for false and malicious prosecution of himself by the defendant.

It appears that the plaintiff was in possession of a certain land by virtue of a yearly settlement from the Canal Authorities. The settlement for 1916 to 1917 expired on the 31st March 1917, and it also appears that the plaintiff made no fresh application for settlement to the Canal Authorities. On the 5th of May 1917, the defendant applied for settlement, and on the 7th of May the land was settled with the de-

fendant. The defendant entered upon possession of the land on the 7th August, and it is the case of the defendant that on the 8th of August the plaintiff came upon the land and ordered the defendant to leave the land and called upon his men to beat him. Thereupon the defendant went and told the Canal Authorities of all that had happened and the Canal Authorities informed the Police of the occurrence of the 8th of August. The Police ultimately recorded the first information of the defendant in which he clearly asserts that he was making a complaint against the plaintiff. The plaintiff was tried under sections 143 and 447 of the Indian Penal Code. He was acquitted of the charge under section 143 but was convicted under section 447, Indian Penal Code, by the Court of first instance. That conviction was upheld on appeal but was set aside in revision by this Court. The plaintiff thereafter commenced the proceedings out of which this appeal arises for recovery of the sum of Rs. 10,900 as damages for false and malicious prosecution of himself.

The learned Subordinate Judge framed four issues, of which the first and second issues were as follows:—

(1) Has the plaintiff any cause of action against the defendant?

(2) Is the suit as framed tenable?

On the date of the hearing, however, that is to say, on the 21st of April 1920, the learned Subordinate Judge made an addition to the second issue and the added portion runs as follows:—"Was the complaint, if any, made by the defendant malicious and without any reasonable and probable cause?"

He tried the first and second issues as preliminary issues, and he says in the order-sheet that the parties did not adduce any oral evidence on the preliminary points. He decided these issues without any oral evidence against the plaintiff and dismissed the plaintiff's suit with costs. In my opinion, it was quite impossible for the learned Subordinate Judge to decide this case without any oral evidence. It is quite true, as has been observed more than once, that the very fact that a Court of competent jurisdiction convicted the plaintiff shows that the defendant had a foundation for

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the prosecution but as was laid down by Mookerjee, J., in the case of *Shama Bibi v. Chairman of Baranagore Municipality* (1), the true rule is that if the plaintiff has been convicted in the first instance and ultimately acquitted on appeal, the presumption is against the absence of reasonable and probable cause unless the original conviction is proved to have proceeded on evidence known by the defendant to be false or on the wilful suppression by him of material information. It was, therefore, open to the plaintiff to adduce evidence to establish that the original conviction was based on evidence known by the defendant to be false or on the wilful suppression by him of material information. The learned Subordinate Judge having decided the case on arguments and without any oral evidence, it was plainly impossible for the plaintiff to adduce any oral evidence to establish that there was want of reasonable and probable cause in lodging the information against him.

It has been strenuously contended before us that the plaintiff declined to give any evidence in the case and that it was open to the Subordinate Judge to decide the case in the way in which he has done. The argument does not impress me. The order-sheet is quite clear that the learned Subordinate Judge tried the first and second issues as preliminary issues; but, in my opinion, the second issue, as amended by him, could not be regarded as a preliminary issue. No doubt, issues Nos. 1 and 2 as they stood, before the learned Subordinate Judge made the addition to the second issue, could be regarded as preliminary issues, but the second issue, after the addition made to it by the learned Subordinate Judge, could not, in my opinion, be regarded as a preliminary issue. The plaintiff was obviously misled by the circumstances that the learned Subordinate Judge insisted on dealing with the most important issue on facts as a preliminary issue. I cannot agree that the case has at all been properly tried by the learned Subordinate Judge in the Court below. On the second point, namely, whether there was any cause of action against the defendant, the learned Subordinate Judge has come to the conclusion that

the plaintiff has no cause of action as against the defendant. According to him, the Canal Authorities were the real prosecutors in the case, and that the plaintiff should have proceeded against the Canal Authorities. In discussing this point, the learned Subordinate Judge refers to the decision of the Judicial Committee in the case of *Gaya Prasad v. Bhagat Singh* (2). But in that case the Judicial Committee laid down that the question in all cases must be, who was the prosecutor, and that the answer must depend upon the whole circumstances of the case. It is quite impossible for a Court to say who the real prosecutor is unless there is evidence before the Court to assist it in the investigation of this important question. As I have said, the case has not been properly tried, and I must allow the appeal, set aside the judgment and decree passed by the Court below and remand the case to that Court for a decision according to law.

The costs will abide the result and will be disposed of by the learned Subordinate Judge.

We grant the appellant a certificate under section 13 of the Court-Fees Act, entitling him to a refund of the Court-fees paid by him on the memorandum of appeal.

Kulwant Sahay, J.—I agree.

Z. K.

Appeal allowed;

Case remanded.

(2) 30 A. 525; 10 Bom. L. R. 1080; 4 M. L. T. 204; 18 M. L. J. 394; 5 A. L. J. 665; 14 Bur. L. R. 318; 11 O. C. 371; 8 C. L. J. 337; 35 I. A. 189; 12 C. W. N. 1017 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2006 OF 1921.

June 30, 1922.

Present.—Mr. Justice Harrison.

SUNDAR SINGH—PLAINTIFF—APPELLANT
versus

NIGAHYA alias NIHAL SINGH AND
ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105,
O. IX, r. 13—Order setting aside ex parte decree
whether can be questioned in appeal.

An order setting aside an ex parte decree cannot
be questioned in appeal.

Faza v. Hashmal, 31 Ind. Cas. 914; 40 P. R. 1916; 133 P. W. R. 1916, followed.

(1) 6 Ind. Cas. 675; 12 C. L. J. 410.

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An error, made by a Court in setting aside an *ex parte* decree is not an error affecting the decision of a case within the meaning of section 105 of the Civil Procedure Code, and cannot, therefore, be set forth as a ground of objection in the memorandum of appeal from any decree passed in the case.

Fazal v. Hashmati, 31 Ind. Cas. 914; 40 P. R. 1916; 133 P. W. R. 1916 and *Chintamony Dassi v. Raghoonath Sahoo*, 22 C. 981; 11 Ind. Dec. (N. S.) 651, relied upon.

Second appeal from the decree of the District Judge, Ludhiana, dated the 14th June 1921, affirming that of the Munsif, First Class, Ludhiana, dated the 31st August 1920

Lala Kahan Chand, for the Appellant.

Mr. J. G. Sethi, for the Respondent.

JUDGMENT.—In this appeal Counsel has given up the three first grounds in his memorandum and confines himself entirely to ground 4. This is to the effect that the learned District Judge erred in holding that the Court of first instance had inherent power to set aside the *ex parte* decree even after the expiry of the period of limitation. Counsel for the respondents raises a preliminary objection that the correctness of an order setting aside an *ex parte* decree cannot be questioned on appeal, and he relies on *Fazal v. Hashmati* (1). In this ruling it has been clearly laid down that not only can an order setting aside an *ex parte* decree not be questioned on appeal but that any error, etc., made by Court in setting aside such an *ex parte* decree is not an error affecting the decision of the case within the meaning of section 105 of the Code and cannot, therefore, be set forth as a ground of objection in the memorandum of appeal. Counsel for the appellant urges that this ruling was based on an Allahabad ruling which has since been dissented from by a Division Bench of that Court. This is quite immaterial, for the view taken is, in my opinion, absolutely correct and is, moreover, supported by *Chintamony Dassi v. Raghoonath Sahoo* (2) and the earlier decision of the Allahabad High Court. Finding, therefore, that the only ground of appeal argued by Counsel

cannot be taken, I dismiss the appeal with costs.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 1867 OF 1917.
February 27, 1923.

Present:—Mr. Justice Abdul Raoof and
Mr. Justice Campbell.

ABDUL SHAKUR, PROPRIETOR, DEJI HOUSE, LAHORE—PLAINTIFF
—APPELLANT

versus

MESSRS. LIPTON & COMPANY, TEA MERCHANTS, CALCUTTA, AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Malicious prosecution—Reasonable and probable cause, absence of—Malice, what is—Burden of proof—Test.

In order to succeed in an action for damages for malicious prosecution the plaintiff must allege and establish both absence of reasonable and probable cause and malice and must fail altogether if he fails to establish both. [p. 415, col. 1.]

Reasonable and probable cause means an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. [p. 415, col. 1.]

The malice necessary to be established in a case of malicious prosecution does not mean malice in law, such as may be assumed from the intentional doing of a wrongful act, but malice in fact; *malus animus* indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody. [p. 415, col. 1.]

Hicks v. Faulkner, (1882) 8 Q. B. D. 167; 51 L. J. Q. B. 268; 30 W. R. 545, followed.

If there was an honest belief in the accused's guilt, neither anger nor hastiness on the part of the accuser would evidence malice. Anger, so far from being a wrong or indirect motive, is one of the motives on which the law relies to secure the prosecution of offenders, while hastiness in

(1) 31 Ind. Cas. 914; 40 P. R. 1916; 133 P. W. R. 1916.

(2) 22 C. 981; 11 Ind. Dec. (N. S.) 651.

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the 'accuser's conclusion as to the accused's guilt, although it might account for his coming to a wrong conclusion, would not show the presence of any indirect motives. [p. 421, col. 2.]

Brown v. Hawkes, (1891), 2 Q. B. 718; 61 L. J. Q. B. 151; 65 L. T. 108; 55 J. P. 823, followed.

The test as to the burden or onus of proof is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the Tribunal will have to say that if the case stops there it must be decided in a particular manner. [p. 416, col. 1.]

Abrath v. North Eastern Railway Co., (1883) II Q. B. D. 440; 52 L. J. Q. B. 620; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692, followed.

First appeal from a decree of the Senior Subordinate Judge, Lahore, dated the 18th April 1917.

Sheikh *Abdul Qadir*, K. B., Messrs. *M. Saleem* and *Badraddin Kureshi*, for the Appellant.

Bakhshi Tek Chand and *Lala Mehr Chand Mahajan*, for the Respondents.

JUDGMENT.—This is a first appeal by Abdul Shakur whose suit for damages for malicious prosecution against Lipton & Company, Calcutta, has been dismissed by the Subordinate Judge, Lahore.

The appellant is a general merchant of Lahore, and, up to the 31st December 1914, was under agreement with Liptons' not to sell their tea below certain rates. From the 1st January 1915 he commenced to undersell the other local merchants, who remained bound by the agreement. The result was protests on the part of the other merchants and correspondence between Liptons' and their Lahore Agent, a man named Lajpat Ram, about the best means of pacifying them. This correspondence shows that Liptons' wished at the same time to raise the prices of their various brands of tea, and that the Lahore merchants in February 1915 accepted an enhancement of two annas per pound tin of the yellow and blue label brand and one anna per tin of the red label brand, bringing the rates at which Liptons' teas were to be sold in Lahore up to Re. 1-4-0, Re. 1-2-0 and 0-14-0 per tin. Meanwhile, a price list issued by the appellant Abdul Shakur on 1st February advertised Liptons' yellow label tea at 0-15-0 per tin, blue label at 0-13-0

per tin and red label at Re. 0-10-0 per tin. As a counter stroke Liptons' advertised by hand-bills, posters and in the press a warning to the public that certain merchants in Lahore were holding old stocks of tea which they were trying to foist on the consumers at reduced rates, and inviting purchasers to insist upon being supplied with tins labelled "Packed in 1915." A considerable number of special labels were sent from Calcutta by Liptons' to Lajpat Ram for the purpose of being affixed to tins which had been received by retail vendors in 1915 and had left the Calcutta warehouse before the system of special labelling had been started there. Simultaneously, according to Mr. Newby, witness for the defendants in this case, who was Liptons' Calcutta Manager at the time, Lajpat Ram was instructed to invite the Lahore shopkeepers to return the remainder of their 1914 stocks to Calcutta, and to receive fresh tea in exchange. Whether these instructions were actually given or not is a point in dispute, and no letter conveying them has been forthcoming, but it has been proved that tea tinned in Calcutta as far back as March 1914 was labelled in a Lahore shop as packed in 1915.

The next thing that happened was, that tins of Liptons' tea were exposed for sale by Abdul Shakur in his shop labelled. "This was despatched by Messrs. Liptons' Limited, Calcutta, on 22nd December 1914 and received here on 4th January 1915. Guaranteed good. If not good return with the relative cash memo, and the price paid will be returned."

Lajpat Ram reported this to Liptons' and informed them that Abdul Shakur was so labelling tea which he had received from Calcutta in 1914. Liptons' were indignant, expressed their intention of taking legal proceedings against Abdul Shakur, and directed Lajpat Ram to secure as many of Abdul Shakur's labelled tins as possible, and send them down to Calcutta for examination.

Lajpat Ram obtained and sent some tins, the exact number of which has not been elicited. Liptons' consulted their Solicitors in Calcutta, who communicated with Mr. Broadway, Advocate, in Lahore. Lajpat Ram was instructed to see Mr. Broad-

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way and to place at his disposal all his information on the matter. As a result, a complaint was drawn up by Mr. Broadway, charging Abdul Shakur with offences, under sections 487 and 488, Indian Penal Code, in that he had affixed the labels described above to tins of tea supplied to him before 22nd December and had sold goods in receptacles bearing false marks. The complaint was presented in Court on the 9th April 1915 by Mr. S. H. Andrews an employee of Liptons', who had been sent up from Calcutta for the purpose and was accompanied by six tins of tea bearing Abdul Shakur's labels, which Mr. Andrews swore in his examination as complainant, had been despatched from the Calcutta Warehouse, four on the 7th October 1914, and two on the 11th December 1914.

It is here necessary to describe the system by which Liptons' employees professed to be able to locate the date of despatch of any tin of tea sent out of their Calcutta Warehouse. Every label encircling the four sides of a square tin is or should be stamped with three perforated and inconspicuous letters, the first of which denotes the week of the month, the second the month and the third the year. This Code is stated to be a secret one, known only to a limited number of persons and to be changed frequently. The Code for 1914 has been revealed in the proceedings of this case, and is as follows: (1. Week) M=1st week, N=2nd week, O=3rd week, P=4th week, Q=5th week. The first week commences on the first of the month irrespective of the day of the week, the second week on the 8th and so on. (2. Months) U=September, V. October, W. November, X. December. (3. Year) U. 1914. M.X.U. means 1st week December 1914. Q.V.U. means 5th week October. According to Messrs. Newby and Andrews and other witnesses in the employ of Liptons', the tea to be despatched in compliance with an order from an up-country station is freshly tinned and packed on the day on which the order is received. The required quantity is discharged through tubes from the blending rooms upstairs into machines in the basement. The tea is weighed and run into tins by machinery. The tins are closed by hand. The requisite number of labels is stamped with the appropriate

Code letters in another machine. The labels are stuck on in yet another machine. The tins are then hand-wrapped in paper and immediately packed in boxes and the boxes are removed to the Railway Station on the same day or the next day. No stock of filled tins or packed boxes is kept for what are termed Railway orders, and thus the firm is able to say with confidence that every tin in a consignment despatched to Lahore, *e.g.*, on the 22nd December 1914, has been filled on that or the preceding day and that the label of each tin will be marked O.X.U. The reason for the system has been stated to be that the Company finds it useful in dealing with complaints to know precisely when a tin of tea has been filled, and this, indeed, is obvious.

To return to the complaint of Mr. Andrews, which was dealt with by Mr. O'Neil Shaw, Magistrate of the First Class: summons was issued to Abdul Shakur, and on the 12th April Mr. Andrews and Counsel for the prosecution and defence were deputed by the Magistrate to visit Abdul Shakur's shop and to bring thence to Court any tins of labelled tea that they might find. They found exposed for sale a certain quantity of Liptons' tins which did not bear the offending labels, and 12 labelled tins were produced by Abdul Shakur. On five of these the Code marks were so indistinct that Mr. Andrews could not read them. Of the other seven, five were stated by Mr. Andrews to "belong to the consignment dated 7th October 1914" and the other two "to the consignment of the 11th December 1914." This evidence, by the way, was not strictly accurate. Five of the seven tins are before us, and one of those stated to belong to the consignment of 7th October is marked N.V.U, which means the second week of October 1914; while of the two December tins the first letter on one is very indistinct, and is as likely to be M, first week, as N, second week.

On 25th May 1915 the Magistrate framed a charge against Abdul Shakur under sections 487 and 488, Indian Penal Code, and on the 8th June 1915, the date fixed for the second cross-examination of the witnesses for the prosecution, Abdul Shakur brought to Court ten cases of tea (each case containing 60 one-lb tins) and said that these were what remained unpacked

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in his show room out of 25 cases sent to him by Liptons' from Calcutta on 22nd December 1914. Mr. Andrews, under cross-examination, was invited to pick out any cases that appeared to him not to have been tampered with, to open them and to see what was in them. He declined to do so. He admitted that the cases were Liptons' cases and bore their invoice mark. The Magistrate, Mr. O'Neil Shaw, then selected two out of the ten cases and had them opened. He stated later in his judgment, and also as a witness in the present suit, that he was convinced that these two cases had not been opened since they left Calcutta. Mr. Andrews was unable to point to anything about the boxes to indicate that they had been opened previously, but he declared that he was not satisfied that they had not been tampered with. The result of the test was that "most of the tins" in the first case (the figures are not given) were found to be marked O.X.U. (3rd week December 1914) and O.W.U. 3rd week of November 1914) and the marks on five could not be deciphered. In the second case there were three tins with no letters on them, eleven tins with indistinct letters, three tins marked N.X.U. (2nd week December 1914), three marked O.W.U. (3rd week November 1914), one marked M.X.U. (1st week December 1914) and the remaining thirty-nine marked O.X.U. (3rd week December 1914). Thereafter, Abdul Shakur produced as a defence witness, Mr. J. N. Marshall, a former employee of Liptons' at Calcutta, and then travelling agent for Brook Bond and Company, who gave a different description of the packing system at Liptons' to that stated by Mr. Andrews, and said that, after filling and labelling, the tins were stacked in compartments and that, when orders came boxes were packed from these compartments where tins might remain for days or for months. Eventually, on the 27th July 1915, the Magistrate delivered judgment acquitting Abdul Shakur.

On the 28th January 1916 Abdul Shakur brought the present action against Mr. Andrews and Liptons' and Company claiming Rs. 17,000 damages for malicious prosecution. The principal evidence led for the plaintiff consisted of proof that he had paid Rs. 2,100 as Counsel's fees in the cri-

iminal case, statements of witnesses to the effect that his health had suffered, and that his reputation had been damaged, statements by other shop-keepers in Lahore whose 1914 tea had been labelled "packed in 1915" by or at the instance of Lajpat Ram, statement by himself and his servants that the labels put on by him correctly described the tins to which they had been affixed, a statement by Mr. Marshall which repeated the description given by the same witness in the criminal trial of Liptons' packing system, a number of documents mostly obtained from Mr. Linch, a defence witness, accountant in Liptons' Calcutta Office, and several tins of tea which had been produced in the criminal case. The chief witnesses for the defendants were Mr. Andrews and other members of Liptons' Calcutta staff, who were examined on commission, namely, Mr. Newby, the ex-manager, who admittedly was responsible for the criminal proceedings taken, Babu Ashutosh Kumar, the despatch clerk, Mr. Wagstaff, the Warehouse Superintendent, Mr. Stewart, the present Manager, and Mr. Linch, the Accountant. Lajpat Ram has not appeared in these proceedings as a witness for either party and his connection with Liptons' is said to have terminated soon after the criminal trial.

The Subordinate Judge, as stated already, dismissed the suit. His categorical findings were ; (a) the plaintiff has failed to prove that he had not labelled as despatched by Liptons on 22nd December 1914 and received by him on 4th January 1915 other tea which he had received previously in 1914 ; (b) the tea labelled by him was all of one uniform quality ; (c) the fact elicited did not establish an offence under section 437, Indian Penal Code, against the plaintiff ; (d) the defendants had reasonable and probable cause for believing that the plaintiffs had committed an offence ; (e) the defendants' complaint was not malicious ; (f) if the plaintiff had been entitled to damages both Mr. Andrews and Liptons' and Company would have been liable for those damages and a reasonable and proper amount would have been Rs. 5,000.

The plaintiff has appealed to this Court for a decree for Rs. 6,000 damages.

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We deem it desirable to state at the outset our view of the law applicable to the case. The correctness of the Trial Court's finding that the plaintiff-appellant, in fact, was not guilty of the offences attributed to him in the complaint has not been contested by the respondents. This leaves the appellant with the obligation of satisfying us that the prosecution was instituted against him without any reasonable and probable cause and with malice. The most notable pronouncement on the questions of what constitutes reasonable and probable cause, and what constituted malice, is that delivered in 1878 by Mr. Justice Hawkins in *Hicks v. Faulkner* (1). It has been adopted and applied repeatedly in subsequent decisions both in India and in England, and its correctness is nowhere disputed in any of the authorities which have been cited before us. After making it clear that to succeed in an action for malicious prosecution the plaintiff must allege and establish both (a) absence of reasonable and probable cause and (b) malice, and must fail altogether if he fails to establish both. Mr. Justice Hawkins proceeded to define reasonable and probable cause as follows:—

“... an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

Later on he defined the malice necessary to be established as “... not, even malice in law, such as may be assumed from the intentional doing of a wrongful act, but malice in fact; *malus animus* indicating that the party was actuated either by spite or ill-will towards an individual or by indirect or improper motives though these may be wholly unconnected with any uncharitable feeling towards any body.”

We have no difficulty in holding that the law is expressed accurately and com-

prehensively in the above passages. The explanation given in the same judgment of the respective functions of Judge and Jury in applying these rules does not concern us in the present case.

The appeal has been argued before us at considerable length by Mr. Abdul Qadir for the appellant, and by Mr. Tek Chand for the respondents and we have been referred to every detail of a somewhat voluminous record. Certain facts are clear to us. The person responsible for the prosecution of the plaintiff was Mr. Newby, the then manager of Liptons' at Calcutta. He was led to take up the question of instituting legal proceedings by reports received from Lajpat Ram. The full correspondence between Lajpat Ram and Liptons' Calcutta Office has not been produced, but the letters which have been filed can be read as indicating malice in the sense defined above on the part of Lajpat Ram against Abdul Shakur. The prosecution, however, was in no way the result of the malice of Lajpat Ram. What Mr. Newby acted upon were the four tins of tea, which are admitted to have been purchased at the plaintiff's shop by emissaries of Lajpat Ram, which were labelled 'despatched from Calcutta 22nd December 1914 and received in Lahore 4th January 1915,' and which were stamped with Liptons' secret Code letters for the 1st week of October 1914. Before taking action Mr. Newby consulted his Solicitors and he arranged for the complaint to be drawn up by one of the leading Advocates of Lahore. His motive was in no sense personal spite against the plaintiff, but was a determination to stop the sale by the latter of tea marked with 1914 Code letters as tea received in Lahore in January 1915. His object was to protect what he considered to be the interests of his firm in Lahore, and relied for success upon the secret letter Code system.

The questions then which arise for determination are, firstly, whether the Code system was, in fact, not infallible, secondly, if it was not infallible, whether Mr. Newby did not honestly believe, on reasonable grounds, such as would appeal to an ordinarily prudent man, that the system was at least capable of rendering it impossible for the tea tinned at the beginning of October

(1) (1882) 8 Q. B. D. 167; 51 L. J. Q. B. 268; 32 W. R. 545.

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to be sent to Lahore on the 22nd December, and, thirdly, if there was no such honest belief, whether Mr. Newby can be held to have been actuated by indirect or improper motives, if he launched a prosecution relying upon the system, solely with an eye to the business advantage of his firm with no honest desire to bring to justice a man whom he believed to have broken the law and without heed to the personal consequences entailed upon the individual concerned.

In all these questions the burden of proof is on the plaintiff-appellant. This is made clear in the discussion by the Court of Appeal in *Abrath v. North Eastern Railway Co.* (2) in which it was pointed out that, if, in order to show the absence of reasonable and probable cause, there are minor questions which it is necessary to determine, the burden of proving each of those minor questions lies upon the plaintiffs, just as much as the burden of proving the whole does. "The test", it was explained by Brown, L. J., "as to the burden or onus of proof, whichever term is used, is simply this; to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the Tribunal will have to say that, if the case stops there it must be decided in a particular manner." If no more evidence has been given by the plaintiff in the present case than that Liptons' Code system was not infallible, he would not be entitled to a finding, that there was absence of reasonable and probable cause. He had to go further and to prove that they did not take reasonable care to inform themselves of the facts and that they did not honestly believe in the case which they placed before the Magistrate. Having done this and established that the defendants acted without reasonable and probable cause, he had to go further still in order to obtain a decree, and to prove also [to borrow the words used by Cave, J. in his summing up to

the Jury in *Abrath v. North Eastern Railway* (2)] that the defendants in what they did were actuated by malice, that is to say, were actuated by some motive other than an honest desire to bring a man whom they believed to have offended against the criminal law to justice.

The plaintiff has succeeded in proving that the defendants do not work according to a system which enables them to say positively the date within a few days on which any tin of their tea was filled, packed and despatched from their Calcutta Warehouse. Several instances of tins being sent off without any Code letters on them or with letters which cannot be read have been proved. These show that if there is supervision of the packing operations, which are described as being carried out by coolies, that supervision is not effective. It has been admitted by the defendant's witnesses that in the same room in which cases for "Railway orders" are packed there are shelves on which is kept a stock of 4,000 or 5,000 filled tins for compliance with local orders or miscellaneous orders (*i. e.*, orders for boxes of mixed kinds of tea or of tea and other articles such as jam, coffee, etc.). It is true that the witnesses say that no tin is allowed to remain on these shelves for more than a week after being filled, but the evidence given does not satisfy us that adequate precautions to this end are prescribed. The plaintiff has proved, further, that his consignments from Liptons' in the last three months 1914 were four and were despatched on 30th September, 7th October, 12th December and 22nd December. A tin found in his shop on 12th April 1915 was Code marked 2nd week October 1914, and this, if received by him direct from Liptons' (and there is nothing to indicate the contrary) must have been packed in the consignment of 12th December.

Again, there is Mr. O'Neil Shaw's evidence that two boxes which showed no signs of having been opened since they were first packed contained tins marked 3rd week November 1914 and 3rd week December 1914. It was elicited, too, from a book produced by Ashutosh Kumar, Liptons' despatch clerk, that 95 cases were despatched on 3rd January 1917 in fulfillment of 43 orders which had been received on various

(2) (1883) 11 Q. B. D. 440; 52 L. J. Q. B. 620; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692.

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dates from 16th December 1916 and 1st January 1917. This fact contradicts the declarations of this same witness and of other witnesses for the defendant that tea ordered is tinned, packed and despatched on the day of arrival of the order.

Finally, there is the evidence of Mr. Marshall. The lower Court considered him unworthy of belief as a discontented former employee of Liptons', but the state of discontent imputed to him is scarcely made on the record. It is certainly impossible to reconcile his description of the method of packing adopted in Liptons' Warehouse with that given by Liptons' present employees and by Mr. Newby. Mr. Marshall had left Liptons before the events now under discussion occurred, but the other witnesses say that the system was the same in his time as it was in 1914 and 1915, and Mr. Marshall declares that he visited Liptons' Warehouse in May 1915 and found things being done then exactly as they had been done when he was employed. We can find nothing on the record to suggest any reason why Mr. Marshall should perjure himself on behalf of Abdul Shakur. He belongs now to what may be a rival firm, but we cannot suppose that he would be encouraged by his employers to obtain custom for them by giving false evidence in Courts of Justice on behalf of persons likely to be lucrative clients. It has been urged for the defendants that in comparison with Mr. Marshall their principal witness Mr. Newby is thoroughly disinterested since he has severed his connection with Liptons', but there is an obvious retort that Mr. Newby, who appears still to be connected with the tea industry, would not relish being known in business circles as the man who costs Rs. 17,000 in damages. It is fair to say at this stage that we have been favourably impressed by the record of Mr. Newby's evidence to which we shall return. Our immediate concern is with what Mr. Marshall says.

The packing procedure described by him is up to a certain stage more methodical *prima facie* than that stated by Liptons' witnesses, which appears to us, if rigidly adhered to, to involve machinery and labourers alternately working at high pressure and standing idle perhaps for a whole day. According to Mr. Marshall tins are taken

from the labelling machine to the shelves where they are stacked by colours, and the packers draw their supplies from the shelves. Packed cases are stocked in the sameroom, also by colours, and, when an order comes, the required numbers of cases are taken out and sent to the Railway Station. This may be taken out of the shelves and packed on the day on which they are placed there or they may stay on the shelves for weeks or months. Packed cases may remain a month or two before being removed.

The version of Liptons' employees has been narrated already. They have explained that Mr. Marshall himself admits that tea deteriorates from the moment of tinning and that the deterioration may be noticeable after six months to the consumer and they say that for this reason tea is not tinned until orders arrive.

The only method of testing these two divergent stories is by the result of Mr. O'Neil Shaw's examination of two cases, and this indicates that neither account is strictly accurate. The bulk of the tins in both cases had been filled on the day of despatch or the day before and this fact does not corroborate Mr. Marshall. On the other hand, the presence of November filled tins contradicts the other version and the truth seems to be that, although efforts are made to send out newly tinned tea, there are other previously packed tins lying about in the packing room, and there is no effective arrangement for keeping these from getting mixed up with the freshly filled tins. Mr. Marshall says that the Despatch clerk checks the colours of the tins packed, but that there is no check of the Code mark, and here he seems to be right. When he says that the system is such that tins filled months before and boxes packed months before are knowingly allowed to remain in the Warehouse before being sent out he is probably wrong. His own statement and the other evidence had made quite clear the advantage which tea merchants gain by placing tea in the hands of consumers at the earliest possible moment after packing, and a successful business, such as Liptons' has been shown to be, must be presumed to work towards that object.

We come now to the second point, the absence of reasonable and probable cause.

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We think that Mr. Newby did believe honestly when he placed the matter in the hands of his Solicitors that the system of filling, labelling, packing and despatching was capable of rendering it impossible for a tin filled at the beginning of October to be contained in a case despatched at the end of October. Mr. Newby was very frank and very patient throughout what seems to us to have been an unnecessarily long cross-examination. He says that he did hold that belief and there is no reason for doubting his word. But was his belief based on reasonable grounds? We think not. He was manager of the warehouse and it was his duty to know every thing that went on there. He has committed himself to the positive assertions that not only would it be impossible for tins packed in October to be despatched in December, but that it would also be impossible for tins packed in the 1st week of December to be despatched by Railway in the 3rd week of December, and that it would be impossible for one case to contain tins of different dates. In the light of the proof given to the contrary, these statements can only mean that Mr. Newby did not take reasonable care to inform himself of the true facts. He was unable, when challenged in cross-examination on the 24th February 1917 to swear positively that he made full enquiry regarding the truth of the allegations in paragraph 5 of the complaint filed on the 9th April 1915. Those allegations were that Abdul Shakur has affixed his labels, "despatched on 22nd December 1914 and received 4th January 1915" to tins supplied to him on antecedent dates and received in 1914. The answer given to the question is, of course, additional proof of Mr. Newby's good faith and anxiety to speak nothing but the truth, but the plaintiff is entitled to claim the benefit to his case of the character of the answer. Another damaging admission was elicited in the same cross-examination. The question was "Have you ever got back tins from customers at Lahore, which according to you are old, before or after the criminal case?" The answer was, "Most likely; you can quite understand that with millions of tins going out from Liptons' scarcely a week passes without we received some complaint regarding tea which may have become con-

taminated. I cannot remember any instance in Lahore." There were, then, complaints, which it seems to us should have put Mr. Newby on his guard against absolute faith in his system, and we think that a prudent man should have made a thorough enquiry into what was actually being done in the packing room before making up his mind definitely that the October marked tins purchased from Abdul Shakur's shop by Lajpat Ram's agent could not possibly have been included in the consignment of the 22nd December.

It is true that Mr. Newby took legal advice before instituting his complaint and that Lajpat Ram was instructed to "place the whole case openly" before Mr. Broadway (letter dated 9th March 1915 Exhibit P.R. 17 page 34, printed record). But the information laid before the Solicitors and Mr. Broadway as facts has not been disclosed and herein lies a material distinction between the present case and the well-known Privy Council case *Corea v. Peiris* (3) which has been cited by the defendant's learned Advocate. In *Corea v. Peiris* (3) the respondent obtained a decision in his favour that he had acted with reasonable and probable cause on proof that he had believed the story told to him by old trusted servants, that he had consulted his legal advisers at every step and that he had taken action in defence of his title to his property in the *bona fide* belief that the appellant has trespassed on his land and forcibly removed his goods. Both the legal advisers, however, whom Mr. Peiris consulted entered the witness-box and described in detail what had been placed before them, and the information given by the old and trusted servants was not of such a nature that Mr. Peiris could have verified it by personal observation. There are other distinguishing features which need be dwelt upon, notably the antecedents of the plaintiff. In the present case Mr. Newby may have made special enquiries from his Warehouse Staff and may have been told the same story as the witnesses have told in Court but there is no proof that he did so, and, if it be assumed that he must have done so, he was not compelled to rely upon the

(3) (1909) A. C. 549; 79 L. J. P. C. 25; 100 L. T. 790; 25 T. L. R. 631.

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assurances given by his subordinates. There were direct tests which he could apply himself; for instance, he could have gleaned a certain number of packed boxes and scrutinized the Code marks of the contents. As for what he told his Solicitors, we can only presume from the contents of the complaint subsequently put into Court that he must have told them that the Code mark system was absolutely watertight. He thought that it was, but he did not take reasonable steps to verify his belief, and the system was not watertight. Therefore, the defendants did not have reasonable and probable cause for the prosecution. The lower Court went wrong in thinking it sufficient proof of reasonable and probable cause that the defendants stated in their complaint nothing beyond what they believed to be the absolute truth.

The third and the most important point is the question of malice, for it is not enough for the plaintiff to prove absence of reasonable and probable cause. It has been made clear, as we have stated already, that the main object which the defendants desired to attain by the prosecution was to protect their own business interests. This does not mean that they did not believe the plaintiff to have offended against the law and that they did not honestly desire to bring him to justice. Mr. Newby has sworn that his motive was to prevent the plaintiff from selling tea with a false description and that he had no indirect motive such as to induce the plaintiff to renew his old agreement. The expressions of indignation at Abdul Shakur's conduct contained in certain letters to Lajpat Ram, the talk of bringing "the most damaging action against Shakur," (letter of 9th March 1915 Exhibit P. R. 17) the assertions that "we mean business" and that "we are going to stop this false dealing at any cost" (letter of 8th March Exhibit Z. 5) are in no way inconsistent with this position, which was perfectly legitimate. There is, however, an argument in favour of malice having been established which has been pressed strenuously and which is based upon the proceedings of Lajpat Ram in connection with the labelling of the stock in other Lahore shops as packed in 1915 and alluded to at the beginning of our judgment.

The only account of these proceedings is contained in incomplete fragments of correspondence between Liptons' and Lajpat Ram which the plaintiff succeeded in getting out of the defendants. The full correspondence has not been produced, and the defendant's Counsel in the commission proceedings at Calcutta said that he could produce nothing more, but presumably the missing letters are or were in the defendant's power and possession. On the other hand, Lajpat Ram himself would have been the most material witness on the point, and there is nothing to show that the plaintiff on whom the burden of proving malice lay, made any attempt to place this man in the witness-box. The record shows that Lajpat Ram was at times in Court during the trial of the suit.

It has been proved, as we have stated, that tea packed in 1914 was labelled in Lahore shops as packed in 1915. Of this there is no doubt. The tins with the labels and the 1914 Code marks are before us in Court and they have been identified by the persons from whose shops they were obtained. The suggestion is that Lajpat Ram was authorised and encouraged by the Head Office to label tea falsely, that in any case the Head Office sent Lajpat Ram 4,000 labels with a free hand and knew that he was likely to put the labels on old 1914 tea and that the firm took no steps to prevent him from doing this. It is contended that Lajpat Ram was the firm's agent, that it must be responsible for his action. That the firm, while professing to protect the public by prosecuting Abdul Shakur, was at the very moment perpetrating a fraud on the public of the same character as that imputed to Abdul Shakur by supplying labels for the misdescription of tea in the shops of other traders and that such conduct is conclusive proof of malice.

Now, Mr. Newby has sworn that his instructions to Lajpat Ram were to withdraw all the 1914 packed tea from the Lahore shops when the special 1915 labels were issued. Mr. Gregory, Counsel for the defendants in the Calcutta proceedings, was asked to produce the letter in which these instructions were conveyed but was unable to do so. Nevertheless, there are letters by Lajpat Ram on the record which have

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been admitted in evidence without objection and which corroborate what Mr. Newby says. On 28th January 1915 (Exhibit P. R. 32, page 45 of the printed record) Lajpat Ram wrote in reply to a letter from Liptons' of 21st January 1915. "The names of merchants are being printed in tickets. A list of stocks of 1914 held by merchants is being prepared. I will ticket only those tins which were received by merchants in 1915 and will not give chance to Shakur to bring a fresh trouble. The instructions conveyed in your letter are very clear and require no modification." Again, acknowledging another letter of 1st February 1915 Lajpat Ram wrote (Exhibit P. R. 30, page 44 of the printed record): "The 1914 stock in possession of our customers will be taken possession of by Saturday next, but the merchants want similar quantities of tea in exchange." There is certainly no proof that any 1914 tea was actually returned to Calcutta by any shopkeeper in Lahore, and there is, on the other hand, proof that 1914 tea was labelled in certain shops as packed in 1915; but Lajpat Ram is not shown to have known the Code and letter from Liptons' (Exhibit P. R. 17 dated the 9th March 1915, page 34 of the printed record) proves that they believed that he did not know. Lajpat Ram would thus have had to depend upon the word of the shopkeepers for the dates of their consignments.

The learned Counsel for the plaintiff points to the evidence of one of these shopkeepers, Firoz Din, and to a letter from Liptons' to Lajpat Ram (Exhibit P. R. 26 dated the 22nd February 1915) as showing that Liptons' encouraged or connived at false labelling. Firoz Din stated "in 1915 an agent of Liptons' came to me and told me to keep my tins ready and he would come again and label them. He came again and affixed the labels. I think their colour was red. The labels were special labels of 1915. The tea in the tins was old tea, that is to say, that the tea had come before 1915, some 7, 8 or 9 months previously." The passage in the letter runs "Messrs. Bakhsh Elahi and Company," (a firm of agents in Calcutta), "were instructed to let us have full particulars of all Lahore orders but they have not apparently done so in the case of Mohammad Din-Firoz

Din's order, and we trust you will see the tins ticketed." Liptons', however, (and perhaps Lajpat Ram too), are exonerated by the terms of Lajpat Ram's letter to which this letter is a reply. Lajpat Ram wrote on 18th February 1915 (Exhibit Z 16 page 51 printed record) "Messrs. Mohammad Din-Feroz Din, the China House, have received 16 cases of tea in January last through Bakhsh Elahi and Company, but without tickets. I will ticket the tins in a day or two. But I would like to request you to tell Bakhsh Elahi and Company that they should in future instruct their packers to specially label the consignments intended for Lahore."

The evidence of other shopkeepers produced as witnesses by the plaintiff on the subject of this labelling was as follows.—

Kanshi Nath, from whose shop two tins with 1914 Code marks and 1915 labels were procured, stated that Lajpat Ram supplied him with the labels, that 90 or 100 labels were pasted on by Lajpat Ram himself, that the tea had been received in November 1914, and that when labelled it was falsely described. In cross-examination he admitted that he could read the labels and understood what they stated; that he made no objection to the false description being put on, and that he did not tell any purchaser that the label was false. This man has stultified himself.

Sitaram stated that Lajpat Ram labelled 200 or 250 tins in his shop, that he had a stock of tea in December and received a fresh consignment in January, that the labels were put on in April when the tea was two or three months old, that he did not know whether the old tins or the new tins were labelled and that he did not assent to nor would have allowed a false label being affixed.

Mohan Lal said that Lajpat Ram labelled 120 tins in his shop all of which had been ordered in December 1914 and had been received on 4th January 1915, and that "Lajpat Ram told me that the old tea should not be sold and that traders should see that the tins bear the label of 1915." A tin labelled 1915 was procured from this witness's shop which is Code marked 3rd week December 1914.

In our opinion the plaintiff has not proved either that the Company instructed Laj-

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pat. Ram to label old tea in Lahore shops as packed in 1915 or that Lajpat Ram himself knowingly did so label old tea. Lajpat Ram may have been careless, in fact he was, for he sent his sons out to label in certain shops and he issued labels to the shopkeepers themselves, but, the defendants, in spite of the fact that they have not produced the full correspondence, have satisfied us that their instructions to him were not to label 1914 tea.

It has been remarked already that some of Lajpat Ram's letters contain indications of personal spite against Abdul Shakur and some of the information conveyed by him to Liptons' was inaccurate. But the prosecution had nothing to do either with Lajpat Ram's spite or with false information sent by him. It was solely due to true information given by Lajpat Ram that tea tins bearing the Code mark of 1st week October 1914 had been labelled by Abdul Shakur as despatched from Calcutta on 22nd December 1914. We do not think that concrete malice on the part of the defendants in the matter of Abdul Shakur's prosecution can be evolved out of the mere carelessness and supineness of their agent Lajpat Ram in his dealing with Liptons' 1915 labels.

Mr. Andrews stated in his first examination as complainant that tea packed in 1914 is of different quality to that packed in 1915. This has been fastened upon by the plaintiff's Counsel as an indication of malice in the light of subsequent proof that Liptons' successfully maintain a continuously uniform quality, and it is suggested that the statement was made falsely in order to induce the Magistrate to issue process. We think, however, that the reference was to the deterioration of tea from the date of tinning as to which all the witnesses connected with the tea industry are agreed.

Next, we have been referred to a passage in *Rai Jung Bahadur v. Rai Gudur Sahoy* (4) where the learned Judges agreed with the Court below that, ordinarily, the absence of a reasonable and probable cause in instituting a proceeding which terminates in favour of the plaintiff would give rise to the inference of malice. This proposition

was considered in *Shama Bibi v. Chairman of Baranagore Municipality* (5) to have been expressed too broadly. We can readily imagine instances where such an inference might arise but the correct law applicable to the present case, in our opinion, is to be found in *Brown v. Hawkes* (6). There the Jury held, firstly, that the defendant did not take reasonable care to inform himself of the true facts of the case (as we have held here); secondly, that the defendant honestly believed in the full charge which he laid before the Magistrates (also as we have held) and, thirdly, that the defendant was actuated by malice and indirect motives in the proceedings taken against the plaintiff. On these findings the judgment was entered for the plaintiff. The Court of Appeal allowed the defendant's appeal, holding that, although the absence of reasonable and probable cause is some evidence from which malice may be inferred, the Jury, by their finding as to the honest belief of the defendant, had negated any inference which depended solely on such evidence, and that, in the absence of any other evidence of indirect motive, the finding of the Jury that the defendant was actuated by malice could not be supported. It was pointed out by Cave, J., (whose judgment ultimately was affirmed) in discussing the evidence that, if there was an honest belief in the plaintiff's guilt, neither anger nor hastiness on the part of the defendant would evidence malice, and that anger, so far from being a wrong or indirect motive, is one of the motives on which the law relies to secure the prosecution of offenders, while hastiness in the defendant's conclusion as to the plaintiff's guilt, although it might account for his coming to a wrong conclusion, does not show the presence of any indirect motive.

Lastly, we have been asked to accept as proof of malice the fact that Mr. Andrews did not at two stages after the commencement of proceedings withdraw from the prosecution of Abdul Shakur. The first stage was on 12th April when the search of

(5) 6 Ind. Cas. 575; 12 C. L. J. 416.

(6) (1891) 2 Q. B. 718; 61 L. J. Q. B. 151; 65 L. T. 108; 55 J. P. 823.

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Abdul Shakur's shop produced twelve labelled tins only of which five exhibited no distinct Code mark, the other seven being marked with dates previous to the 3rd week in December. The second stage was when Mr. O'Neil Shaw opened the two boxes with the result already described. There is no force in this argument. The 12th April was a long time after Abdul Shakur first commenced to under-cut the rates of the other shop-keepers and it would have been quite reasonable to suppose that by that date he had succeeded in selling nearly all his 1914 stock. At the time when Mr. O'Neil Shaw opened the boxes Mr. Andrews declared that he was not satisfied that either box had not been opened before, and he could not know what view the Magistrate was likely to take until the judgment had been delivered. The record shows that he made no incautious or intemperate statement imputing trickery to Abdul Shakur. He did not assert that the boxes had been tampered with, nor did he say that they must have been tampered with. He said in his cross-examination, "I am not satisfied that the case has not been opened before," and in re-examination, "I can't account for tins bearing different marks getting into one case. It is impossible for tins bearing different Code letters for the month to be despatched in one case." He appears to have assisted the Court readily in interpreting the Code marks on the unpacked tins, and there is no indication that he attempted to prevaricate or to withhold any information which might help the accused.

We hold, therefore, that while the plaintiff has proved that the defendants instituted proceedings against him without taking reasonable care to inform themselves of the true facts, nevertheless he has not succeeded in establishing that they were actuated by malice, and his appeal, therefore, must be dismissed. Since, however, the appellant has succeeded partially, and on an important point, in a case of much difficulty, we direct that parties bear their own costs.

Z. K.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 69 OF 1920.

October 9, 1922.

Present:—Mr. Hallifax, A. J. C.

NARAYAN AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

VENKATRAO AND OTHERS

—DEFENDANTS—RESPONDENTS.

Mortgage—Sale to mortgagees of mortgaged property—Mortgagee, liability of, to pay mortgage-debt, whether extinguished—Contract Act (IX of 1872), s. 62.

Where a mortgagor sells a part of the mortgaged property to the mortgagee, intending thereby with the sale-proceeds to pay off the mortgage-debt, the sale and the mortgage are entirely unconnected, and the effect of the sale is not to relieve the mortgagor of his liability to pay the mortgage-debt under section 62 of the Contract Act.

Appeal from a decree of the First Subordinate Judge, Nagpur, dated the 8th April 1920, in Civil Suit No. 32 of 1919.

Mr. M. R. Bobde, for the Appellants.,

Messrs. M. K. Padhye and S. B. Gokhale, for the Respondents.

JUDGMENT.—This suit was for foreclosure of a mortgage executed on 14th August 1908. It was of the simplest possible character, being a claim for the amount still due on the mortgage after making allowance for a payment of Rs. 9,000 made on 17th October 1917. On that date the mortgagor sold a portion of the property and paid the Rs. 9,000 he received for the sale to the mortgagees towards satisfaction of the mortgage-debt. It is the fact that the purchasers happened to be the mortgagees and that appears to have befogged all consideration of the case; the fact is practically irrelevant. The mortgagor originally agreed to sell the property for Rs. 9,000 on 9th January 1913, and he agreed also that the purchaser might retain enough of the purchase-money to pay off the mortgage. Such an agreement was unnecessary as the purchaser already had that right under the proviso to section 55 (5) (b) of the Transfer of Property Act. It happens that at that time the amount due on the mortgage was less than Rs. 9,000.

2. But the defendant mortgagor did not carry out his agreement till he was compelled to do so by a decree of a Civil Court in a

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suit instituted under the Specific Relief Act; the sale-deed was eventually executed by the Court for him on 17th October 1917, by which time the amount due on the mortgage was considerably in excess of Rs. 9,000. The learned Subordinate Judge has held that the parties intended that the sale should pay off and extinguish the mortgage, that is to say, that the sale was substituted for the original contract to pay the mortgage-debt, so that the mortgagor would no longer be bound to pay the mortgage-debt under section 62 of the Contract Act. This view is obviously and entirely wrong and arises out of a lax use of expressions. The parties undoubtedly intended that the mortgage should be fully paid off by means of the sale or rather of the sale-proceeds but not that it should be extinguished by the sale itself. In the latter case it would have been unnecessary to specify the value of the property sold or the exact amount due on the mortgage.

3. There is admittedly no indication of any such intention in the sale-deed, which was executed in 1917. The indication has apparently been found in the fact that when the agreement to sell was made the mortgage-debt was less than Rs. 9,000. That, however, indicates no more than an expectation that the sale would be effected within a reasonable time and before the amount due on the mortgage had increased beyond Rs. 9,000. It is, indeed, the case for both parties that it was not the sale that was to pay off the mortgage-debt but that the sale proceeds were to be used for that purpose.

4. The sale and the mortgage are entirely unconnected except that they are between the same parties and cover the same property. Even if we go back to the agreement to sell, as has been done, this is perfectly clear from the very fact that the balance of the consideration of the sale, after deducting whatever was found to be due on the mortgage, was to be paid to the mortgagor. It is made still clearer by the words of the document which was filed as Exhibit P-2 in the suit for specific performance. A translation of the relevant portion is as follows: "For the aforesaid sum of Rs. 9,000 the fields are sold to you. As earnest-money I have to-day received Rs. 500. As for the rest

the balance after deducting whatever is found due on your mortgage will be paid to me when I get the sale-deed registered."

5. Nothing further need be said about the case except to note its similarity to that of *Maung Shwe Goh v. Maung Inn* (1) decided by the Privy Council. The appellants are undoubtedly entitled to the decree they seek. The decree of the lower Court is accordingly set aside. In place of it a decree will issue in the terms of r. 2 of O. XXXIV of the Civil Procedure Code ordering foreclosure of the property mentioned in the plaint in default of payment by the defendants by the 5th of January 1923 of the sum of Rs. 9,618-6-0, plus all the costs incurred by the plaintiffs in the lower Court and in this appeal.

W. C. A.

Appeal accepted.

(1) 38 Ind. Cas. 938; 44 C. 542; 21 M. L. T. 18; 15 A. L. J. 82; (1917) M. W. N. 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 21 C. W. N. 500; 5 L. W. 532; 10 Bur. L. T. 69; 44 I. A. 15 (P. C.).

GOPI MAL, v. PANNA LAL.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1314 OF 1920.

June 8, 1922.

Present.—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

GOPI MAL, AND ANOTHER—DEFENDANTS
—APPELLANTS

versus

PANNA LAL, AND ANOTHER—PLAINTIFFS
AND THAKAR DAS AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Jains—Adoption, effect of—Civil Procedure Code (Act V of 1908), O. XXI, r. 3—Death of plaintiff—Substitution, time for, extension of—Appellate Court, interference by—Guardian and minor—Guardian, whether trustee—Power of guardian to charge property of minor.

There is no warrant for the proposition that Jains cannot adopt in the *Dattaka* form or that an adopted son among Jains can, in no case, become a member of the family of his adoptive father. [p. 426, col. 1.]

Manah Chand v. Munna Lal, 4 Ind. Cas. 844; 95 P. R. 1909; 168 P. W. R. 1909; 212 P. L. R. 920, referred to.

It is open to a Court to extend the time for the substitution of the representatives of a deceased plaintiff and, when it has so extended the time and effected such substitution an Appellate Court should not interfere with the exercise of its discretion. [p. 426, col. 1.]

A guardian of a minor may be a *quasi* trustee for certain purposes, for instance, in respect of money received by him on behalf of his ward, but he cannot incur expenses to any extent he likes without seeking the intervention of any Court, in the hope that he would be allowed to create a charge on the property of the minor to that extent. [p. 426, col. 2.]

Second appeal from a decree of the District Judge, Amritsar, dated the 29th April 1920, reversing that of the Subordinate Judge, First Class at Amritsar, dated the 23rd July 1917.

Lala Moti Sagar, R. B., and Lala Faqir Chand, for the Appellants.

Lala Badri Das, for the Respondents.

JUDGMENT.—The parties in the suit, out of which this second appeal arises, are Jains belonging to Amritsar. The property in dispute is a house and a half share in a shop, which belonged to one Kanshi Ram and after his death came into the possession of his widow, Musammatt Uttam Devi. She adopted a boy, named Amin Chand, son of Gopi Mal, and executed a deed of adoption, Exhibit D-5, dated the 29th April 1907, adopting him as a son to her husband and herself. She died in May 1907 and shortly before her death she executed a Will, Exhibit D-6, dated the 20th of May 1907, by which she appointed

Gopi Mal, father of Amin Chand, to act as a guardian of his person and property in her place. The boy then remained under the care of his natural father but died as a minor in November 1913, after having been ill for a considerable period. The property was at that time in the possession of Gopi Mal in his capacity as a guardian of the deceased minor. Certain persons, including Ishar Das, plaintiff in the present case, claimed shares in the property as collaterals of Kanshi Ram, deceased. This matter was referred to arbitration by both the parties and the arbitrators gave an award treating Ishar Das, etc., as collaterals and giving them certain specified shares. This award was not, however, accepted, for one reason or other, by the parties, and was not acted upon. On the 19th December 1913 the plaintiff Ishar Das brought the present suit against Gopi Mal and others for possession of one-fourth share of the property left by Kanshi Ram. Some of the defendants were collaterals other than the plaintiff, who were made *pro-forma* defendants, because they did not join him in bringing the suit. Gopi Mal, the contesting defendant, denied the alleged relationship between the plaintiff and Kanshi Ram and further pleaded that the widow was the sole owner and had passed a complete title to Amin Chand and that he was now entitled to succeed Amin Chand as his heir. He also pleaded that he had spent Rs. 3,261-0-0 on the minor and this amount was a charge on the property and no one could get any part of the property without paying the above sum. The Trial Court held that the plaintiff was a reversioner of Kanshi Ram, but he was not entitled to succeed to the property left by Amin Chand, because the property would now pass on to the natural heirs of the latter. It, therefore, dismissed the plaintiff's suit who appealed against this decision. The learned District Judge agreed with the Trial Court in holding that the plaintiff was a collateral of Kanshi Ram and also came to the conclusion that the collaterals of Kanshi Ram were entitled to succeed to the property and not the natural heirs of Amin Chand. It remanded the case, therefore, under O. XLVI, r. 25, Civil Procedure Code, for a decision on Issues Nos. 5 and 6, which ran as follows and had not been decided by the Court of first in-

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stance.

5. What is plaintiff's share in the properties in question? On plaintiff. 6. Whether (Gopi Mal and Kheman Mal) defendants Nos. 1 and 2, spent any monies for *Musammatt* Uttam Devi or Amin Chand, and if so whether these create a first lien on the property in dispute? On defendants Nos. 1 and 2. The report of the learned Subordinate Judge on these issues was made on 6th April 1920, to the effect that the share of the plaintiff amounted to one-fourth according to the pedigree-table. Exhibit P. 1 relied on by him, and that Gopi Mal was not entitled to the money claimed by him on account of expenses incurred, as such expenses were not a charge on the property. The learned District Judge has agreed with the view taken by the Subordinate Judge and has accepted the appeal of the plaintiff and passed a decree as prayed for in the plaint. Defendant Gopi Mal and Kheman Mal have come up to this Court in second appeal and we have heard Mr. Moti Sagar on behalf of the appellants, whose arguments may be divided in the following four heads:—

1. It is not proved that the plaintiff was a collateral of Kanshi Ram as the pedigree-table relied upon by the plaintiff has not been properly proved.

2. That by virtue of the adoption of Amin Chand by *Musammatt* Uttam Devi under the Jain Law the property must pass on to the heirs of Amin Chand instead of going to the collaterals of Kanshi Ram.

3. That the appeal of the plaintiff in the lower Appellate Court had really abated for want of substitution of any one as the representative of the plaintiff in time after his death during the pendency of the appeal and, therefore, the learned District Judge has erred in not dismissing it.

4. That in any case Gopi Mal was entitled to be re-imbursed for money spent out of his pocket in his capacity as a trustee and the Court below had erred in simply declaring that the money was not a charge on the property and giving no finding as to the amount actually due.

We will take up the above points *seriatim*. As regards the first point it is urged that the oral evidence adduced to prove the relationship consisted of the statements of P. W. No. 1, P. W. No. 3 and P. W. No. 4,

who had very little first hand knowledge and whose evidence was of no value. It is added that the inference drawn by the Courts below from the facts that there was an admission of the status of Ishar Das and other collaterals as such in the reference to arbitration made by the parties is not a reasonable inference and cannot at any rate prove the pedigree-table as propounded by the plaintiff. We think, however, that the finding of the relationship between Ishar Das and Kanshi Ram must be treated as a finding of fact which cannot now be questioned. The following remarks were made on this point by the learned District Judge in his order dated the 5th January 1918, remanding the suit for decision on the fifth and sixth issues:—

"The evidence produced by the plaintiff in support of the pedigree-table is certainly somewhat scanty, but in 1907 the dispute was referred to arbitration though the award was never acted upon, and the arbitration proceedings amount to an admission of the plaintiff's relationship on the part of the defendants."

The relationship has been held to be established on the material above alluded to, by the Courts below. Meagre though the material may be, it is not open to us to interfere with this finding and we may add that the inference that they drew from the reference to arbitration is reasonable and legitimate. We, therefore, agree with the Courts below that it has been proved that Ishar Das was a collateral of Kanshi Ram and was entitled to one-fourth share of the latter's property, according to the pedigree table attached to the plaint.

Concerning point No. 2, emphasis is laid on the fact that the parties are Jains and their law differs in many respects from Hindu Law and that an adoption among them is a purely secular matter devoid of religious significance and that, therefore, *Musammatt* Uttam Devi, who is a Jain widow, and, as such, was an absolute owner, passed such a title to Amin Chand when she adopted him, that after him his property should go to his father or other natural heirs of his. Mr. Moti Sagar refers to *Manak Chand v. Munna Lal* (1) where it is laid down that

(1) 4 Ind. Cas. 844; 95 P. R. 1909; 168 P. W. R. 1909; 212 P. L. R. 1910.

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an adoption among Jains is more akin to the *Kririma* than to the *Dattaka* form of adoption, and that a person adopted under the *Kririma* form is not transferred completely from his natural family to the family adopting him but can retain his ties with his natural relations. We are not very favourably impressed by this argument of the learned Counsel. There is nothing in *Manak Chand v. Munna Lal* (1) to show that Jains cannot adopt in the *Dattaka* form or that an adopted son among Jains can, in no case, become a member of the family of his adoption. In this particular case there can be no doubt so far as the intention of *Musammatt Uttam Devi* was concerned that she wanted to make the adoption as complete as possible and to bring *Amin Chand* into the family of her husband. She mentions in the deed of adoption that Gopi Mal has two other sons and has given his son *Amin Chand* to her and that she has adopted him as a son to her husband and to herself and that the boy should henceforth be treated like a son born to them. Under these circumstances, we think that the learned District Judge has rightly held that in the present case collaterals of *Amin Chand* were entitled to succeed to the property.

Coming to the question of abatement, we think there is no force in the contention. *Ishar Das* died after the case had been remanded by the District Judge under O. XII r. 25. On the 21st November 1918 an application was made to the Sub-Judge stating that the plaintiff died about 11 days back and praying that his legal representatives may be brought on the record. It is contended that this application should have been made to the District Judge, who was really seized of the case, and who actually proceeded to decide this application on 10th October 1919, but by that time the period within which the substitution could legally be made had elapsed and, therefore, there was no proper substitution. We do not see, however, that now that the learned District Judge has substituted *Panna Lal* and *Khairati Ram* as the representatives of *Ishar Das*, and it was open to him to extend the time for substitution of representatives, that we can or should interfere with his discretion in second appeal.

The only point that remains to be considered is that of expenses incurred by Gopi Mal. It is argued that he was appointed guardian of the person and property of the minor and thus stood in a fiduciary relation to the minor and should be regarded as a trustee and, under section 32 of the Indian Trusts Act II of 1882, is entitled to reimbursement of expenses. There is no doubt that he would be entitled to such reimbursement if it was established that he was a trustee, but, we are not satisfied that the position of trustee was created by the Will dated 10th May 1907, appointing him as guardian of the minor. Mr. Badri Das, who appears for the respondents, argues that Gopi Mal would be governed by the Guardians and Wards Act, as a guardian appointed under a Will, and there is no provision in the said Act entitling him to any such position as to claim reimbursement as a trustee. We have very carefully considered the arguments on this point, advanced by Counsel on both sides, but think that it is open to serious doubt that a trust was created by the Will above referred to, or that a guardian of a minor does in effect become a trustee. He may be a quasi-trustee for certain purposes, e.g., for money received by him on behalf of his ward, but it is not clear that he can incur expenses to any extent he likes without seeking the intervention of any Court in the hope that he would be allowed to create a charge on the property of the minor to that extent. In this particular case the greater part of the expenses is said to have been incurred owing to the illness of the minor and it is difficult to say whether all that expense was incurred by Gopi Mal in his capacity as a guardian or on account of natural filial affection. Moreover, he has admittedly been in possession of the property for many years and, has appropriated the mesne profits, and, according to the terms of his written statement, appears to have made no allowance for the sums so received, by him. We think that, under the circumstances, it cannot be said that the expense incurred by him was a charge on the property of which a proportionate share must be paid by the representatives of *Ishar Das* before they get possession of his share under the decree. If Gopi Mal has an equitable claim he can enforce it by a separate suit

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against the representatives of Ishar Das and against the other heirs of Kanshi Ram deceased.

We, therefore, dismiss this appeal with costs.

Z. K. & N. H.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL, APPEAL, NO. 86 OF 1921.

January 3, 1923.

Present.—Mr. Kotval, A. C. J.
SINGHAI KANCHHEDILAL—
PLAINTIFF—APPELLANT

versus

SHRIDHAR AND OTHERS—

DEFENDANTS—RESPONDENTS.

Mortgage—Sub-mortgagee, rights of—Sale of mortgaged property.

A sub-mortgagee can ask for a sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief. [p. 427, col. 2; p. 428, col. 1.]

Muthu Vijia Raghunatha Ramachandra v. Venkatachallam Chetti, 20 M. 35; 6 M. L. J. 235; 7 Ind. Dec. (N. S.) 25, followed.

One of the objects which a Court of Equity ought always to have in view is to minimise the number of cases which may arise out of the relation between the parties to a mortgage. [p. 428, col. 1.]

Appeal against a decree of the Subordinate Judge, Jubbulpore, dated the 30th July 1921 in Civil Suit No. 77 of 1920.

Mr. J. C. Ghosh, for the Appellant.

Mr. P. C. Dutt, for the Respondents.

JUDGMENT.—On the 3rd October 1908 defendants Nos. 5 to 10 and Abdulla the father of defendants Nos. 11 and 12 mortgaged a house situated in Munhai Mohalla Jubbulpore to Gangadhar and on the 28th October 1911 sold it to defendant No. 4 Bansidhar. On the 9th January 1913 Gangadhar's son Sitaram who was the father of defendants Nos. 1 to 3 mortgaged the above mortgage of 1908 and a house of his own situated in Bhaldarpura Jubbulpore to Laxman Rao and Sonu. Sonu assigned this mortgage to Bhaiyalal. The plaintiffs are Bhaiyalal's representatives. The present suit purports to be based on both the above mortgages and the plaintiffs claim in default of payment of the debt

due on the mortgage of 1913 the sale of both the houses. Defendant No. 4 denied the plaintiff's right to the sale of the Munhai Mohalla house. The issue framed on this plea was "whether the plaintiff as sub-mortgagee cannot sue on Abdulla's mortgage?" The lower Court's finding on this issue is as follows:—"The plaintiffs as sub-mortgagees can simply obtain an order for sale of the rights of Abdulla's mortgagees under the mortgage-bond dated October 3, 1908 and this is my finding on Issue No. 8. The plaintiffs are entitled to have an order for the sale of the rights of Abdulla's mortgagee, under the mortgage-bond dated October 3, 1908. Strictly speaking, the plaintiffs are not entitled to have the property of Abdulla sold." The lower Court has passed a decree directing the sale of the Bhaldarpura house and of the rights of the mortgagee Gangadhar in the Munhai Mohalla house.

The plaintiff appeals and urges that an account should have been taken of the mortgage of 1908 and that an order directing the sale of the Munhai Mohalla house should have been passed.

In *Ram Shankar Lal v. Ganesh Prasad* (1) it was ruled that a sub-mortgagee is entitled to sue for and obtain a sale of the property mortgaged to him, namely, the mortgagee rights of the sub-mortgagor. In *Zaki Hasan v. Deo Nath Sahai* (2) this was held to be in accord with the principle recognized by the Madras High Court in *Muthu Vijia Raghunatha Ramachandra v. Venkatachallam Chetti* (3), by the Bombay High Court in *Narayan Vithalmaval v. Ganoji* (4) and *Padgaya v. Baji Babaji* (5) and by the Calcutta High Court in *Bansi Lal Bhagat v. Durga Prasad* (6).

In *Muthu Vijia Raghunatha Ramachandra v. Venkatachallam Chetti* (3) it was held that a sub-mortgagee can ask for a sale of the original mortgagor's interest in cases and in circumstances which would have entitled

(1) 29 A. 385; 4 A. L. J. 273; A. W. N. (1907) 97; 2 M. L. T. 248 (F. B.).

(2) 4 Ind. Cas. 433; 10 C. L. J. 470.

(3) 20 M. 35; 6 M. L. J. 235; 7 Ind. Dec. (N. S.)

25.

(4) 15 P. 692; 8 Ind. Dec. (N. S.) 468.

(5) 20 B. 549; 10 Ind. Dec. (N. S.) 931.

(6) 2 Ind. Cas. 645; 9 C. L. J. 429.

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the original mortgagee on the date of the sub-mortgage to claim such relief. In *Ram Subhag v. Nar Singh* (7) Stanley, C. J., referring to this ruling observed that there was a good deal in the judgment of Subramania Aiyar, J., in support of his view which commended itself to him. In *Bansi Lal Bhagat v. Durga Prashad* (6) it was observed: "One of the objects which a Court of Equity ought always to have in view is to minimise the number of cases which may arise out of the relation between the parties to a mortgage. The view taken by the Allahabad High Court would involve the necessity of two suits, a suit on the sub-mortgage and, after the foreclosure of the interest of the sub-mortgagors, a suit on the original mortgage; whereas, according to the practice which is followed in the Courts of Equity and the Madras High Court, the equities between the parties may be adjusted in one suit by allowing the sub-mortgagee to bring the property mortgaged to sale for the amount of the original mortgage." *Gokul Dass v. Eastern Mortgage and Agency Co.* (8) is a case where the suit was brought by an equitable sub-mortgagee against the original mortgagor. In English Law the sub-mortgagee is allowed to enforce the original mortgage against the original mortgagor and the form of a decree in a suit of that kind is given in Seton on Judgments and Orders, 6th Edition at page 2073.

I am of opinion that the plaintiff is entitled to ask for a sale of Abdulla's house in the present case. The pleas, therefore, that arise in connection with the mortgage of 1908 must be decided. If anything is found due on this mortgage, the usual decree for sale must be passed against the mortgagors, defendants Nos. 5 to 12. They will be directed to pay to the plaintiff the amount found due on this mortgage not exceeding the amount due on the plaintiff's mortgage of 1913. The balance, if any, will be directed to be paid to the original mortgagee's heirs, defendants Nos. 1 to 3. The case is remanded to the lower Court to be dealt with advertance to the above remarks. Costs of this appeal will abide the result.

G. R. D.

Case remanded.

(7) 27 A. 472; 2 A. L. J. 162; A. W. N. (1905)

58.

(8) 33 C. 410; 10 C. W. N. 276; 4 C. L. J. 102.

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION REVISION No. 7 OF 1923.

February 26, 1923.

Present :—Mr. Kanhaiya Lal, J. C.
THE ROHILKHAND AND KUMAON
RAILWAY CO., LIMITED, THROUGH AGENT,
IZATNAGAR, BAREILLY—DEFENDANT
—APPLICANT

versus

BIJ RAJ—PLAINTIFF—RESPONDENT.

Railway Company—Goods consigned under Risk No. 6, B—Loss of goods in transit—Liability of Railway Company—Wilful neglect.

Certain goods were entrusted to a Railway Company for carriage. The goods were placed in a Road Van. According to the usual practice of the Company the doors of the Van were not locked but were secured by bolts, which it was the duty of the guard to examine at every intermediate station. On arrival at destination it was found that a package of the consignment was missing. In a suit by the consignor against the Railway Company for damages:

Held, (1) that the securing of the doors of the Road Van with bolts only was inconsistent with the security which the Company was bound to provide for the goods entrusted to its custody for transit; [p. 429, col. 1.]

(2) that although the burden of proving wilful neglect by the Railway Administration or its servants lay on the plaintiff, in the circumstances of the case, wilful neglect might be inferred from the fact that the steps taken to secure the goods against loss by theft were inadequate.

Bengal and North-Western Railway Company v. Haji Mutsaddi, 7 Ind. Cas. 160; 7 A. L. J. 833 followed.

Hazari Lal v. Secretary of State for India, 65 Ind. Cas. 342; 8 O. L. J. 588; (1922) A. I. R. (O.) 170, *G. I. P. Railway Company v. Jitan Ram-Nirmal Ram*, 67 Ind. Cas. 664; 3 P. L. T. 222; (1922) A. I. R. (Pat.) 17, *East Indian Railway Company v. Nathmall-Behari Lal*, 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321 and *Bombay Baroda and Central India Railway Company v. Ranchhodlal-Chhotalal & Co.*, 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779, referred to.

Application for revision of the decree of the Subordinate Judge, Kheri, sitting as Small Cause Court Judge, dated the 11th December 1922.

Mr. Ram Sarup Pande, for the Applicant.

Mr. Arabi, for the Opposite Party.

JUDGMENT.—The plaintiff claims damages for the loss of one bale out of a consignment of six bales of cotton yarn despatched by him from Lakhimpur to Gola Gokaran Nath by the Rohilkhand and Kumaon Railway. The consignment was sent on the 26th January 1922 under a Risk-Note in Form B, which pro-

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vided that the Railway Company shall not be responsible for any loss, destruction, deterioration of, or damage to, the said consignment from any cause whatever, except for the loss of a complete consignment or one or more packages, forming part of a consignment, due either to the wilful neglect of the Railway Administration, or to theft by, or to the wilful neglect of, its servants or transport agents or carriers employed by them, provided that the term "wilful" neglect shall not be held to include fire, robbery from a running train, or any other unforeseen event or accident. There was another Risk-Note in Form A which declared that the bales were in slack condition, and the Railway Company would not be responsible for the condition in which the aforesaid goods may be delivered to the consignee at destination, and for any loss arising therefrom from the same.

The consignment was placed in a Road Van attached to a mixed train, which was supposed to have left Lakhimpur on the 26th January 1922 at 9.30 P.M. The doors of the Road Van were enclosed with bolts or cotter pins; but were neither locked nor sealed. There were two intervening stations, on which the guard on duty is supposed to have examined the doors, and found them in proper condition; but whether he did so or not rests merely on his evidence, which is not supported by any independent testimony. "When the train reached Gola Gokran Nath at about 10 P.M., one of the station staff called out that the door of the Road Van was open and, on examination, two bundles of cotton yarn, belonging to two different consignments, were found missing. One of them formed part of the consignment in suit.

The Court below found, that the Railway Company was guilty of wilful neglect in not locking the Road Van, or otherwise properly securing it against theft and decreed the claim accordingly for damages suffered by plaintiff. It is urged here on behalf of the Railway Company, that a Road Van is not locked but its doors are secured by bolts, because goods have to be loaded and unloaded at intermediate stations, and that the guard on duty is required to examine the bolts at every intermediate station.

If such a practice prevails, it is not consistent with the security which the Railway Company is bound to provide for the goods entrusted to its custody for transit because the guard may not always be alert in the discharge of his duty. There may, moreover, be at times temporary stoppages in the way or at some distance from the Railway Station, due to the signal being not down, or to some other cause and the security afforded by the bolting of the doors may prove utterly insufficient. If by any inadvertence the bolts are not sufficiently well-secured, theft may also be otherwise possible. The right of a Railway Company to limit its liability in consideration of a reduction of the freight by special agreement has been recognised in *Hazari Lal v. Secretary of State for India* (1) and *G. I. P. Railway Company v. Jitan Ram-Nirmal Ram* (2) and as observed in the *East Indian Railway Company v. Nathmali-Behari Lal* (3) and *Bombay Baroda and Central India Railway Company v. Ranchhodlal-Chhotalal & Co.* (4) the burden of proving wilful neglect by the Railway Administration or its servants lies on the plaintiff; but in the circumstances above mentioned, wilful neglect may be inferred from the fact that the steps taken to secure the goods against loss by theft were inadequate. In *Bengal and North-Western Railway Company v. Haji Mut-saddi* (5) damages were awarded because the wagons carrying goods were not locked during transit; and the fastening of the doors was considered absolutely insecure and ineffective. A theft is not the same thing as a robbery from a running train, because the latter imports the idea of the use of force.

The application, therefore, fails and is dismissed with costs.

W. C. A.

Application dismissed.

N. H.

(1) 65 Ind. Cas. 342; 8 O. L. J. 588; (1922) A. I. R. (O.) 170.

(2) 67 Ind. Cas. 664; 3 P. L. T. 222; (1922) A. I. R. (Pat.) 17.

(3) 39 Ind. Cas. 10; 39 A. 418; 15 A. L. J. 321.

(4) 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779.

(5) 7 Ind. Cas. 160; 7 A. L. J. 833.

BANAKARA BASAVANA V. BANAKARA DODDAINGAPPA.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 166 OF 1922.

January 22, 1923.

Present :—Mr. Justice Oldfield and Mr.

Justice Venkatasubba Rao.

BANAKARA BASAVANA GOWD AND
OTHERS—DEFENDANTS,—APPELLANTS

versus

BANAKARA DODDAINGAPPA AND
ANOTHER—PLAINTIFFS—RESPONDENTS.*Civil Procedure Code, (Act V of 1908) ss. 11, 16, 17
O. II, r. 2—Suit for partition of some items
of joint family property—Subsequent suit for
partition of others, whether maintainable.*

A suit for partition of an item of joint family property is unsustainable where the plaintiff has already brought a suit and obtained a decree for partition as regards another item.

A suit for partition of joint family property is a comprehensive ascertainment of the assets, including immoveable property belonging to the family and the liabilities to be satisfied out of those assets. [p. 430, col. 1.]

The effect of the provisions contained in section 11, Explanation IV, and O. II, r. 2 of the Civil Procedure Code is that ordinarily only one suit for partition will lie. The cause of action in a partition suit of joint family property must be regarded as exhaustive of the whole property available for division so far as its existence is known at the date of the plaint, even where the properties are situate within the jurisdiction of more Courts than one. [p. 431, col. 1.]

Sections 16 and 17 of the Civil Procedure Code do not override the principles of the provisions of section 11 and O. II, r. 2 of the Code. They simply provide for the machinery to enable litigants with property in more than one jurisdiction to adhere to these principles. [p. 431, col. 1.]

Subba Rau v. Rama Rau, 3 M. H. C. R. 376, *Mansaram Chakravarti v. Ganesh Chakravarti*, 16 Ind. Cas. 383; 17 C. W. N. 521, distinguished. *Ram Harakh v. Ram Lal*, 33 Ind. Cas. 124; 38 A. 217; 14 A. L. J. 257, dissented from.

Appeal against an order of remand of the District Court, Bellary, dated the 10th November 1921, in Appeal Suit No. 69 of 1921, preferred against a decree of the Court of the District Munsif, Hospet, in Original Suit No. 150 of 1920.

Mr. D. Sreenivasa Row, for the Appellant.

Mr. V. S. Narasinhachari, for the Respondent.

JUDGMENT.—In this case the question is whether the present suit is sustainable for one item of what is admittedly joint family property, in view of the fact that the plaintiff has already brought a suit and obtained a decree for other items.

We cannot follow the learned Judge in deciding in the plaintiff's favour, on the sole ground that the property now claimed as in possession of the 7th defendant is alleged by him to be his by purchase and prescription, whereas in the previous suit it seems to have been referred to in the plaint as in the possession of the 7th defendant as a tenant. In either case the joint family character of the property was in question, and it was on account of that character that reference to it was made before and the claim to it is made now. We cannot see how the ground on which the 7th defendant may be withholding it from the co-parcenary is material to the plaintiff's duty to have included it in the previous suit.

To turn to the grounds of decision adopted by the learned District Munsif, it cannot be disputed that a suit for partition of joint family property is a comprehensive ascertainment of the assets, including immoveable property, belonging to the family and the liabilities to be satisfied out of these assets. In our opinion, the contention that generally only one suit for partition will lie represents settled law. That is the only view reconcilable with the terms of section 11, Explanation IV and O. II, r. 2, Civil Procedure Code. The ground on which the plaintiff would distinguish the present case and exclude it from the purview of those provisions, is that the property dealt with in his previous suit was situated within the jurisdiction of one Court, whereas the property now in question is situated in that of another. It is no doubt the case that the first of those Courts is in the Bombay Presidency whilst the second in the Bellary District of this Presidency. But we have not been shown how that difference of Presidency is in any way material. The plaintiff's argument is that sections 16 and 17 of the Code give him the option to bring either two suits in the two Courts for the property in the jurisdiction of each or one suit in whichever Court he prefers for the whole property, and that he has simply exercised his option in choosing the former alternative. That, however, takes no account of the broader principle involved in section 11, Explanation IV and O. II, r. 2 or of the meaning to be attached to the expression "cause of action" used in them. The cause of action, as already

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observed, in a partition suit of joint family property must be regarded as exhaustive of the whole property available for division, so far as its existence is known at the date of the plaint. We have not been shown any authority for holding that the principles of the provisions of the Code last mentioned are over-ridden by those of sections 16 and 17 or that sections 16 and 17 are not simply the machinery provided to enable litigants with property in more than one jurisdiction to adhere to those principles. The decision quoted *Subba Rau v. Rama Rau* (1) no doubt refers to the Mofussil, but as the learned Judges observed, the words of sections 11 and 12 in the Code then in force enabled the plaintiff to sue in one Court in respect of property situated in more than one, only with the permission of the Saddar Court, the position then being identical with that which now obtained on the Original Side of the High Court, where permission is necessary before a suit can be brought in respect of property outside as well as in the Original Side Jurisdiction. *Subba Rau v. Rama Rau* (1), therefore, and other cases relating to the original jurisdiction of this and other High Courts are accordingly beside the point. In *Mansaram Chakravarti v. Ganesh Chakravarti* (2) the property was held in common. There was, therefore, no question of the necessity for an exhaustive settlement of assets and liabilities, which a suit for partition of family property entails. *Ram Harakh v. Ram Lal* (3) is based mainly on, *Subba Rau v. Rama Rau* (1) and with all respect we differ from the learned Judges in the view we take of that case and are unable to follow them in the remainder of their judgments. In these circumstances, we cannot hold that the position of the suit properties in two jurisdictions makes any difference in the application of the principle involved in O. II, r. 2.

Reliance is next placed on the mention by the plaintiff of the property now in dispute in his previous plaint, that mention being accompanied by a statement that he reserves his right to sue for it and that he

would enforce that right in other proceedings. Such statements are not uncommon in plaints and are made properly and naturally, when the property in question is not immediately divisible and the plaintiff desires to put on record that he will claim it in the future. But in the case before us we have not been shown how his statement could have any effect, since, he could not exclude the application of the principle above referred to by merely saying that he would not respect it.

The remaining argument addressed to us in support of the lower Appellate Court's decision is that the property now claimed, was excluded from the previous suit in consequence of the negligence or fraud of the plaintiff's guardian. There is no such allegation in the plaint in the present suit, and none was made in the appeal to the lower Appellate Court. We are not prepared to consider a new case of that description for the first time in the second appeal.

The result is that the appeal is allowed, the lower Appellate Court's decision being set aside and the District Munsif's decision restored with costs throughout.

V. N. V.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 993 OF 1921.

February 15, 1923.

Present:—Mr. Justice Ross.

Babu BIKOO MAHTON AND OTHERS—
PLAINTIFFS—APPELLANTS

VERSUS

NARAYAN SAHU AND OTHERS—DEFEND-
ANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 9—Easement, declaration against—Some of several servient owners, whether can sue—Custom—Profit a prendre in gross, acquisition of—Right to take earth from waste land, whether reasonable.

Where some of several servient owners sue for a declaration that the defendants are not entitled

(1) 3 M. H. C. R. 376.

(2) 16 Ind. Cas. 383; 17 C. W. N. 521.

(3) 33 Ind. Cas. 124; 38 A. 217; 14 A. L. J. 257.

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to exercise a certain right, the suit is not liable to be dismissed for non-joinder of the other servient owners and there is nothing to prevent the Court from adjudicating on the rights of the parties actually before it. [p. 432, col. 2.]

Madon Mohan Chattopadhyaya v. Akshoy Kumar Baruri, 5 Ind. Cas. 23; 14 C. W. N. 15, relied upon.

There is nothing to prevent the acquisition by a fluctuating body, for instance, the residents of a particular village, of a *profit a prendre* in gross, by custom, provided the custom is not unreasonable and does not operate to destroy the subject-matter of the right. [p. 433, col. 1.]

Bhola Nath Nundi v. Midnapore Zemindary Co., 31 C. 503; 31 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 152; 8 Sar. P. C. J. 611 (P. C.) and *Maharaj Bahadur Singh v. Gandauri Singh*, 39 Ind. Cas. 868; 2 P. L. J. 323; 2 P. L. W. 282, relied upon.

A custom by which earth is taken from a piece of waste land to repair houses in a village after inundations is not unreasonable. On the contrary, it is an eminently reasonable custom that the people of the village should take earth from a ditch which serves no other purpose in order to repair their houses. [p. 433, col. 1.]

Appeal from a decision of the Subordinate Judge, Third Court, Patna, dated the 19th February 1921, affirming that of the Officiating Munsif, Barh, dated the 31st October 1919.

Mr. Shiveswar Dayal, for the Appellants.

Messrs. K. P. Jayaswal and B. C. Sinha, for the Respondents.

JUDGMENT.—The allegations in the plaint are these: The plaintiffs are *Istim-rari Mokarraridars* and *Thikudars* of *Mouza Saidpur Soniawan*. In the village there is a plot of *gair mazrua* land belonging to the plaintiffs, an area of 1.5 acres with which the defendants have no concern. Since the 5th of March 1919 the defendants had been digging and taking out earth from this land without leave of the plaintiffs and without any right. The plaintiffs claimed a declaration, that the defendants had no right to dig and take earth out of this land and an order of the defendants to fill up the ditch, and damages and an injunction. The defence, so far as is now material, is that the plaintiffs are not the whole body of proprietors of the village and the suit is, therefore, bad for defect of parties; and that the defendants, who are seven tenants of the village, and their ancestors, have been from time immemorial digging and taking earth from the land in suit, whenever re-

quired, without leave of the proprietors, and that they have a right to do so; that their houses are situated near the land in suit and the village is visited by flood each year whereby their houses are damaged, and they dig earth from the land for their repairs.

The Munsif held that although the plaintiffs were not proprietors of the whole village, they were in possession of it; but their lessors ought to have been made parties to the suit because two of the leases, under which the plaintiff held, reserved to the lessors all cases of dispute about title; and that by reason of the provisions of O. I, r. 9, the suit was nevertheless maintainable. The Subordinate Judge on appeal held that the plaintiffs represent the entire body of landlords.

The learned Counsel for the defendants, who are the respondents in this appeal, relied on the decision in *Madon Mohan Chattopadhyaya v. Akshoy Kumar Baruri* (1) and contended that no decree on an easement could be passed in the absence of some of the servient owners. That was a case in which the persons claiming the easement were plaintiffs. Here the plaintiffs are the servient owners and, although those proprietors, who are not parties, may not be bound by the decree, there is nothing to prevent the Court from adjudicating on the rights of the parties actually before it.

On the question of substance the Munsif believed the witnesses for the defence, that the defendants had been digging and taking earth from this land without protest by the proprietors for more than 20 years. He also held that it was natural for them to dig earth from this land near their houses to repair them and that they had a right to do so. He further held that although there were embankments on the sides of the ditch in suit, which would be damaged if the ditch were dug to the depth of two men's height, yet as the ditch was only breast deep, or the depth of one man's height, the plaintiffs had sustained no injury. He, therefore, dismissed the suit. The Subordinate Judge on appeal held that the village community can exercise common rights in respect of the disputed land and that the common

(1) 5 Ind. Cas. 23; 14 C. W. N. 15.

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use that is made of this land is to take earth from it for the purposes of occasional repairs of their houses when damaged by a heavy flood; that the plaintiffs had no exclusive right of possession on the land and that the embankments were in no danger of collapse. He dismissed the appeal.

It is now contended on behalf of the plaintiffs that the taking of the earth is not an easement but a *profit a prendre* and cannot be acquired by custom which would be void for unreasonableness as tending to the entire destruction of the property; that no decided case recognise any right to take away the subject-matter of an easement of custom, and that the Subordinate Judge has not considered whether the custom is reasonable or not. In *Bhola Nath Nundi v. Midnapore Zemindary Co.* (2) it was held that on proof of enjoyment of a right of pasturage over the waste land of the village from time immemorial there could be no difficulty in the way of the Court in finding a legal origin for the right. In *Maharaj Bahadur Singh v. Gandauri Singh* (3) it was observed as follows at page 337* "It is true that we have been shown no case which recognises a *profit a prendre* in gross by custom, but the only obstacle in recognizing *profit a prendre* in favour of fluctuating bodies is that the exercise of the custom would operate to destroy the subject-matter of the right, and if in this case it can be established that the exercise of the right by the Sonthal and Ghatwals was not, under the circumstances, unreasonable, I see no reason why we cannot find in favour of the custom." There is no uncertainty about the custom. The only question is: whether the alleged custom is reasonable or not. I see no ground for saying that a custom by which earth is taken from a piece of waste land to repair houses in a village after inundations is unreasonable. On the contrary, it seems to me an eminently reasonable custom that the people of the village should take earth from a ditch which serves no other purpose, in order to repair

their houses. It has not been shown that it is destructive of the subject-matter. The findings of the Courts below do not indicate any such result as probable; and, in any case, the contingency seems too distant to justify the Courts in summarily putting an end to the right, as was said in *Mohidin v. Shiwlingappa* (4).

The appeal is dismissed with costs.

Z. K.

Appeal dismissed.

(4) 23 B. 666; 1 Bom. L. R. 170; 12 Ind. Dec. (N. S.) 415.

LAHORE HIGH COURT.

CIVIL APPEAL NO. 531 OF 1917.

July 6, 1922.

Present:—Mr. Justice Brasher and Mr. Justice Scott-Smith.

GHULAM MUHAMMAD—DEFENDANT—

APPELLANT

versus

PANNA RAM AND OTHERS—PLAINTIFFS

—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 16 (6), 36—Transfer made more than two years before order of adjudication, whether can be annulled—Interpretation of Statutes—Intention of Legislature.

Section 16 (6) of the Provincial Insolvency Act does not govern section 36 of the Act and, therefore, a transfer effected more than two years before the order of adjudication but within two years of the date of the presentation of the petition cannot be annulled under the section. [p. 435, col. 2.]

Jokhan Singh v. Deputy Commissioner, Fyzabad, 23 Ind. Cas. 924, approved.

Bhagwant v. Munim Khan, 8 Ind. Cas. 1115 at p. 1116; 6 N. L. R. 146. *Rakhal Chandra Purkait v. Sudhindra Nath Bose*, 52 Ind. Cas. 747; 46 C. 991; 24 C. W. N. 172. *Sankaranarayana Aiyar v. Alagiri Aiyar*, 49 Ind. Cas. 283; (1918) M. W. N. 487; 24 M. L. T. 149; 35 M. L. J. 296; 8 L. W. 281 and *Sheo Nath Singh v. Munshi Ram*, 55 Ind. Cas. 941; 42 A. 433; 2 U. P. L. R. (A) 122; 18 A. L. J. 449, dissented from.

The meaning of a Statute is not to be interpreted with reference to what its framers intended to do, but with reference to the language which they did in fact employ. [p. 435, col. 2.]

The proceedings of the Legislature in passing a Statute cannot be taken into consideration in the judicial construction of the Statute. [p. 435, col. 2.]

(2) 31 C. 503; 31 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 152; 8 Sar. P. C. J. 611 (P. C.).

(3) 39 Ind. Cas. 868; 2 P. L. J. 323; 2 P. L. W. 282.

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When by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced even though it be absurd or mischievous. [p.436, col. 1.]

Appeal against a decree of the District Judge, Mianwali, dated the 13th December, 1916.

Mr. Saleem, for the Appellant.

Mr. M. L. Puri, for the Respondents.

JUDGMENT.—In this case the learned District Judge has held that a mortgage and a gift are void against the Receiver under section 36 of the Provincial Insolvency Act (III of 1907). The transactions were effected about 6½ months before the petition for insolvency was presented, and more than two years before the order of adjudication was passed. The District Judge considered that section 36 of Act III of 1907 is governed by section 16 (6) of the same Act, and that, consequently, the transactions could be annulled since they took place within two years of the date of the presentation of the petition.

The main question raised in this appeal is, whether the District Judge was correct in this view of the law, and since there was some conflict of authority upon the point the learned Judge before whom the appeal came up for hearing has referred the case to a Division Bench.

At the time when the order of reference was passed there appear to have been only two judicial decisions dealing with the matter in issue. In *Bhagwant v. Munim Khan* (1) the Judicial Commissioner of Nagpur held that section 16 (6) of the Provincial Insolvency Act governed section 36 and that the two years mentioned in the latter section mean the two years before the date of the presentation of the insolvency petition. In *Jokhan Singh v. Deputy Commissioner, Fyzabad* (2) the opposite view was taken by the Judicial Commissioner of Oudh. There have since been two cases decided in accordance with the view expressed by the Judicial Commissioner of Nagpur, viz., *Rakhal Chandra Purkait v. Sudhindra Nath Bose* (3), a decision of a

Division Bench of the Calcutta High Court and *Sankaranarayana Aiyar v. Alagiri Aiyar* (4) a decision of a Division Bench of the Madras High Court. The latter decision has also been approved in *Sheo Nath Singh v. Munshi Ram* (5), though in that case there was no question as to the annulment of a transfer under section 36 of the Act.

The weight of authority, therefore, favours the view taken by the District Judge, but after a careful consideration of the judgments in the cases cited above we consider that the correct exposition of the law is that given in *Jokhan Singh v. Deputy Commissioner, Fyzabad* (2). Section 36 of the Provincial Insolvency Act (III of 1907) provides that a transfer of property may be annulled if the transferor is adjudged insolvent within two years after the date of transfer, and in order to support the decision of the lower Court it must be held that the transferor is adjudged insolvent when the petition for insolvency is presented. Under section 16 (6) an order of adjudication shall relate back to and take effect from the presentation of the petition on which it is made, but this cannot mean that for all purposes the date of adjudication is to be taken as identical with the date of presentation of the petition. If there were any doubt on the subject it would be removed by the difference in the phraseology employed in sections 36 and 37 of the Act. Section 37 allows the annulment, in certain cases of transfers in favour of creditors "where the transferor is adjudged insolvent on a petition presented within three months after the date of the transfer." If the framers of the Act intended that the period provided by each section should terminate on the date of the presentation of the petition for insolvency it is obvious that the words "once a petition presented" which occur in section 37 either should have been inserted also in section 36 or on the supposition that section 16 (6) would apply, should have been omitted altogether.

This point is fully discussed in *Jokhan Singh v. Deputy Commissioner, Fyzabad* (2).

(1) 8 Ind. Cas. 1115 at p. 1116; 6 N. L. R. 146.

(2) 23 Ind. Cas. 924.

(3) 52 Ind. Cas. 747; 46 C. 991; 24 C. W. N. 172.

(4) 40 Ind. Cas. 283; (1918) M. W. N. 487; 24 M. L. T. 149; 35 M. L. J. 296; 8 L. W. 281.

(5) 55 Ind. Cas. 941; 42 A. 433; 2 U. P. L. R. (A) 122; 18 A. L. J. 449.

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and in only one of the decisions in the respondents' favour, viz., *Sankaranarayana Aiyar v. Alagiri Aiyar* (4) is any reference made to it. The decision in *Bhagwant v. Munim Khan* (1) is based upon the wording of the corresponding English Act and upon the debate which took place in the Legislative Council when the Indian Act was passed. Section 43 of the English Act of 1883 is the section which is said to have led to the provision contained in section 16 (6) of the Indian Act, while sections 47 and 48 of the English Act are the sections which correspond to sections 36 and 37 of the Indian Act. While, however, section 37 of the Indian Act of 1907 is almost a literal reproduction of section 48 of the English Act, sections 16 (6) and 36 of the Indian Act differ materially from the corresponding sections of the English Bankruptcy Act. Under section 43 of the latter Act, "the bankruptcy of a debtor, whether the same takes place on a debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor." Section 47 runs as follows:—

"(1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within 10 years

after the date of the settlement, be void against the trustee in the bankruptcy unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

"(2) Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy.

"(3) 'Settlement' shall for the purposes of this section include any conveyance or transfer in property."

Though it appears that the framers of the Indian Act of 1907 had these sections in mind when they drew up sections 16 (6) and 36 of Act III of 1907, the difference in language is so great that we think it would hardly be safe to conclude that they intended section 16 (6) to govern section 36. Assuming, however, that we are mistaken on this point, we conceive that the meaning of the Act is not to be interpreted with reference to what its framers intended to do, but with reference to the language which they did in fact employ.

The learned Judicial Commissioner of Nagpur appears to us also to have been wrong in placing reliance on the debates which took place in the Legislative Council. In *Administrator-General of Bengal v. Premal Mullik* (6) their Lordships of the Privy Council observed that, proceedings of the Legislature in passing a Statute are excluded from consideration on the judicial construction of Indian, as well as of British Statutes. The Calcutta decision *Rakhal Chandra Purkatt v. Sudhindra Nath Bose* (3) is based mainly upon

(6) 22 C. 788; 22 I. A. 107; 6 Sar. P. C. J. 603; 11 Ind. Dec. (N. S.) 522 (P. C.).

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the consideration that, if the contrary view were adopted, the provisions of section 36 might be defeated by delay in the insolvency proceedings. This, however, is not a matter which can be taken into account when the meaning is plainly expressed.

"It matters not in such a case what the consequence may be when by the use of clear and unequivocal language capable of only one meaning anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous." (Maxwell on the Interpretation of Statutes, 5th Edition, page 5).

In the Madras case *Santharanarayana Aiyar v. Alagiri Aiyar* (4) reference has been made, as mentioned by us above, to the argument based on the difference in the language of sections 36 and 37 of the Act, but the reason given for rejecting this argument appears to us, with all due respect, to be unsound. According to the judgment of Sadasiva Aiyar, J., the Indian Legislature aimed at brevity in framing section 36 and "as section 16 (6) precedes section 36 it seems to have considered the words, 'adjudged insolvent' to be sufficient as indicating that the date was the date from which the adjudication takes effect by the force of section 16 (6)."

This amounts merely to an admission that the framers of the Act committed a mistake and to an explanation as to how the mistake came to be committed. If the framers of the Act were really so careless as not to notice what the difference between the language of sections 36 and 37 implied we must again observe that the Act cannot be interpreted with reference to what they intended to do. We accordingly hold that section 16 (6) of the Act does not govern section 36, and it follows that the transactions which are in dispute in this case cannot be annulled. We accept the appeal, and set aside the order of the District Judge. The appellant will be given his costs in both Courts against the Receiver.

Z. F.

*Appeal accepted.***MADRAS HIGH COURT.**

CIVIL APPEAL NO. 33 OF 1922.

January 18, 1923.

Present:—Mr. Justice Phillips and
Mr. Justice Devadoss.

MUTHU PILLAI—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL, THROUGH THE COLLECTOR
OF MADURA—RESPONDENT.

Contract—Offer and acceptance—Auction-sale of Government property, subject to Collector's confirmation—Highest bidder, rights of—Refusal of Collector to confirm, effect of.

An auction-sale was held by a Tahsildar of a house belonging to Government under a sale notification containing a stipulation that the sale would be subject to confirmation by the Collector. The highest bidder at the auction duly paid the sale price and the report of the sale was forwarded by the Tahsildar to the Collector with a note that the auction was concluded in favour of the highest bidder. The latter was allowed to occupy the house on condition that he would quit it when required. More than two years after the sale the Collector passed an order declining to confirm the sale. In a suit to eject the highest bidder from the house:

Held, that there was no concluded contract of sale and that the transaction amounted merely to an offer which was never accepted by the Collector; and that the order of the Tahsildar that the auction had been concluded in favour of the highest bidder had not the effect of altering the original condition of the sale which was subject to the Collector's confirmation. [p 437, col. 2.]

Chitibobu Adenna v. Garimalla Jaggarayadu, 29 Ind. Cas. 12; 28 M. L. J. 617, distinguished.

Appeal against a decree of the Court of the Additional Subordinate Judge, Madura, in Original Suit No. 73 of 1920.

Mr. F. S. Vaz, for the Appellant.

The Government Pleader, (Mr. C. Madhavan Nair), for the Respondent.

JUDGMENT.—In this case a house was put up for sale by Government and the auction was held by the Tahsildar of Madura. First defendant was the highest bidder and the report of the sale was forwarded to the Collector for confirmation. First defendant deposited 15 per cent. of the purchase-money on the day of sale and the balance one month later. The sale was on the 15th of July 1915 and it was neither confirmed by the Collector nor cancelled until late in 1917. Apparently, the first defendant on several occasions, applied to the

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Collector for the grant of sale-certificate and for the possession of the house. On one occasion, he was informed that the matter had been referred to Government and orders were awaited. Finally, in 1916, at his own request, first defendant was allowed to occupy the house on condition that he would quit it whenever required. The present suit has now been brought to recover possession from the first defendant who refused to quit. The Government declined to confirm the sale in first defendant's favour, but he now contends that he is entitled to possession as the sale was completed.

The real question for our consideration here is, what was the effect of the transaction of the 15th of July 1915, namely, the auction held by the Tahsildar? It is contended for the first defendant that it was a completed contract and, on that assumption, the greater part of his argument has been addressed. It is contended for Government that there was no completed contract but that the transaction before the Tahsildar amounted to merely an offer which the Collector could, or need not accept as he pleased. The sale notification contained a stipulation that the sale would be confirmed on receipt of the Collector's order of confirmation, and, after holding the auction, the Tahsildar wrote at the foot of the bidding list: "The auction was concluded in favour of Muthu Pillai" (*i. e.*, the first defendant). It is argued for the first defendant that the meaning of "the auction was concluded in favour of Muthu Pillai" is that there was concluded agreement to sell and that the right was reserved in the Collector to rescind such agreement on reasonable grounds, and reliance is placed on *Chitibobu Adenna v. Garimalla Jaggarayadu* (1). The facts of that case are, however, somewhat different to the present one, for when the sale was held there would appear to have been no prior stipulation as to what was going to happen, and, finally, the *Amin* who conducted the sale recorded the following: "first defendant bid the last bid for Rs. 150 and as no other bid for more than that, it (the sale) has been confirmed in the name of the highest bidder, subject to the approval and orders of the special

agent." Subsequently, apparently, the sale was approved by the special agent. Here we see that there was a distinct statement that the sale had been confirmed and was merely subject to a subsequent approval by the special agent, and, in these circumstances, it was held that there was an acceptance by the principal of the offer and, therefore, the contract was concluded. In the present case, however, there has been no such communication to the first defendant and he was distinctly informed that the sale would not be confirmed until the orders of the Collector had been received; so that the order of the Tahsildar saying that the auction had been concluded in first defendant's favour cannot have the effect of altering that condition, namely, that the sale would not be confirmed until the orders of the Collector were obtained. In the present case no such orders were obtained and the sale was not confirmed. No doubt, there was a very great delay on the part of the Collector in making up his mind whether the sale should be confirmed or not and it would probably have been open to the first defendant, after waiting for a reasonable time, to refuse to be bound by the contract. That was not what he wanted to do; he wished to hold by the contract, and was always pressing for the confirmation of the sale, and it is quite clear from his conduct that he was under the impression that the sale had not been concluded, for we see that he frequently put in petitions asking for the confirmation of the sale and pointing out the difficulties in which he was placed. On this evidence, we are satisfied that there was no concluded contract on the 15th of July and that the offer made by the first defendant was never accepted. That being so, the whole of the argument addressed to us on the supposition that there was concluded contract need not be considered now.

The only other two points which remain for consideration are (1) the rate of interest which has been allowed to the first defendant upon the money which he deposited, and (2) the amount of rent which has been awarded to Government for first defendant's occupation.

As regards interest, the first defendant in his early petitions always asserted that he had borrowed at 12 per cent, but when

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the case came into Court he alleged that he had borrowed at 18 per cent, and he produced one document which showed that on a certain occasion he did borrow Rs. 2,000 at 18 per cent. In view of his former assertions that he borrowed at 12 per cent this last statement is obviously false and it throws a good deal of doubt on the allegation that he was compelled to borrow at all. In any case, the lower Court has considered what would be the reasonable rate of interest and has awarded 6 per cent and we are not prepared in appeal to interfere with this finding.

As regards the rate of rent, we have on the one side the opinion of the Tahsildar and the *Kurnam* of Madura town that the proper rent is Rs. 35 a month, whereas the first defendant says that it is only Rs. 20. The first defendant has admittedly leased out a portion of the house, but he has not adduced any evidence to corroborate his statement that the whole house would fetch only Rs. 20. The only ground on which we could interfere would be that Rs. 35 seems to be somewhat high rate of interest on the capital, but there is no evidence as to what the usual rate is in Madura, and, therefore, we must accept the lower Court's finding that Rs. 35 is the proper rent. In the result, the appeal is dismissed with costs.

V. N. V.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL, No. 366 OF 1921.

February 7, 1923:

Present.—Mr. Batten J. C.

HINDUSINGH AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

MANGAL AND ANOTHER—DEFENDANTS

—RESPONDENTS.

Interpretation of Statutes—Rule of Interpretation—Retrospective effect—Tenancy Act (I of 1920), s. 49 (1), whether retrospective.

Unless an intention to the contrary is clear, an Act is to be construed as operating only on

cases or facts which come into existence after the Act, and not retrospectively to cases which had come in existence before the Act. As a general rule, mere alterations in forms of procedure are retrospective in effect and apply to pending proceedings. [p. 440 col. 12]

The provisions in section 49 (1) of the C. P. Tenancy Act relating to the lapsing of the tenancy rights granted by an ex-proprietor in the *sir* land cannot have retrospective effect over tenancy rights created before the passing of the Act. [p. 440, col. 1.]

Appeal against the decree of the District Judge, Hoshangabad, in Civil Appeal No. 38 of 1921, dated the 14th May 1921.

Mr. C. B. Parakh, for the Appellants.

Mr. A. C. Roy, for the Respondents.

JUDGMENT.—The plaintiffs-appellants in 1910 leased certain of their *sir* fields to the defendants for 18 years. In 1917 the plaintiffs' share of the village in which these fields lay was sold in execution of a decree, and the plaintiffs became occupancy tenants, but, according to sub-section (5) of section 45 of the Tenancy Act, 1898, the defendant's rights were not affected. On the 30th November 1920 after the Tenancy Act of 1920 came into force, the plaintiffs sued for possession of the fields on the ground that, according to sub-section (1) of section 49 of that Act, the defendants' tenancy right had elapsed.

Sub-section (1) of section 49 of the Act of 1920 runs as follows:—

“Notwithstanding any contract to the contrary, and, save where sanction has been given in accordance with the provisions of this Act, a proprietor, who temporarily or permanently loses, whether under a decree or order of a Civil Court or a transfer or otherwise, his right to occupy any portion of his *sir*-land as a proprietor, shall, at the date of such loss, become an occupancy tenant of such *sir* land, and any tenancy right granted by him in such *sir* land for a period exceeding 5 years, without the sanction of a Revenue Officer, shall thereupon lapse.” The words from “and any tenancy right” to the end of the sub-section are new; there was no such provision in the former Tenancy Act. The First Court held that the provision was retrospective and decreed the suit, the learned District Judge on appeal took a contrary view and reversed the decision. The only question before me is which view is correct,

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The learned District Judge, after discussing the law as to the interpretation of Statutes and the reasoning of the First Court, says:—"But a point is to my mind fatal to the plaintiffs' case and that is, that the section and sub-section (1) refer to a proprietor. I do not think that the meaning of the word 'proprietor' can be strained to include people who have ceased to be proprietors for more than three years before the Act comes into force. Were ex-proprietors to be considered, mention would have been made of them. Were the opposite assumption correct, every *malguzar* who has evaded the old Tenancy Act whether he has done so for his own benefit, or been forced into evasion by the ruthless creditors, by executing a long lease of his *sir*-land, would be able to come forward after an indeterminate number of years and claim protection of the passing of the new Act. The plain meaning of the section is, that where a proprietor loses his proprietary right in *sir* after the Act comes into force, he becomes an occupancy tenant of such *sir* land, and if he has granted away tenancy rights, either before or after the Act comes into force, for more than five years, such rights shall lapse. The object of the section is unmistakeable, and is open to prevent the evasion of section 45 of the Tenancy Act of 1898, and to safeguard the *malguzar* for the future, but I cannot read into it the intention of restoring *malguzars* who have evaded the Act in the past to the position they held before they tried to defeat the object of the Tenancy Act of 1898."

It is to be observed that sub-section (5) of section 45 of the Tenancy Act of 1898 enacted that the accrual of occupancy tenant right under sub-section (1) would not affect the rights of an ordinary tenant of the *sir* land *at the time of such accrual*. At the time of the accrual the defendant was an ordinary tenant for the term of eighteen years, and if the new provision were to have retrospective effect, it would mean that he would be deprived of rights which were expressly preserved for him by the former Act.

It is also to be observed that under the old Act a Revenue Officer had no jurisdiction to give or withhold sanction to a lease of the *sir* land for a period exceeding five

years. Such jurisdiction has for the first time being conferred by the last part of sub-section (1) of section 49 of the Act of 1920. By Notification No. 20T, dated the 16th June 1920, rules have been made for the regulation of the procedure of Revenue Officers in dealing with applications to grant tenancy rights for a period exceeding five years. If retrospective effect is given to the new provision, in the sense desired by the plaintiffs, it would mean that a lease would lapse because it was not sanctioned, although no such sanction could possibly have been applied for, granted or refused, a result which appears to be absurd. When holding that the new provision applies to leases granted before the new Act came into force, in cases where occupancy rights accrued to the proprietor after the Act came into force the learned District Judge has overlooked this consideration.

The law as to the retrospective effect of Statutes has been succinctly put by Ismay, J. C., in *Kala Tihari v. Narayan* (1): "It is a general rule that all Statutes are to be construed to operate in future, unless from the language a retrospective effect is clearly intended. It is chiefly when the enactment would prejudicially affect vested rights or the legal character of past transactions that the rule in question operates. Every Statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation (Maxwell on the Interpretation of Statutes, page 257). These principles have been embodied in section 6 of the General Clauses Act, 1897. As a general rule, mere alterations in forms of procedure are retrospective in effect and apply to pending proceedings, but where a change in procedure is complicated with a change of existing rights the rule could not I think be held to apply." Again, in *Seth Nerbudda Prasad v. Raja Seth Gokuldas* (2) he

(1) 13 C. P. L. R. 143.

(2) 1 N. L. R. 158.

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observes:—"Now, whenever the intention is clear that an Act shall have a retrospective operation it must unquestionably be so construed, however unjust and hard the consequences may be. On the other hand, unless an intention to the contrary is clear an Act is to be construed as operating only on cases or facts which come into existence after the Act is passed." The same principle was recognised by Brockman, J. C., in *Nilkant v. Ghulya* (3) and this is not a case of a Statute affecting only the procedure and practice of the Courts, such as was dealt with in *Shankargir v. Ramchandra* (4). The new provision is most certainly one, as I have shown above, that would prejudicially affect vested rights and the legal character of past transactions. I am of opinion that the latter portion of sub-section (1) of section 49 of the Tenancy Act cannot possibly have the retrospective effect which the plaintiffs contend should be attached to it, and I dismiss the appeal with costs.

G. R. D.

Appeal dismissed.

(3) 42 Ind. Cas. 384; 13 N. L. R. 165.

(4) 11 Ind. Cas. 912; 7 N. L. R. 125.

PATNA HIGH COURT.

CIVIL REVISION No. 236 OF 1922.

January 31, 1923.

Present.—Justice Sir B. K. Mullick, Kt., and Justice Sir John Bucknill, Kt.

THE GREAT INDIAN PENINSULAR RAILWAY COMPANY—APPELLANTS

versus

MESSRS. JITAN RAM-NIRMAL RAM

—RESPONDENTS.

Railways Act (IX of 1890), s. 72—Risk-Note Form B—Contract Act (IX of 1872), ss. 151, 152, 161—Liability of Railway—"Loss", meaning of—Burden of proof.

Under sections 151 and 152 of the Contract Act, read with section 72 of the Railways Act, the liability of a Railway Administration for the loss, destruction, or deterioration of goods delivered to the Administration to be carried by Railway is that of an ordinary bailee; that is to say, if the Railway Administration take as much care of the goods bailed to them, as a man of ordinary pru-

dence would under similar circumstances take of his own goods of the same bulk, quality and value, as the goods bailed, they will not, in the absence of special contract, be responsible for the loss, destruction or deterioration of the goods.

[p. 441, col. 1.]

The onus is, however, on the bailee to show that he is exonerated from liability for loss to the bailor. [p. 441, col. 2.]

Under the Risk-Note Form B the burden of proof lies in the first instance upon the Railway Administration to prove that there was such loss as is contemplated by the first part of the Risk-Note and when they have done so, the onus is shifted upon the bailor to show that the loss is due to the wilful neglect of the Railway or their servants as provided in the latter part of the Risk-Note. [p. 441, col. 2.]

The loss referred to in section 72 of the Railways Act is the loss suffered by the consignor or the true owner whether such loss occurred by reason of misdelivery or non-delivery. [p. 442, col. 2.]

Hill, Sawyers & Co. v. Secretary of State, 61 Ind. Cas. 926; 2 L. 133; 3 L. L. J. 297, relied upon.

The Risk-Note Form B applies not only when the goods have been lost by the bailee in the sense that he cannot trace them but also when they are lost to the owner because the bailee fails to deliver them to him in breach of his contract for any reason whatsoever. [p. 442, col. 2.]

A bailor cannot, by merely suing for compensation for non-delivery, take the case out of the Risk-Note. [p. 442, col. 2.]

(Case-law discussed.)

Application against a decision of the Second Subordinate Judge, Gaya, dated the 27th March 1922.

Messrs. N. C. Sinha and S. N. Bose, for the Petitioners.

Messrs. S. Dayal and Brijkishore Prasad, for the Opposite Party.

JUDGMENT.

Mullick, J.—The plaintiff filed the suit out of which the present application arises, in the Court of the Subordinate Judge of Gaya, alleging that, on the 22nd October 1920, his agent at Bombay delivered to the first party defendants, the Great-Indian Peninsular Railway Company, seven bales of twist for despatch by goods train to Gaya, a station belonging to the second party defendants, the East Indian Railway Company; that out of these bales one bale, valued at Rs. 406-4-0, was not delivered at Gaya, and that the plaintiff believes that it was lost within the jurisdiction of the second party defendants. He accordingly claims, for the value of the goods and for the estimated profits and for interest, a total sum of Rs. 485 as compensation.

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At the trial the plaintiff did not press his claim against the second party defendants. The suit, therefore, proceeded against the first party defendants only, who, among other things, pleaded that as the goods were booked at owner's risk under a Risk-Note in Form B as prescribed in the Indian Railways Act the plaintiff was not entitled to any compensation at all. They further contended that there was no wilful neglect on their part or theft by any of their servants.

The Subordinate Judge held that, as the suit was one for compensation for non-delivery of goods, he was bound by the decision of a Judge of this Court in *Agent, East Indian Railway Co. v. Ajodhya Prasad* (1) and he decreed the claim less the sum of Rs. 40 claimed for profits, that is to say, he gave a decree for Rs. 445 exclusive of costs.

The present application is made under section 25 of the Provincial Small Cause Courts Act by the first party defendants.

It is clear that this is not a suit in tort; it is a suit in contract and the only question is, what is the liability of the defendant carrier.

Under sections 151 and 152 of the Indian Contract Act, read with section 72 of the Indian Railways Act, the liability of the Railway Administration for the loss, destruction or deterioration of goods delivered to the Administration to be carried by Railway is that of an ordinary bailee, that is to say, if the Railway Administration take as much care of the goods bailed to them as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality, and value as the goods bailed, they will not, in the absence of special contract, be responsible for the loss, destruction or deterioration of the goods.

Section 161 of the Indian Contract Act prescribes that, if by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, the bailee is responsible to the bailor for any loss, destruction or deterioration of goods from that time.

Further, the Indian Railways Act of 1890, by repealing sections 7 and 10 of the Car-

riers Act (Act III of 1865), and by also enacting in section 72 (3) that nothing in the Common Law of England or in the Carriers Act of 1865 regarding the responsibility of common carriers with respect to the carriage of animals or goods shall affect the responsibility of a Railway Administration, leaves no room for doubt that the liability of the Railway Company must be measured and determined solely by the tests formulated in sections 151 and 152 of the Indian Contract Act.

The onus, therefore, being upon the bailee to show that he is exonerated from the liability for loss to the bailor, the question is, whether there is any special contract here which relieves him from such liability.

The bailee pleads such a contract, namely, the Risk-Note in Form B, the execution of which by the consignor has been established. It is in the form prescribed by the Indian Railways Act, and the material portion runs as follows:—

"Risk-Note Form B.

"I, the undersigned, do in consideration of such lower charge agree and undertake to hold the said Railway Administration harmless and free from responsibility for any loss, destruction, or deterioration of or damage to the said consignment from any cause whatsoever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of his servants, provided that the term wilful neglect be not held to include fire, robbery from a running train, or any other unforeseen event or accident."

It is clear that, upon this special contract, the burden of proof lies, in the first instance, upon the defendants, that is to say, they must first prove that there was such loss as is contemplated by the first part of the Risk-Note, and when they have done so the onus will be shifted upon the plaintiff to show that the loss is due to the wilful neglect of the defendants or their servants as provided in the latter part.

An attempt had been made to show that by suing for compensation for non-delivery, the plaintiff has taken the case out of the Risk-Note, which applies only to loss

(1) 49 Ind. Cas. 498; (1919) Pat. 150.

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by the bailee and involves the notion of an involuntary or unwilling parting with the thing with reference to which the word is used, and that the goods cannot be said to be lost if the carrier detains them wrongfully or wilfully or negligently delivers them to another. Reliance is placed for this view upon *Morritt v. North Eastern Railway Co.* (2), *Changa Mal v. Bengal N. W. Railway Company* (3).

Now, the English decisions do not apply because they are based either upon the Common Law or the English Carriers Act and are not in *pari materia* with the Indian Railways Act, and as for *Changa Mal v. Bengal N. W. Railway Co.* (3) the point for decision there was whether the period of limitation was governed by Art. 30 or Art. 31 of Schedule II of the Indian Limitation Act of 1908 which enactment also was not *in pari materia*.

Moreover, *Changa Mal's case* (3) has now been overruled. In that case a Division Bench of the Punjab Chief Court held that the term "loss" in Art. 30 of the Indian Limitation Act, Schedule II contemplates an actual losing of the goods by the carrier himself, and, therefore, when the carrier delivers the goods to a wrong person it cannot be said that he has lost the goods, and they also held that Art. 31 did not apply because misdelivery was not non-delivery. But the recent Full Bench decision of the same Court in *Hill, Sawyers & Co. v. Secretary of State* (4) is authority for the view that misdelivery is loss within the terms of section 80 of the Indian Railways Act and it supports the view that the loss referred to in section 72 and other relevant sections of Chapter VII of the Indian Railways Act is the loss suffered by the consignor or the true owner whether such loss occurred by reason of misdelivery or non-delivery.

To the same effect are the *Madras and Southern Maharatta Railway Company, Limited v. Hariadoss Banmali Doss* (5), *Madras and Southern Maharatta Railway Company,*

Limited v. Mattai Subba Rao (6) and *Great Indian Peninsula Railway Company v. Ramchandra Jagannath* (7).

It has been argued that if loss to the owner was meant then there was no necessity for any reference to liability for destruction of the goods. This is true. Destruction must always be included in loss and the draftsman of the Risk-Note has merely availed himself of the device of first stating the generality and then, without prejudice thereto, reciting the particulars. The word destruction is surplusage but it does not alter the sense. In my opinion, therefore, the Risk-Note will apply not only when the goods have been lost by the bailee in the sense that he cannot trace them but also when they are lost to the owner because the bailee fails to deliver them to him in breach of his contract for any reason whatsoever; and I cannot admit that by merely suing for compensation for non-delivery the plaintiff can take the case out of the Risk-Note. He seeks, however, to ground an argument on Art. 31 of Schedule I of the Indian Limitation Act and points out that if "non-delivery" had been included in "loss" there would have been no necessity for amending this Article in 1899, so as to cover both non-delivery and delay in delivery. Apart from the objection that the Indian Limitation Act can afford no guide for construing the Indian Railways Act, there was clearly some necessity for the amendment as the object of the Legislature was to prescribe the same period of limitation for claims for non-delivery as Art. 30 which referred to suits against carriers for losing goods and which could not cover suits for non-delivery.

Although in the present case the English Authorities cannot be of great assistance, there is one recent case which is both pertinent and instructive. I refer to *Smith, Limited v. Great Western Railway Co.* (8). In that case six pairs of boots were forwarded in

(2) (1876) 1 Q. B. D. 302; 45 L. J. Q. B. 289; 34 L. T. 940; 24 W. R. 386.

(3) 6 P. R. 1897.

(4) 61 Ind. Cas. 926; 2 L. 133; 3 L. L. J. 297.

(5) 49 Ind. Cas. 69; 41 M. 871; 35 M. L. J. 351; 34 M. L. T. 38; 8 L. W. 340.

(6) 55 Ind. Cas. 754; 43 M. 617; (1920) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 360; 28 M. L. T. 49.

(7) 49 Ind. Cas. 396; 43 B. 386; 21 Bom. L. R. 6.

(8) (1921) 2 K. B. 237; 90 L. J. K. B. 644; 125 L. T. 44; 26 Com. Cas. 84; 65 S. J. 172; 37 T. L. R. 117.

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a package weighing 19 lbs. for carriage by Railway from Birmingham to Wilton. The parcel was consigned to the defendant Railway Company but was not delivered. The Risk-Note ran as follows:—"In consideration of your charging such lower rate we agree to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods, except upon proof that such loss, damage, misconveyance, misdelivery, delay, or detention, arose from the wilful misconduct of your servants." The Railway Company declined to account for the loss, and the Appeal Court held that such refusal did not justify the Court in inferring that the loss arose from the wilful misconduct of the defendants' servants. That decision was affirmed by the House of Lords and the following passage in the judgment of Lord Buckmaster in *Smith, Limited v. Great Western Railway Co.* (9) might almost have been delivered in respect of the present Risk-Note. "It has been suggested on the part of the appellant that it must be read as though it contained exceptions in favour of the Railway Company with a proviso reserving to the consignor rights in a certain event and that it was consequently incumbent upon them to prove that the goods had disappeared owing to the specified facts, and when that was proved it would become necessary for the consignor to establish that he had the benefit of the proviso, or, in other words, that the loss had arisen owing to the wilful misconduct of the Company's servants. I am unable so to regard this clause; it is in my opinion a clause which throws upon the trader, before he can recover for any of the goods, the burden of proving in the first instance that the loss sustained arose from the wilful misconduct of the Company's servants. It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory; it practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods between the time when he delivered them into the hands of the Railway Company's

servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the Railway Company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the Railway Company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. Nonetheless, that is the burden that he has undertaken, and the question is whether in this case he has afforded any evidence which calls for an answer on the part of the Railway Company." Both in the Court of Appeal and in the House of Lords the plaintiffs, Smith & Co., strongly relied on *Curran v. Midland Great Western Railway Company of Ireland* (10), and contended that there was a *prima facie* presumption that the goods were in the possession of the carrier till he showed the contrary and that the unexplained detention would be wilful misconduct for which an action would lie. Now, in *Curran's case* (10) the Railway Company undertook to carry some pigs from Sligo to Manchester and failed to deliver some of them. There was a Risk-Note which recited that the Company shall be free from liability including liability for loss, injury or delay unless such injury or delay shall be occasioned by the intention or wilful neglect or misconduct of their servants, and the Court held that burden of proof was on the defendant and the inference from non-delivery and refusal to give any explanation was that the pigs were still in the possession of the defendant and that there was wilful misconduct. In discussing this case Lord Buckmaster proceeded as follows:—"Now, my Lords, in that case there had been no answer given at all on the part of the Railway Company to the request for information as to what had happened, but in the present case the evidence that was before the learned County Court Judge included the answers to interrogatories, in which the defendant Company had said that they had no knowledge as to whether the goods had been handed to them at Wilton, and that they believed that the same were lost and never arrived at Wilton. It is impossible to place such evidence on an exact parallel with the

(9) 1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359.

(10) (1896) 2 Ir. R. 183; 2 Ir. L. R. 739.

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evidence which warranted the Chief Baron in assuming the possession of the pigs as a fact in the custody of the defendants, and then inferring from that possession that the refusal to give any explanation of their whereabouts or their existence was an act of wilful misconduct. My Lords, I desire to say nothing further about that authority, because for these reasons I do not think that it deals with the same facts as those in the present case, and it may be that on some later occasion the actual words of that judgment may come up for consideration." Lord Sumner and Lord Wrenbury following Lord Buckmaster agreed that if it were necessary to discuss *Curran's case* (10) on any future occasion it would have to be examined with great care.

In my opinion, Risk-Note B is no less harsh than that to which Lord Buckmaster was referring. It may perhaps be not inequitable inasmuch as the trader enters into the contract with his eyes open and in consideration of a cheaper rate, but it cannot be denied that he undertakes in most instances a crushing and almost insuperable burden.

The learned Vakil for the plaintiff next takes a point for which there is some recent authority. He urges that it is not sufficient for the defendant to plead, he must call evidence to satisfy the Court that the goods are not still in the possession of the defendant and in support he cites *Ghelabhai Punsu v. East Indian Railway Co.* (11) and *Jamnadhhar Baldevdass v. Burma Railway Co.* (12). It is true that in both these cases the Court held that a mere pleading was not sufficient, but with very great respect I think that the decisions were based on the authority of *Curran's case* (10) which was distinguished, if not doubted, by the House of Lords in *Smith, Limited v. Great Western Railway Co.* (8). Indeed, the matter really does not turn on evidence. It is a question of the construction of the Risk-Note, and if loss due to non-delivery is covered by the document then there is an end of the matter and nothing further is required from

the defendant. The general rule is that, where a contract contains an exception and a proviso, the party who desires to take the benefit of the former must not only plead it but prove it, and that when that has been done, the other party who desires to take the benefit of the proviso, which is in reality an extrinsic covenant by way of defeasance must prove that the subject matter is not within the exception. That, however, is not the position in the present case.

Moreover, in the present case the plaintiff admits in his plaint that the goods have been lost; and as the defendant does not in any way repudiate the contract but on the contrary sets up the Risk-Note in his defence, no presumption can arise that the goods are still in his possession simply because he says that he cannot give any account of the manner in which they have disappeared.

The question that remains, therefore, is, has the plaintiff satisfied the burden which rests upon him to show that the loss has been caused by the wilful neglect of the defendant. The quantum of evidence required for this purpose must necessarily vary according to the nature of the goods, and it has been observed elsewhere that the loss of an elephant might be difficult to explain except on the hypothesis that there had been wilful neglect, but in the present case our task is simplified because there is clear and apparently reliable evidence that while the goods were lying on the platform at Bombay the plaintiff's agent asked a subordinate in the service of the first party defendants to remove them into the godown but was told in reply that after a Railway receipt had been given to the consignor he had no business to make any such request. There is also evidence that after the institution of the suit a goods clerk informed the plaintiff that one of the bales had not been despatched. There is no rebutting evidence on the side of the defendants and, in my opinion, it has been established that there was wilful neglect on their part and, therefore, the plaintiff is entitled to a decree.

The application will, therefore, be dismissed with costs. As this is a case which has

(11) 63 Ind. Car. 241; 45 B. 1201; 23 Bom. L. R. 525.

(12) 64 Ind. Cas. 395; 10 L. B. R. 354; 13 Bur. L. T. 190.

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been argued at more than ordinary length, we assess the hearing fee at 10 gold *mohurs*.

Bucknill, J.—I agree.

Z. K.

Application dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2011 OF 1914.

June 2, 1922.

Present :—Mr. Justice Broadway and
Mr. Justice Harrison.

BAL MUKAND AND OTHERS

PLAINTIFFS—APPELLANTS

versus

MUSAMMAT KISHEN DEVI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Custom v. Personal law—Succession—Beri Khatri of Jagraon.

The Beri Khatri of Jagraon are governed by Hindu Law and not by custom in matters of succession. [p. 447, col. 2.]

First appeal against a decree of the District Judge, Ludhiana, dated the 1st June 1914, dismissing plaintiff's claim with costs.

Bakhshi Tek Chand and Mr. *Mukand Lal Puri*, for the Appellants.

Lala Moti Sagar, R. S. and Mr. *Prem Lal*, for the Respondents.

JUDGMENT.—On the 1st of February 1908, one Gauri Shanker, a Beri Khatri of Jagraon, died, leaving a widow *Musammat Kishen Devi*, and a daughter *Musammat Bhagwanti*. *Musammat Bhagwanti* was married to *Rattan Chand* and had borne him a son named *Fateh Chand*. On the 6th of August 1911, *Balmukand* and his

two brothers, sons of *Uttam Chand*, first cousins of the deceased *Gauri Shanker*, instituted a suit against *Musammat Kishen Devi* and *Musammat Bhagwanti*, *Rattan Chand* and *Fateh Chand*, alleging that they (plaintiffs) were by custom entitled to succeed to *Gauri Shanker's* estate on the death of his widow *Musammat Kishen Devi* and alleging that the said *Musammat Kishen Devi* was wasting the estate, and praying that a Receiver be appointed to manage the property and that a perpetual injunction be issued against *Musammat Kishen Devi* prohibiting her from alienating or otherwise disposing of her late husband's property. A declaration was also asked for to the effect that such alienations that had been made by *Musammat Kishen Devi* in favour of her son-in-law *Rattan Chand* should not affect the plaintiff's reversionary rights.

The defendants, while admitting the plaintiff's relationship to *Gauri Shanker*, alleged that the parties were governed by Hindu Law under which plaintiffs had no rights whatever, the property devolving on *Gauri Shanker's* daughter and her issue after the death of *Musammat Kishen Devi*. It was also pleaded that during the lifetime of *Musammat Kishen Devi* no Receiver could be appointed and that no such acts of waste had been specified as would justify the issue of an injunction.

Plaintiffs also alleged that *Gauri Shanker* had left a Will in their favour. The defendants denied either the existence of any such Will or *Gauri Shanker's* power to make one either by law or custom.

The Trial Court settled the following issues :—

1. Have the plaintiffs got a cause of action against defendants Nos. 2 and 3?
2. Is this claim of a speculative nature?
3. Have the plaintiffs got a *locus standi* to bring this suit?
4. Do the plaintiffs follow any custom by which they exclude daughter and daughter's son from inheriting the late *Gauri Shanker's* property?
5. (a) Can the plaintiffs exclude mother of the deceased? and if not
(b) Can they bring this claim during her existence?

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6. Did the late Gauri Shanker execute a Will in favour of the plaintiffs and if so, could he do so by law or custom?

7. Is *Musammatt Kishen Devi* in any way guilty of such waste and mismanagement as should justify the interference of the Court towards the better management and protection of the estate?

8. Does the renewal of *hundis* worth Rs. 14,000 amount to an alienation, and, if so, can that fact be made a basis of any relief?

9. To what relief are the plaintiffs entitled?

But in deciding the case it confined itself to the points raised in Issues Nos. 1 to 6.

The main issue for decision was Issue No. 4 and on this the Trial Court after going exhaustively into the evidence, oral and documentary, adduced by the parties came to the conclusion that plaintiffs had failed to prove the custom set up by them and held that the parties were governed by Hindu Law under which the daughter succeeded to her father's estate on the death of *Musammatt Kishen Devi*.

On Issue No. 6 the Trial Court held that the execution of the Will had not been proved. On these findings the plaintiff's suit was dismissed and they have preferred an appeal to this Court in support of which we have heard Mr. Tek Chand while Mr. Moti Sagar has addressed us on behalf of the respondents.

The appeal came up before a Division Bench of this Court on the 10th of February 1920, when an order of remand was passed in order to enable the parties to produce evidence on the questions "which portions, if any, of the property in dispute are ancestral," and for recording of the statements of certain witnesses for the plaintiffs whose evidence had been disallowed by the Trial Court.

The order of remand has been complied with, but Mr. Tek Chand before us definitely conceded that he was unable to attack the finding of the Court below as to the execution of the Will. Similarly, he has not referred us to any of the evidence re-

lating to the nature of the property left by Gauri Shanker and contends that the custom which he seeks to prove governs equally ancestral and self-acquired property. The only question argued at the Bar relates to the existence of the custom set up by the plaintiffs-appellants and somewhat varied during the pendency of the litigation. They appear at first to have relied on a general custom prevailing amongst all Khattris throughout the Province in addition to a special custom on the same lines governing their own particular family belonging to the sub-caste of Beris. Subsequently, on appeal, the existence of the general custom was not pressed and all that Mr. Tek Chand has endeavoured to show is that there is a family custom governing this section of Beris and he relies on instances of the same custom amongst other branches of Khattris merely by way of analogy. The custom set up, as stated by Mr. Tek Chand was that near collaterals exclude daughters and their issues both as regards self-acquired and ancestral property left by a sonless proprietor. The instances relied on by the plaintiffs have been dealt with in detail in the judgment of the Trial Court and have been summarised at page 180 of the printed book. Mr. Tek Chand admitted the correctness of the Trial Court's criticism of the instances referred to in columns 2, 3, 4, 5 and 6 of the said summary, but has taken us through the instances mentioned in column 1. He has contended that these 66 instances have been wrongly held to relate to cases where the property was that of a joint family. We find that the evidence relating to these 66 instances is vague and is not borne out by any documentary evidence and we agree with the Court below in thinking that these instances do not bear out the contention of the appellants and that it is by no means established that even if the statements made by the witnesses called in support of these instances be true and correct, there had been such separation in the families concerned as would exclude the natural rule of inheritance by survivorship of the collaterals under the Hindu Law. If among Khattris generally, or amongst the various sub-castes of the Khattris to which these instances belong, near collaterals exclude daughters and

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their issue, we should expect a mass of documentary evidence including copies of Revenue Records to be available in order to establish beyond all doubt that in the cases of landed proprietors who form a large section of the more prosperous Khattris, this custom prevails. In the absence of any such evidence, these vague statements often made by one witness only regarding each particular instance are of extremely little value in discharging the heavy onus which lies upon plaintiffs when they attempt to prove that they are not governed by Hindu Law.

Next, Mr. Tek Chand referred to instances among the Beris themselves. These are summarised and dealt with at pages 176-178 of the printed book. It was admitted that the first two instances were of no value. Mr. Tek Chand, however, contended that the remaining instances have been proved and support his case. After giving due weight to Mr. Tek Chand's criticism we consider that the Trial Court's view is correct and that the existence of the custom set up has not been established among the Beri Khattris.

Three instances were referred to as having occurred in this very family. Of these Mr. Tek Chand gave up two, namely, the succession to Goverdhan Das and Kirpa Ram. He, however, contended that the case of Nihal Chand satisfactorily established the custom set up. Nihal Chand died some 30 years ago and in connection with his estate certain litigation took place in 1884. Nihal Chand had left two widows, a daughter and daughter's son. His uncle Govind Das and his cousin Uttam Chand and Ramji Das brought a suit against the widows and the daughter's son (but not the daughter) asking for a declaration that the said daughter's son had not been adopted by Nihal Chand and was not entitled to inherit the estate. The defence set up was that the adoption had actually been made, and, though invalid under Hindu Law, was good under custom. It was further pleaded that the daughter's son in any event excluded the collaterals. The case was decided in favour of the then plaintiffs, it being held that the collaterals had established a custom by which a daughter's son was excluded or rather that

they had established a general custom governing the Khattris as a whole in spite of the fact that not one single instance had been adduced of a collateral excluding a daughter's son amongst the Beris, and it was held that the then defendants had failed to establish any exception in favour of their contention. The more natural and the sounder way of approaching the question was not adopted, namely, to see whether the plaintiffs who alleged this peculiar custom amongst the Beri Khattris had proved that it existed amongst the Beri Khattris. Anyhow, it was decided, and the decision was upheld by the Chief Court, that the plaintiffs, as collaterals, had established their right to oust the daughter's son. To this litigation, it may again be noted, the daughter was no party and it is still open to her to bring a suit to establish her right to her father's property, as one of the widows of Nihal Chand is still alive and the decision in this previous case operates in no way as *res judicata* against her. It is on this case that plaintiffs rely as their sheet anchor and they contend that it is of such overwhelming value as to be sufficient to establish the custom on which they rely on its own authority alone and even without the analogous cases which they say have occurred amongst Khattris generally throughout the Province. They contend that so far as their family is concerned the existence of this custom is thus proved for all time. With this view we cannot agree and Counsel for the respondents has quoted a mass of authority showing that one instance by itself cannot establish a custom. We find, therefore, that this case though no doubt an instance and a valuable instance as occurring in this family is by itself wholly inconclusive and does not establish the existence of any family custom. Besides we find, for the reasons given above, that amongst other branches of the Beri sub-caste it is not established that collaterals exclude daughters and their issue, and although there, doubtless, have been instances, amongst Khattris throughout the Province and more especially amongst Kapurs of Hafizabad, of agricultural custom being followed on various points instead of the strict Hindu Law, even amongst decided

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cases there have been more instances to the contrary, as detailed in the list given at page 183 of the paper-book, these all being published decisions of the Chief Court, and where the onus rests heavily on the plaintiff of establishing the existence of a custom which overrides the Hindu Law, it is necessary that he should produce evidence far more convincing, far more abundant and far more directly applicable than has been done in this case. As the plaintiffs had failed to establish their contention it is unnecessary to consider and discuss the evidence relied upon by the respondents, for, in the absence of any custom to the contrary, the parties are governed by the strict Hindu Law.

Finding that the plaintiffs have failed to establish their claim we dismiss the appeal with costs. The cross-objections are dismissed as not having been referred to by the learned Advocate.

Appeal dismissed.

Z. K.

LAHORE HIGH COURT.

CIVIL APPEAL NO. 251 OF 1922.

July 3, 1922.

Present:—Mr. Justice Harrison.

RAMJI LAL, AND OTHERS—DEFENDANTS—
APPELLANTS

versus

RAM SARUP—PLAINTIFF, AND OTHERS—
DEFENDANTS—RESPONDENTS.

Custom—Alienation—Necessity.

Where it is necessary to purchase food and clothing and pay for it subsequently, and such payment becomes technically necessity, it is equally regular to borrow the sum necessary to purchase such

supplies and it is not absolutely essential that a man should first run into debt and then borrow to pay his debts.

Radha Ram v. Khushi Ram, 66 Ind. Cas. 343; (1922) A. I. R. (L.) 204, followed.

Where a small sum which formed part of the consideration of an alienation was borrowed by the alienor in times of scarcity and it was not shown that he owned sufficient land to support himself, and a suit was brought to contest the alienation thirteen years after its date:

Held, that under the circumstances, no further proof of necessity was required for the sum borrowed.

Second appeal from a decree of the Additional Judge, Rohtak, at Hissar, dated the 4th November 1921, reversing that of the Munsif, First Class, Jhajjar, District Rohtak, dated the 28th January 1921.

Mr. *Shamarr Chand*, for the Appellants.
Mr. *Gullu Ram*, for the Respondents.

JUDGMENT.—The only point in this appeal is whether a sum of Rs. 110 which was allowed as being for necessity by the Trial Court and disallowed by the learned District Judge should or should not be treated as having been taken for necessity 13 years before the suit contesting the alienation was brought, limitation having expired against the other reversioners but not against the *ex-minor* plaintiff. The total consideration is small, being only Rs. 356 out of which Rs. 246 have been allowed by both Courts. The sum of Rs. 110 is shown as having been taken because of famine and it must be totally impossible after a lapse of 13 years to prove exactly what such a small sum as this was spent on. Various rulings have been quoted by Counsel, but every case depends upon its own facts and there appears to me to be a vast difference between the taking of a considerable sum for expenses which must have lasted a considerable time and concerning which, therefore, it should be possible to give some account and the taking of a sum of Rs. 110 many years before. The most helpful ruling quoted is to be found in *Radha Ram v. Khushi Ram* (1), a very recent case in which it was held that where it is necessary to purchase food and clothing and pay for it subsequently, and such payment becomes technically necessity it is equally regular

(1) 66 Ind. Cas. 343; (1922) A. I. R. (L.) 204.

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to borrow the sum necessary to purchase such supplies and it is not absolutely essential that a man should first run into debt and then borrow to pay his debts. Considering the smallness of the sum taken, the fact that, it is recited that it was on account of scarcity, that it is not shown that the vendor had any land beyond the small area which he sold, though there is the vague statement of one witness to the effect that he had a great deal of land—and the fact that it is only at this late stage, and, obviously, as an after-thought that the present plaintiff has brought this suit, the other collaterals having taken no action in the interval, I think that sufficient evidence of necessity has been produced and I find, therefore, that the whole of the consideration was for necessity. I accept the appeal and restore the decree of the Trial Court.

Z.K.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 673 OF 1922:

December 13, 1922.

Present :—Mr. Justice Krishnan.

M. KRISHNAJI REDDIAR—

RESPONDENT NO. 1—PETITIONER

versus

MUTHUVEERA REDDIAR AND
ANOTHER—PETITIONER—RESPONDENT
NO. 10—RESPONDENTS.

Madras Local Boards Act (XIV of 1920)—Local rules—Rule 4 (1)—Election petition—Failure to make deposit within time, effect of—Delay due to party's neglect—Civil Procedure Code (Act V of 1908), s. 115—Court assuming jurisdiction under wrong view of law—Revision.

Sub-rule (1), r. 4 of the rules framed by the Local Government for the conduct of election enquiries under the Madras Local Boards Act, requiring a deposit of Rs. 200 to be made within the time prescribed, is mandatory in character and, unless the direction contained in the sub-rule is complied with, the Court has no jurisdiction to proceed to enquire into the petition. [P. 450, col. 2.]

In the case of an objection petition against an election under the Madras Local Boards Act filed on the very last day allowed for its presentation, the Vakil who was entrusted with the petition, stated to the Court that he had Rs. 200 to pay, but did not actually tender the money, nor did he ask the Judge to take the deposit himself. In accordance with the usual practice, he went to the *challan* clerk to obtain a *challan* to pay his money into the Imperial Bank. That being the luncheon interval, the *challan* clerk was not there. He returned soon after, and issued the *challan*

for payment of the money into the Bank. The money was forthwith sent to the Bank, but it reached too late and could not be deposited on that day. It was deposited on the next day. In these circumstances, the question was, whether the maxim *actus curiæ neminem gravabit* (the act of the Court should not prejudice any one) applied so as to make the deposit a valid one:

Held, that the maxim had no application, for as the Vakil only went to the *challan* clerk at a time when the latter was allowed to go for his tiffin, it could not be said that the failure to pay the money in time was due to any action taken by the Court.

Mahomed Akbar Jaman Khan v. Sukhdeo Panday, 10 Ind. Cas. 51; 13 C. L. J. 467, *Munna Lal v. Radha Kishan*, 30 Ind. Cas. 186; 37 A. 591; 13 A. L. J. 793, *Aravamudu Ayyangar v. Samiyappa Nadan*, 21 M. 385; 7 Ind. Dec. (N. S.) 629, *Gajadhar Das v. Ram Sumiran Dube*, 52 Ind. Cas. 161; 17 A. L. J. 991, distinguished.

Where a Court assumes jurisdiction on a wrong view of the law, its order is liable to be set aside by the High Court in revision under section 115 of the Civil Procedure Code. [p. 452, col. 1.]

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order, dated the 3rd October 1922, of the Court of the Subordinate Judge, Cuddalore, in Original Petition No. 12 of 1922.

Mr. C. Padmanabha Aiyangar for the Petitioner:—A petition to set aside an election held under the Local Boards Act has to be presented to the District Judge or Subordinate Judge within 14 days from the date of the declaration of the result, and the petitioner has to deposit with the petition at the time of presentation as security for costs of the same, the prescribed amount in cash. In this case, the 14 days had elapsed during the time the Court was closed and the petition was put in on the re-opening date. On that date the deposit of Rs. 200 was not made. The learned Subordinate Judge is wrong in applying the maxim *actus curiæ neminem gravabit* (the act of the Court should not prejudice any one), as in this case the failure to make the deposit was only sought to be explained by the absence of the *challan* clerk in his place during the luncheon interval. This is not an action or inaction of a Court officer which prejudiced the petitioner in the lower Court as the clerk was privileged to be absent during lunch interval. Further, when it was found that it was too late to make the payment into Court, the application ought to have been made to the Subordinate Judge, himself to take

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the money under r. 133 of the Civil Rules of Practice.

No such application has been made in this case, though the Vakil for petitioner had made a similar application in the lower Court on the same date in respect of another matter. The mere fact that a *challan* had been obtained in time does not render a deposit made out of time a valid one.

The rules are mandatory as they direct that where the deposit is not made at the time of the presentation the petition shall be dismissed.

The cases referred to in the judgment of the lower Court *Mahomed Akbar Jaman Khan v. Sukhdeo Panday* (1), *Munna Lal v. Radha Kishan* (2), *Aravamudu Ayyangar v. Samiyappa Nadan* (3) and *Gajadhar Das v. Ram Sumiran Dube* (4) are cases where the deposit could not be made on account of the action of the Court officer, or on account of the fact that the Court itself was closed. The petitioner was grossly negligent and the default is entirely his own.

Mr. E. V. Sundara Reddiar, for the Respondents:—It is not disputed that the petitioner had the deposit amount in Court on the last day for the presentation of the petition. The *challan* was obtained at 2-45 P. M. on the same day and but for the delay in the issue of the *challan* due to the inaction of the *challan* clerk, a Court Officer, the deposit would have been made on the same day. Whatever may be the practice in the High Court, in the *Mofussil* Courts the clerks had no prescribed intervals for luncheon. The principle that no man shall be prejudiced by an act of the Court has been properly applied to this case. The Civil Rules of Practice have not been made applicable under the rules to the trial of election petitions and the omission to make an application under rule 133 of the said Rules cannot, therefore, be held to prejudice me. In *Koilkpillai Samban v. Sapparamuthu Samban* (5) it was held by this Court that the issue of *challan* itself will

amount to sufficient deposit under certain circumstances and in the present case that has been sufficient deposit. In *Gajadhar Das v. Ram Sumiran Dube* (4) it has been laid down that the proper test in these cases is, whether the petitioner had the deposit amount in Court with him on the day.

The order of the lower Court is correct. In any case the error, if any, is merely one of law and the Court will not in such cases interfere under section 115 of the Civil Procedure Code in revision.

JUDGMENT.—This revision petition is based upon r. 4 of the rules framed by the Local Government for the conduct of enquiries with reference to election to District Boards, etc., under the Madras Local Boards Act, XIV of 1920, published in the *Fort St. George Gazette*, dated 14th June 1921. It is contended that r. 4, sub-rule (1), was not complied with inasmuch as the deposit of Rs. 200 required under it, was not made within time and that under sub-rule (2) the Court was bound to dismiss the petition and sub-rule (3) did not apply as the provisions of sub-rule (1) were not complied with.

The facts on which this question arises are as follows:—The petitioner before me was elected as a member of the Taluk Board of Cuddalore. An objection petition was filed to his election by the counter-petitioner urging certain grounds against its validity. The election was held on the 12th of May and the result published on 15th of May. According to r. 2 of the above-mentioned rules, 14 days are allowed for an objection petition to be presented against the validity of the election. The 14 days in this case having elapsed during the time the Court was closed, the petition was actually put in on the re-opening date, 17th July. It is not contended that the petition was not in time; but on the 17th of July no deposit of 200 Rupees was actually made. It would appear from the judgment of the Subordinate Judge and from the affidavits filed before him that the Vakil who was entrusted with the filing of this petition had with him a sum of Rs. 200 to deposit. He went to the Sub-Judge in the middle of the day, seven minutes past two as the learned Sub-Judge says, and presented the

(1) 10 Ind. Cas. 51; 13 C. L. J. 467.

(2) 30 Ind. Cas. 186; 37 A. 591; 13 A. L. J.

793.

(3) 21 M. 385; 7 Ind. Dec. (N. S.) 629.

(4) 52 Ind. Cas. 161; 17 A. L. J. 991.

(5) 72 Ind. Cas. 220; 17 L. W. 187; 44 M. L. J.

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petition and stated to the Sub-Judge that he had 200 Rupees to pay, but he did not actually tender the money, nor did he ask the Judge to take the deposit himself. In accordance with the usual practice he went to the *challan* clerk to obtain a *challan* to pay his money into the Imperial Bank. That being the luncheon interval, the *challan* clerk was not there. He returned soon after, and issued the *challan* for payment of the money into the Bank, at 2-45 P. M. It is the counter-petitioner's case, and there is nothing to show that it is untrue, that the money was sent to the Bank through one Narayanasami Reddi. But the Bank being about $2\frac{1}{2}$ miles or three miles from the Court-house, he was not able to reach the Bank in time to make the deposit before 3 P. M. as required by the Bank's rules and the officers of the Bank accordingly declined to accept the money that day. The money was paid into the Bank only the next day. In these circumstances, the question arises, whether the Sub-Judge was right in applying the principle of *actus curiae neminem gravabit* (the act of the Court should not prejudice any one) to this case. The Sub-Judge has applied that principle but I regret I am unable to agree with him, for it cannot be said that, in this case, the failure to pay the money in time was due to any action taken by the Court.

The learned Vakil for the respondent says that the *challan* clerk was not in his seat when the petitioner's Vakil went to him at the luncheon hour, he lost time and was unable to make the payment in the Bank according to its rules and the fault is the clerk's. But this argument cannot be accepted, for the time during which the Vakil went to the *challan* clerk was the time when the clerks were allowed to go for tiffin. It cannot be said that the clerk committed any fault in going away for his tiffin and being absent at the time. He seems to have granted the *challan* as soon as he returned. The Vakil certainly knew that he could not expect the clerk to be in his place of work during the luncheon time.

There is nothing that the Judge did that has been pointed out to me as having prevented the respondent from complying with the rule, by making the deposit

in time. It is not stated that any application was made to the Judge that he should take the money himself, under r. 133 of the Civil Rules of Practice.

The learned Subordinate Judge has referred to certain authorities as justifying his view. I shall deal with them now. The case in *Mahomed Akbar Jaman Khan v. Sukhdeo Panday* (1) is the first case cited. That was a case under O. XXI, r. 89 of the Civil Procedure Code. In that case it was found that the agent of the judgment-debtor was ready to deposit the money in Court but he was not able to do so as the Judge had left the Court before time whose signature had to be obtained as the presiding officer for the *challan* to be paid. That was clearly a case where, owing to the action of the Judge himself by leaving the Court before the Court hours were over, the party was actually prevented from complying with the rule requiring the payment into Court within the time fixed. To that case the maxim clearly applied, but that is a different case altogether from the present one. To apply the maxim it must be possible to hold that the failure to comply with the rule of law was due to the action of the Court and not to any default of the party. The other cases cited are also of a similar kind. The case in *Munna Lal v. Radha Kishan* (2), which followed the ruling in *Mahomed Akbar Jaman Khan v. Sukhdeo Panday* (1), was a case where the Treasury Officer refused to receive the money. The amount was large and, though the money was tendered before 3 P. M., the hour fixed before which payment had to be made into the Treasury according to the Treasury Rules, the Treasury Officer refused to receive the money because he thought that there was a period of three days more to pay it in. In that case the First Court had come to the conclusion that the money was tendered after 3 P. M. but the learned Judges in appeal reversed that finding and found that the money was tendered before 3 P. M., and that it was due altogether to the Treasury Officer's fault that the money was not paid in the Treasury and, therefore, the principle was applied that the party should not be prejudiced by the mistaken action of the officer. The Madras case cited *Aravamudu Ayyangar v. Samiyappa Nandan*

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(3) was a case where the Court was actually closed on the date when the payment was to be made. Their Lordships held that payment on the following day was a proper payment. That case has clearly no application to the present case. The last case cited is reported as *Gajadhar Das v. Ram Sumiran Dube* (4). In that case, it would appear on the facts, that the money was tendered both to the Revenue Court and to the Civil Court, but both Courts declined to receive it and the non-payment in time was due to the action of the Courts. Some of the observations perhaps go a little too far but the decision is fully in consonance with the principles enunciated in the other cases cited. The learned Vakil for the respondent drew my attention to a recent decision of Mr. Justice Ramesam in *Koilpillai Samban v. Sapparimuthu Samban* (5), but there the question was one under section 17 of the Provincial Small Cause Courts Act and the point the learned Judge had to consider was, whether, in the circumstances of the case, proper ground had been shown for excusing delay. There is no question of excusing delay in the present case. The position here is clear. The Act expressly lays down that unless the deposit is made at the time of the presentation of the petition it shall be dismissed and again says that only on compliance with the provisions of sub-rule (1), the Judge shall proceed to enquire into the petition. The language is very clear and mandatory in its character and unless the condition is complied with, the petition must be rejected.

I would add, in conclusion, that when the petitioner found that he could not pay the money into the Bank on the 17th, it was easy for him to have returned to the Court as he had ample time to do so and to have tendered the money to the learned Sub-Judge himself under r. 133 but nothing of that sort was done. The non-payment of the money is, therefore, clearly not due to any action of the Court but to the default of the petitioner. Now, in these circumstances, it seems to me clear, that this is not a case to which the maxim applies. The Subordinate Judge having assumed jurisdiction to enquire into the petition on a wrong view of the

law, section 115, Civil Procedure Code, applies. Acting under that section, I set aside the order of the Subordinate Judge and reject the first respondent's election petition. There will be no order as to costs.

V. N. V.

N.H.

Petition rejected.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 246 OF 1920.

February 23, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Harrison.

MULA RAM—DEFENDANT—APPELLANT
versus

JIWANDA RAM—PLAINTIFF, AND

ANOTHER—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XXI, r. 54—Attachment—Proclamation—Fraudulent transfer—Substantial portion of consideration fictitious—Whole transfer, whether affected.

In order to constitute a valid attachment the proclamation described in the second portion of r. 54 of O. XXI, of the Civil Procedure Code must be carried out. [p. 453, col. 1.]

Sinnappan v. Arunachalam Pillai, 53 Ind. Cas. 207; 24 M. 844; 37 M. L. J. 375; (1919) M. W. N. 678; 10 L. W. 391; 26 M. L. T. 281 (F. B.) relied upon.

Where it is found that a transfer made by a judgment-debtor was made in bad faith with the object of delaying, defeating and obstructing the decree-holder and that the transferee aided and abetted him and a substantial portion of the consideration is found to have been fraudulent and fictitious, the whole transfer must be treated as fraudulent and effected with the object of defeating the decree-holder. [p. 453, col. 2.]

Chidambaram Chettiar v. Sami Aiyar, 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351, *Palaniappa Mudali v. Official Receiver of Trichinopoly*, 25 Ind. Cas. 948 and *Subroya Goundan v. Perumal Chettiar*, 43 Ind. Cas. 956, relied upon.

Second appeal from a decree of the District Judge, Shahpur at Sargodha, dated the 20th October 1919, reversing that of the Munsif, First Class, Jhang, dated the 10th March 1919.

Lala Ram Chand Manchanda, for the Appellant.

Messrs. Shamair Chand and Sagar Chand, for the Respondents.

JUDGMENT.—The facts of this case are that on 6th June 1915 a prohibitory order under O. XXI, r. 54, regarding the land in suit was served upon Bahadri, judgment-debtor, at the instance of his

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decree-holder Mula Ram. On the 7th August 1915 a very peculiar lease was executed by Bahadri in favour of one Jiwanda Ram in accordance with which the land in question was leased for a period of 20 years on an annual rental of Rs. 80 a year. In pursuance of that lease mutation was effected, the order showing that the whole of this sum of Rs. 1,600 was alleged by the lessee to have passed at the time of the execution of the lease, Rs. 1,000 in the form of credit in his own account and the balance of Rs. 600 partly in cash payment at the time of the registration, and partly in payment to previous creditors of the transferor.

After presenting an unsuccessful objection the lessee, Jiwanda Ram, has now brought this suit for a declaration that the land cannot be attached by the decree-holder, Mula Ram, in execution of his decree. The suit was dismissed by the Trial Court on the finding that the whole of this transfer was tainted with fraud, that, at any rate, so far as Rs. 600 were concerned, it was not proved that any part of this consideration had passed, and that, therefore, on the principle laid down in section 53 of the Transfer of Property Act the alienation was void against the previous attaching creditor. This finding has been set aside on appeal by the learned District Judge who has given a somewhat sketchy finding to the effect that Jiwanda Ram was a *bona fide* creditor of Bahadri presumably to the extent of Rs. 1,000 but has given no finding whatever as to the passing of the consideration for the smaller items totalling Rs. 600.

On second appeal it is urged that the prohibitory order constituted a sufficient attachment and made section 64 of the Civil Procedure Code applicable to this case. This point has been dropped as it is clearly established by *Sinnappan v. Arunachalam Pillai* (1) that in order to constitute a valid attachment the proclamation described in the second portion of r. 54 of O. XXI must be carried out.

The second point urged is that, in the absence of a finding as to the payment of

Rs. 600, it is open to this Court to come to a finding itself and if it be held that the items in question did not pass and that they are fraudulent and fictitious, then the decree-holder, Mula Ram, is entitled to avoid the whole transaction and to proceed against the land in execution. In the absence of any finding by the learned District Judge we have considered the evidence on the subject or, rather, the absence of any evidence, and we find ourselves in complete agreement with the Trial Court. A sum of Rs. 210 is entered as having been paid before the Sub-Registrar at the time of registration, but no endorsement was made to this effect, and the Sub-Registrar himself has not been produced. Similarly, a sum of Rs. 270 is shown to have been paid to Amir Chand but Amir Chand has not been produced nor has any receipt been tendered. It is stated that Sukh Dial was also paid in satisfaction of a decree which he held, but no copy of that decree has been produced. We find that no portion of Rs. 600 is proved to have passed and, taking every thing into account, the very peculiar nature of the deed, the peculiar conduct of the parties and more especially of the present plaintiff in anticipating the payments which were to have extended over 20 years, the fact of which there is no denying, that so far as the transferor is concerned he acted throughout in bad faith and with the object of defeating, delaying and obstructing his decree-holder, we find that not only was the transferor acting in fraud of his creditor-decree-holder but that the transferee had the knowledge of the fact and aided and abetted him in doing so. The only question remaining is how far the whole transfer is effected on its being shown that a very substantial portion is fraudulent and fictitious. The law on this point has been clearly laid down in *Chidambaram Chettiar v. Sami Aiyar* (2). That case dealt, it is true, with moveable property, but the principle there enunciated was accepted in the case of immoveable property also in *Palaniappa Mudali v. Official Receiver of Trichinopoly* (3) and *Subroya Goundan v. Perumal*

(1) 53 Ind. Cas. 207; 42 M. 844; 37 M. L. J. 375; (1919) M. W. N. 678; 10 L. W. 391; 26 M. L. T. 281 (F. B.).

(2) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351.

(3) 25 Ind. Cas. 948.

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Chettiar (4). We find that the whole transfer must be treated as fraudulent and effected with the object of defeating the decree-holder.

We, therefore, accept the appeal and restore the order of the Trial Court. The costs of Mula Ram will be paid throughout by the plaintiff, Jiwanda Ram, in all Courts.

Z. K.

(4) 43 Ind. Cas. 956. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2342 OF 1920.

August 23, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

JOGENDRA NATH SUKUL—

DEFENDANT—APPELLANT

versus

SAFIUDDIN SHEIKH AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Receipt evidencing part payment towards mortgage-debt—Registration, if compulsory.

A receipt which states that the mortgagor had paid a certain sum on account of a mortgage but which does not recite that this sum was all that was due under the mortgage and that the effect of the payment was to extinguish the security, is not compulsorily registrable under section 17 of the Registration Act and is consequently not inadmissible in evidence for want of registration. [p. 455, cols. 1 & 2.]

Case-law reviewed.

Appeal against a decree of the District Judge, Nadia, dated the 23rd August 1920, affirming that of the Munsif, First Court, Krishnagar, dated the 4th August 1919.

Babu Narendra Kumar Bose, for the Appellant:—The defendant is the appellant. The appeal arises out of a suit for redemption of a simple mortgage. The plaintiff's case is that by verbal arrangement subsequent to the mortgage, there was payment and the mortgage-debt was cleared. Both Courts decreed the suit. My point is that the receipt is not admissible in evidence inasmuch as it is not registered as is re-

quired by section 17 of the Indian Registration Act. See *Imdad Husain v. Tasadduk Hosain* (1), *Jiwan Ali Beg v. Basa Mal* (2) and *Parashram v. Ganpat* (3). My next point is that, no evidence could be given as to modification of verbal arrangement. The learned Judge holds that the receipt does not extinguish the right of the mortgage and is not, therefore, registrable. I submit that is erroneous. See section 17, Indian Registration Act; section 60, Transfer of Property Act; *Lakshman v. Damodar* (4), *Dina Nath v. Lachmi Narain* (5).

Babu Probodh Kumar Kar, for Maulvi A. K. Fazlul Haq, for the Respondent.—The receipt does not recite the mortgage-debt. I submit it was not compulsorily registrable. The case in *Jiwan Ali Beg v. Basa Mal* (2) is distinguishable. I submit the learned Judge has taken the correct view of the law. Babu Narendra Kumar Bose, replied in brief.

JUDGMENT.—This is an appeal by the defendant in a suit for redemption of a mortgage executed in his favour by the plaintiffs on the 26th February 1912. The case for the plaintiffs is, that on an adjustment between the parties, it was settled that, after remission, Rs. 200 would be accepted in full satisfaction of the sum due under the mortgage. The plaintiffs allege that this sum was paid on the 30th May 1917 and though the defendant granted a receipt, he has not returned the mortgage-bond. The plaintiffs accordingly ask for redemption and for delivery of the deed. The Courts below have found in favour of the plaintiffs and have decreed the suit. On the present appeal, it has been contended that the receipt could not be admitted in evidence, as it was not registered in accordance with section 17 of the Indian Registration Act. The contention in substance is that the receipt was an instrument which

(1) 6 A. 335; A. W. N. (1884) 107; 4 Ind. Dec. (N. S.) 18.

(2) 9 A. 108; A. W. N. (1886) 310; 5 Ind. Dec. (N. S.) 503 (F. B.).

(3) 21 B. 533; 11 Ind. Dec. (N. S.) 357.

(4) 24 B. 609; 2 Bom. L. R. 422; 12 Ind. Dec. (N. S.) 936.

(5) 25 A. 446; A. W. N. (1903) 150.

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purported or operated to extinguish an interest in immoveable property of the value of more than Rs. 100 and was compulsorily registrable. We are of opinion that this argument is not well-founded.

The receipt states that the defendant had paid Rs. 200 on account of the mortgage; but it does not recite that this sum was all that was due under the mortgage and that the effect of the payment was to extinguish the security. It cannot be maintained on these facts that the receipt was compulsorily registrable. Reference has been made to the decision in *Jiwan Ali Beg v. Basa Mal* (2) which was followed by this Court in *Kailash Chandra Nath v. Sheikh Chhenu* (6). The decision of the Full Bench in *Jiwan Ali Beg v. Basa Mal* (2) is an authority for the proposition that an instrument to come within section 17 (b) of the Registration Act must in itself purport or operate to create, declare, assign, limit or extinguish some right, title or interest of the value of Rs. 100 or upwards in immoveable property, while to come within section 17 (c), it must be, on the face of it, an acknowledgment of the receipt or payment of some consideration on account of the creation, declaration, assignment, limitation or extinguishment of such a right, title or interest. The receipt then before the Court did not fulfil this condition and was held admissible without registration. On the other hand, in *Parashram v. Ganpat* (3), the receipt not only acknowledged payment of money, but also stated that "the mortgagee would have no longer any interest remaining in any way in the mortgaged premises and would execute a new sale-deed on stamp." It was held that this was a receipt which fell within section 17 of the Registration Act and was compulsorily registrable. The distinction between the two classes of cases was explained in *Lakshman v. Damodar* (4) where Ranade, J., set out the law as follows:—

"The receipt was what it professes to be, a settlement of accounts. It does not purport to extinguish the mortgage-debt, and it, therefore, comes under the protection of the exception (n) to clause (b) of section 17 of the Registration Act. Even before that clause was added by Act VII of 1888,

this Court had always held that a receipt given by a mortgagee to the mortgagor for sums paid on account of the mortgage are not inadmissible in evidence for want of registration; *Shidlingapa v. Chenbasapa* (7), *Basawa v. Kalkapa* (8), *Annappa v. Ganpati* (9). The Madras and Calcutta High Courts have taken the same view: *Venkayyar v. Venkatasubbayyar* (10), *Sheikh Gugunfur Ali v. Mahomed Yaseen* (11). The Allahabad High Court took a different view in *Dalip Singh v. Durga Prasad* (12), where it held that receipt for sum paid in part satisfaction of a mortgage must be registered, though, at the same time, it held that the payment may be proved by parole evidence. To the same effect was the decision in *Imdad Husain v. Tasadduk Hosain* (1). Subsequently, however, in *Jiwan Ali Beg v. Basa Mal* (2) the Full Bench of that Court has held that endorsements or receipts of payments passed by mortgagees to mortgagors did not fall within section 17, and unless where they are so framed and worded as to purport expressly to limit or extinguish an interest in immoveable property, they did not come within the section and did not require registration."

The receipt in the case before us falls within the latter category. The receipt by itself would not be sufficient to entitle the plaintiffs to a decree for redemption. The plaintiff had to establish in addition that there was a settlement of accounts between the parties and that they had agreed that the mortgage-debt would be wiped out on payment of Rs. 200. The receipt only established a payment of Rs. 200, but not the adjustment and remission. The receipt by itself did not purport or operate to extinguish a debt of the value of Rs. 100 or upwards and was admissible in evidence without registration.

The result is, that the decree of the District Judge is affirmed and this appeal dismissed with costs.

B. N.

Appeal dismissed.

(7) 4 B. 235; 5 Ind. Jur. 143; 2 Ind. Dec. (N.S.) 664.

(8) 2 B. 489; 1 Ind. Dec. (N.S.) 748.

(9) 5 B. 181; 3 Ind. Dec. (N.S.) 121.

(10) 3 M. 53; 1 Ind. Dec. (N.S.) 593.

(11) 20 W. R. 334.

(12) 1 A. 442; 1 Ind. Dec. (N.S.) 328.

(6) 30 Ind. Cas. 804; 42 C. 546.

RANGANAYAKI AMMAL v. VIRUPAKSHEE RAO NAIDU.

MADRAS HIGH COURT.

ORIGINAL SUIT APPEAL NO. 107

OF 1920.

CIVIL MISCELLANEOUS PETITION NO. 659

OF 1922.

January II, 1923.

Present.—Mr. Justice Coutts-Trotter and
Mr. Justice Ramesam.

M. RANGANAYAKI AMMAL—PETITIONER
—APPELLANT

versus

M. VIRUPAKSHEE RAO NAIDU, MINOR,
BY GUARDIAN M. RUKMANI AMMAL, AND
ANOTHER—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49

—Compromise deed acknowledging title to immoveable property—Registration, whether necessary.

A deed of compromise which recites that a house belonging to a person and in his possession and enjoyment shall be enjoyed by him with power to make a gift or sale of the same, does not purport to create or modify title to immoveable property since it contains only a statement of fact. Such a document does not require registration under section 17 of the Registration Act and is admissible in evidence either as a contract to acknowledge an existing title or as evidence in the nature of an admission. [p. 456, col. 2; p. 457, cols. 1 & 2.]

Sakharan Krishnaji v. Madan Krishnaji, 5 B. 232; 3 Ind. Dec. (N. S.) 154, *Varada Pillai v. Jeevarathnammal*, 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.), followed.

Rani Mewa Kuwar v. Rani. Hulas Kuwar, 1 I. A. 157; 13 B. L. R. 312; 3 Sar. P. C. J. 314. (P. C.), relied on.

Khunn Lal v. Gobina Krishna Narain, 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911). 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.), distinguished.

Appeal from the judgment, dated the 8th October 1920, of Mr. Justice Phillips, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 431 of 1919.

Messrs. A. Krishnaswami Aiyar and K. Venkataraghavachari, for the Appellant.

Mr. V. Radhakrishnayya, for the Respondents.

JUDGMENT.—The learned Trial Judge in this case, which is a claim by a grandson against his grandmother, was asked to take into consideration a document which purports to be a deed

of compromise dated 28th December 1918. In that document, there is a statement that House No. 27 in Thatha Muthiappan Street belonging to the said Ranganayakamma, that is the grandmother, and another house with which nobody in this case is concerned, which are in possession and enjoyment of the said Ranganayakamma from the date of the purchase, shall be enjoyed by the said Ranganayakamma with power to make gift and sell away. The learned Vakils have argued this case with great preciseness and Mr. Krishnasami Iyer for the appellant does not ask us to say that there is any magic about this document because it is in the nature of a nominal settlement which would excuse it from registration. It has been held by the learned Trial Judge on the argument of the respondent that it does require registration and to test that, I must look at the section of the Registration Act which is material, and that is section 17. By section 17 (1) (b) among documents which require registration are non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of Rs. 100 and upwards, to or in immoveable property. Now it is said that this part of the document is a declaration of right in immoveable property and that, therefore, by virtue of section 49, the document would create no rights in the property in question. It is said, on the other side, that this is not a document which purports to create or modify in any way anybody's title to immoveable property. It is simply a statement of fact, as I said in the course of the argument, that Johnson's house is Johnson's house. To my mind this matter cannot be put better than in the words of West, J., in the case of *Sakharan Krishnaji v. Madan Krishnaji* (1), where the learned Judge says thus: "Here, however, the document is not itself one which declares a right in immoveable property, in the sense probably intended by section 17. There 'declare' is placed along with 'create', 'assign', 'limit', or 'extinguish', a

(1) 5 B. 232; 3 Ind. Dec. (N. S.) 154.

RANGANAYAKI AMMAL v. VIRUPAKSHIE RAO NAIDU.

'right', 'title' or 'interest' and these words imply a definite change of legal relation to the property by expression of Will embodied in the document referred to. I think this is equally the case with the word 'declare'. It implies a declaration of Will, not a mere statement of fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense, but a letter containing an admission, direct or inferential, that a partition once took place, does not declare a right within the meaning of the section. It does in one sense 'declare' a right, that is the existence of the right is directly or indirectly stated by the writing, but it is not the expression or declaration of Will by which the right is constituted." I wish to associate myself with all that the learned Judge says on the point. It does not appear to me that any of the later decisions, whether of the Privy Council or of the other High Courts in India, have, in any way, modified it, and indeed in one case in which in its initial stage I was concerned, the case of *Varada Pillai v. Jeevarathnammal* (2), it appears to me that the judgment of the Board entirely recognises and proceeds on the principle laid down in the Bombay case by West, J. Now it is said by Mr. Krishnasami Iyer that the document is conclusive of the rights of the parties if not as to moveable property, certainly as to immoveable property and he relies mainly on the decision of *Khunni Lal v. Gobind Krishna Narain* (3), a Privy Council case. The passage he relied on is a sentence which runs as follows:—"In the present case, Khairati Lal acquired no right from the daughters of Daulat for 'the compromise', to use their Lordships' language in *Rani Mewa Kuwar v. Rani Hulas Kuwar* (4), 'is based on the assumption

that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is.'" Turning to *Rani Mewa Kuwar v. Rani Hulas Kuwar* (4), I find their Lordships say at page 166, after the sentence quoted in *Khunni Lal v. Govind Krishna Narain* (3): "The claim does not rest on contract only but upon a title to the land acknowledged and defined by that contract which is part only of the evidence of the appellant to prove her title and not all her case." That seems to me to allow that the document is admissible in evidence either as a contract to acknowledge an existing title or perhaps as evidence in the nature of an admission. At any rate, in my opinion, it is only part of the case of the appellant and it is not a conclusive document on which we can declare rights with regard to immoveable property.

With regard to moveable property in the suit, no doubt the registration objection would not apply, but I gather from the learned Judge's judgment that, besides the plea of want of registration, it was alleged that the document was executed by the next friend in consequence of a misrepresentation made to her and of her negligence. That being so, I think we must send the case back for re-hearing although the learned Judge has dealt with most of the other evidence. We think that, for this Court satisfactorily to deal with the matter, we ought to have the opinion of the learned Judge on the force of the evidence as a whole and it may be that, considered in the light of documents which we have now held admissible, his former opinion as to the rest of the evidence would perhaps require modification and we think that this is a process which ought to be gone through by the Court of the first instance.

We, therefore, remand the case for re-hearing. The appellant will have his costs of this appeal and the costs incurred in the Court below will be in the discretion of the Trial Judge.

(2) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. I. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.).

(3) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.).

(4) 1 I. A. 157; 13 B. L. R. 312; 3 Sar. P. C. J. 314 (P. C.).

The case having been posted to be spoken to this day the Court delivered the following
JUDGMENT.—The re-hearing will be confined to Items Nos. 3, 5, 6 of Schedule I

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and Schedule II. As regards the other items in the plaint Schedule, the decree of the Original Side will be confirmed.

The parties will pay and receive proportionate costs.

V. N. V.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 507 OF 1921.

February 6, 1923.

Present:—Mr. Batten, J. C.

HIRASA AND ANOTHER—DEFENDANTS

NOS. 3 AND 4—APPELLANTS

versus

ONKAR AND OTHERS—PLAINTIFFS AND

DEFENDANTS NOS. 1, 2, 5 TO 9—

RESPONDENTS.

Mortgage-suit—Persons acquiring interest subsequent to mortgage not impleaded, effect of—Decree, form of.

Where a mortgagee sues for the recovery of the full amount of the mortgage-debt by sale of the mortgaged property, but omits to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit, so much only of the claim should be decreed as is proportionate to the interests of the persons who are before the Court. [p. 459, col. 1.]

Ponnusami Mudaliar v. Srinivasa Naichan, 31 M. 333, distinguished.

Ganeshi Lal v. Charan Singh, 19 Ind. Cas. 614; 35 A. 247; 11 A. L. J. 280, *Alam Singh v. Gokal Singh*, 21 Ind. Cas. 271; 35 A. 484; 11 A. L. J. 749, *Budhmal Kewalchand v. Rama Yesu Sangle*, 55 Ind. Cas. 327; 44 B. 223; 22 Bom. L. R. 68 and *Perumal Pillai v. Raman Chettiar*, 42 Ind. Cas. 352; 40 M. 968; 33 M. L. J. 211; 6 L. W. 450; (1917) M. W. N. 752, referred to.

Appeal from a decree of the District Judge, Nimar, in Civil Appeal No. 222 of 1920, dated the 16th July 1921.

Mr. W. R. Puranik, for the Appellants.

Mr. M. Gupta, for the Respondents.

JUDGMENT.—The first ground of appeal, which is divided into four sub-heads, is to the effect that the lower Appellate Court was wrong in confirming the findings of the First Court that the mortgage-deed in suit was validly attested. The learned District Judge merely says that he has to decide whether it is more probable that the attesting witnesses had turned hostile or that the attestation was validly carried

out and that he thinks that the lower Court has come to a correct decision. A Court of First Appeal should have recorded a fuller judgment than this. But I cannot interfere on this ground, since the decision of the lower Courts is the only one that can possibly be arrived at on the evidence. The mortgage-deed purports to have been attested by three persons, Kesoram, Surta and Pirthisingh, all of whom signed under the heading "witnesses." Of these three, Kesoram and Surta have been called as witnesses. Surta says that he saw the executant Ramchand affix his signature, and that Kesoram was present when the deed was executed. Kesoram says he did not see the deed executed, but attested it at the request of one of the mortgagees. The Munsif held this witness to be hostile to the plaintiff, and his grounds for so holding are sound. The third witness Chuni Lal, the other mortgagee, deposes that all three attesting witnesses were present when the deed was executed; his evidence has been accepted, and even if Kesoram was not present, which version has not been accepted, the deed was validly attested by two attesting witnesses. There is thus no force in the first ground of appeal.

The fifth ground of appeal calls in question a concurrent finding of fact regarding re-payments with which I cannot interfere in second appeal.

The 2nd, 3rd and 4th grounds raise a question of law. The defendants, other than those representing the original mortgagor Ramchand, alleged that the 1st and 2nd defendants were not Ramchand's only heirs and contended that the suit should be dismissed as all the necessary parties had not been joined. On the issue framed on these points the learned Munsif observed: "The evidence of D.W. No 1 shows that there are other heirs of Ramchandra. I find that Ramchandra has other heirs besides the defendants Nos. 1 and 2. They are necessary parties but as they have not been made parties their interest in the property, if any, would not be affected." In appeal the District Judge, after referring to rulings cited on behalf of the parties, remarks: "I, therefore, hold that the other heirs of the original mortgagor are not necessary;

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parties to the present suit, and their not having been joined does not prevent the plaintiff from getting a decree for recovery of the full amount due from the sale of the mortgaged property included in the suit."

I have been unable to find any published ruling of this Court dealing with the legal question involved. In *Khawaja Kutbuddin v. Shriram Saligram*, First Appeal No. 38 B of 1919, it was held by Kotwal and Macnair, A. J. Cs., where the rights in the mortgaged property have been split up owing to the death of the mortgagor that a plaintiff claiming foreclosure who omits to implead all the heirs of the mortgagor throws an undue burden on the shares of the persons impleaded, and that the decretal amount must be reduced by an amount proportionate to the shares of the persons omitted, whose shares would not be liable to foreclosure. In that case, as in the one now in the appeal, it would seem that the plaintiff sought to make the whole of the property mortgaged liable for the whole of the mortgage-debt, although some of the heirs of the mortgagor were not parties to the suit. The learned Judge cited the case of *Ponnusami Mudaliar v. Srinivasa Naichan* (1), where the facts were different: the mortgagor released a part of the mortgaged property and sought to realize the whole of the mortgage-debt from the remaining property, without making the holders of the released property parties to the suit. Cases directly to the point are *Ganeshi Lal v. Charan Singh* (2) and *Alam Singh v. Gokal Singh* (3). In the first case it was ruled that when a mortgagee sued for the recovery of the whole of the mortgaged property but by an oversight omitted to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit so much of the claim should be decreed as was proportionate to the interest of the persons who were before the Court. In the second case the same procedure

was followed. Similarly, in *Budhmal Kevalchand v. Rama Yesu Sangle* (4), where the mortgaged property fell into the hands of two purchasers in half shares, only one of whom was sued, it was held that the mortgagee could claim only half the mortgage-money. In the present case the allegation is that the 1st and 2nd defendants are heirs of only portion of the property mortgaged, and that their part interest in the property mortgaged cannot be made liable for the whole of the mortgaged-debt. For the respondents reliance is placed on *Perumal Pillai v. Raman Chettiar* (5), but that case is not to the point; a case where the plaintiff had released part of the mortgaged property and all the persons interested in the equity of redemption of the property in suit were joined as parties. It appears to me that the proper course is to ascertain what is the interest held in the property mortgaged, which is also the property in suit, by all the defendants, not merely the 1st and 2nd defendants as compared with the interest in the property still possessed by the heirs of the original mortgagors not joined. As only the interests of the defendants can be sold, the amount decreed should be proportionate to that interest. The appeal is remanded for further hearing with reference to the above remarks. Costs will be costs in the suit and there will be no refund certificate.

W. C. A.

Case remanded.

(4) 55 Ind. Cas. 327; 44 B. 223; 22 Bom. L. R. 68.

(5) 42 Ind. Cas. 352; 40 M. 968; 33 M. L. J. 211; 6 L. W. 450; (1917) M. W. N. 752

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1 OF 1923.
CIVIL MISCELLANEOUS PETITION No. 7
OF 1923.

February 2, 1923.

Present:—Mr. Justice Oldfield and
Mr. Justice Venkatasubba Rao.

RAJAGOPALA AYYANGAR—

PLAINTIFF No. 1—PETITIONER

versus

RAMANUJA AYYANGAR AND OTHERS—
DEFENDANTS NOS. 1 TO 6 AND PLAINTIFF
No. 2—RESPONDENTS.

Evidence Act (I of 1872), s. 163—Inspection

(1) 31 M. 333.

(2) 19 Ind. Cas. 614; 35 A. 247; 11 A. L. J. 280.

(3) 21 Ind. Cas. 271; 35 A. 484; 11 A. L. J. 749.

RAJAGOPALA AYYANGAR v. RAMANUJA AYYANGAR.

of documents—Burden of proof, whether affected—Civil Procedure Code (Act V of 1908), s. 115—Interlocutory order—Revision.

Where one party calls for and inspects documents with the other party the latter is entitled, under section 163 of the Evidence Act, to have such documents exhibited, but such exhibiting is always subject to proof of execution and genuineness.

Section 163 of the Evidence Act does not render proof of the documents to be exhibited unnecessary or alter the normal incidence of that burden. A Court which diverts from the normal course in such a case and wrongly throws the burden of proof on the party inspecting instead of on the party relying on the documents commits a material irregularity and the order is liable to be set aside in revision under section 115 of the Civil Procedure Code.

Quære.—Whether section 163 of the Evidence Act is applicable to documents produced under the discovery procedure or only after the trial has begun.

Petition, under section 115 of Act V of 1908 and sections 107 and 108 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Tanjore, dated the 30th October 1922, in Original Suit No. 59 of 1916, and petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing transfer of Original Suit No. 59 of 1916 on the file of the Court of the Subordinate Judge, Tanjore, to the file of the District Court, Tanjore. West or any other Subordinate Court competent to try the suit.

Messrs. T. R. Ramachandra Iyer and K. Narasimha Aiyangar, for the Petitioners.

Messrs. C. V. Anantakrishna Aiyar, A. Srirangachari and V. N. Venkatavarada Chari, for the Respondents.

JUDGMENT.—That the general course of the proceedings in this case has been deplorable will be clear, when it is stated that, although they began in 1914, they still are not within measurable distance of any conclusion. We, however, are particularly concerned only with the order which we are asked to revise and which was passed on 30th October 1922.

The facts, shortly, are that much earlier in the case the defendants in response to the plaintiff's petition for discovery produced certain accounts and at a later date

produced further accounts. Those accounts were before the Court, and the suit being for an account of the profits of properties which had been in the possession of the defendants and their father, they would have been most material in arriving at the amount to which the plaintiffs were entitled. The plaintiff having inspected the accounts, brought to the notice of the lower Court that they did not admit their genuineness or completeness. The case standing thus, the lower Court has held that, as the accounts have been inspected by the plaintiffs, the defendants' Vakil is entitled to insist on their being exhibited in spite of the objection from the other side that they are not genuine and ought not to be exhibited without proof. The lower Court justified this with reference to section 163, Indian Evidence Act, and, if it meant simply that the defendants were entitled to have the accounts exhibited, subject to proof and that, as they relied on them, they would be bound to prove them, the plaintiffs being entitled to adduce counter evidence, we could find no fault. But the plaintiff in the first page of the affidavit of 31st October 1921 says (and it is not contradicted) that the lower Court at once called upon them to adduce evidence about the genuineness or otherwise of the said accounts. That was in no way justified by section 163 of the Evidence Act. For section 163 does not, in our opinion, render proof of the document to be exhibited unnecessary or alter the normal incidence of that burden. We do not think it necessary to decide in these proceedings whether section 163 is applicable to accounts produced under the discovery procedure or only to accounts produced after the trial has begun. It is sufficient that it includes nothing relating to the burden of proof or the necessity for the proof prescribed in the other sections of the Act.

We are, of course, unwilling in revision to interfere with an order passed by the lower Court in a pending trial and we should not do so in the present case, if it were not possible to isolate the point on which our interference is asked for. Here, however, we think that, in ruling as it did, and diverting from the usual course, in accord-

MITSUI BUSSAN KAISHA, LD. V. PADAMRAJ FULCHAND.

ance with which the burden of proof was on the defendants, the lower Court committed a material irregularity which we should set aside.

The application before us for a transfer of the case is founded on the alleged perversity of the lower Court's order and procedure and on certain oral observations which it is alleged to have made. We do not think those observations, if they were made, merit serious notice; and we can find nothing except a mistake, which there is no reason for doubting was made in good faith. There is accordingly no reason for a transfer.

Our attention has been invited to the memo. by defendants dated 30th October 1922, in which the first defendant declined to supplement the evidence already given. They did so, so far as we can understand, in consequence of the lower Court's ruling just dissented from. They must be allowed, if so advised, to re-consider their refusal to adduce further evidence.

Civil Revision Petition No. 1 of 1923 is allowed to the extent stated. Civil Miscellaneous Petition No. 7 of 1923 is dismissed. Costs will be costs in the cause and will be provided for in the lower Court's decree.

V. N. V.

Revision allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL, No. 57-B OF 1921.

February 23, 1923.

Present:—Mr. Kotwal, A. J. C., and
Mr. Prideaux, A. J. C.

MITSUI BUSSAN KAISHA, LIMITED,
AMRAOTI—DEFENDANT No. 1

—APPELLANT

versus

PADAMRAJ FULCHAND AND OTHERS—

—PLAINTIFFS AND DEFENDANT

No. 2—RESPONDENTS.

Auction sale—Property sold subject to mortgage-decree—Payment by mortgagor out of Court—Payment not certified to Court—Encumbrance paid off by auction-purchaser—Credit given for amount paid by mortgagor—Refund of amount—Judgment-debtor, right of.

On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be whether the price be settled by private bargain or determined by public competition together with an indemnity against the encumbrances affecting the land. The contract of indemnity

may be expressed or implied. If the purchaser covenants with the vendor to pay the encumbrances it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the encumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property. [p. 463, cols. 1 & 2.] *Izzatunnisa Begam v. Pertab Singh*, 3 Ind. Cas. 793; 31 A. 583; 13 C. W. N. 1143; 10 C. L. J. 313; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 19 M. L. J. 682; 36 I. A. 203; (P. C.), followed.

Certain property was sold in execution subject to an encumbrance of a mortgage-decree for a certain sum of money. Before the proclamation of sale was issued, the judgment-debtor paid out of Court a part of the amount due under the mortgage-decree. This payment was not certified to the Court and was consequently ignored in the execution sale. Subsequently, the auction-purchaser paid off the encumbrance and was given credit by the mortgagee decree-holder for the amount received by the latter. The judgment-debtor brought a suit against the auction-purchaser for recovery of the amount and in the alternative claimed it from the mortgagee decree-holder:

Held, (1) that the auction-purchaser was under no obligation to pay the amount and the mere fact that he derived benefit from the payment did not give the judgment-debtor any cause of action against him: [p. 464, col. 1.]

(2) that in view of the fact that there was no fraud committed by the mortgagee decree-holder the judgment-debtor's cause of action as against him could only be based on the ground of negligence or on a breach of an implied agreement to certify the payment and make it effectual in execution; [p. 464, col. 1.]

(3) that as there was no period fixed by the law for the certification of the payment, failure to certify within a particular time could not be treated as negligence or as a breach of agreement; [p. 464, col. 1.]

(4) that even if there was a breach of agreement on the part of the mortgagee decree-holder, the loss was more directly due to the negligence of the judgment-debtor himself in not attending the hearing at which the sale-proclamation was prepared than to the mortgagee decree-holder's failure to certify; [p. 464, col. 1.]

(5) that, consequently, the judgment-debtor was not entitled to claim the amount from either the auction-purchaser or the mortgagee decree-holder. [p. 464, col. 2.]

First appeal from the decree of the District Judge, Amraoti, dated the 4th August 1921, in Transfer Civil Suit No. 2 of 1921.

Sir B. K. Bose and Mr. P. N. Rudra, for Appellants.

Messrs. M. Gupta and M. B. Marathe, for the Respondents.

MITSUMI BUSSAN KAISHA LD. V. PADAMRAJ FULCHAND.

JUDGMENT.—The facts of this case, briefly stated, are that on the 2nd August 1916 Bhagwandas, defendant No. 2, obtained a preliminary mortgage-decree in Civil Suit No. 20 of 1914 in the Court of the Additional District Judge, Amraoti, against the plaintiffs for a sum of Rs. 1,22,528-1 payable by instalments with interest. On 31st August 1918 Radhakisan Gopikisan obtained a money-decree against the plaintiffs for Rs. 28,675-9-3 in the Court of the District Judge, Khandwa, and having got it transferred to Amraoti for execution attached a Ginning and Pressing Factory belonging to the plaintiffs. The Factory was sold subject to the incumbrance of the decree in Suit No. 20 of 1914. There were some objections preferred to the confirmation of the sale but they were dismissed and the sale was ultimately confirmed in favour of defendant No. 1, Mitsui Bussan Kaisha, Limited. The proclamation of sale had stated the incumbrance in the following terms:—

“The above (the Factory) may be auctioned subject to the encumbrance of Rs. 1,22,528-1-0 in Civil Suit No. 20 of 1914 decided on the 2nd of August 1916, on the file of the First Additional District Judge. Auction may be held subject to the encumbrance of mortgage.”

The plaintiffs state, and the defendants admit, that the plaintiffs had paid out of Court Rs. 18,000 in various sums towards the decree before the proclamation of sale was issued. It is also admitted that defendant No. 1 paid off the decretal debt and credit for the amount of Rs. 18,000 was given to him in the account of the mortgage-debt by defendant No. 2. The plaintiffs sue for this amount in the present case.

Paragraphs 9 and 10 of the plaint refer to the grounds of defendant No. 1's liability as follows:—

“9. That the plaintiffs submit that the plaintiffs were interested in the payment of the said mortgage-money, which the defendant Company, Mitsui Bussan Kaisha, was bound by law to pay, and the plaintiffs thereon paid the said sum of Rs. 18,000 and as such the plaintiffs are entitled to be re-imbursed of the said sum of Rs. 18,000 and its interest of which the defendant Company enjoyed the benefit.

“10. The plaintiffs further submit that the said defendant Company enjoyed the benefit.”

Paragraphs 6 and 8 state the grounds of defendant No. 2's liability:—

“6. That before the said auction the plaintiff paid to the defendant, Bhagwandas, a sum of Rs. 18,000 towards the said mortgage. The said defendant agreed to certify the payment of the said sum to the Court.

“8. That the plaintiffs charge the defendant, Bhagwandas, with having committed fraud upon the plaintiffs in not certifying the said payments to the Court and thereby having caused loss and damage to the plaintiffs to the extent of Rs. 18,000 and interest thereon.”

Plaintiffs claim a decree against defendant No. 1 or, in the alternative, against defendant No. 2.

It is not necessary to refer to the pleas raised by the defendants.

The following facts have been found by the lower Court:—

That the plaintiffs suffered a loss by the payment not having been certified; that Bhagwandas was not guilty of any fraud in not certifying the payment; that though plaintiff, Dharamchand, did not apply to have the payment certified he did inform the Court of it before the sale was confirmed; that the damage to the plaintiffs was caused by their own silence in the matter in not certifying the payments to the Court and not by Bhagwandas' silence, and that defendant No. 1 derived benefit from the payment of Rs. 18,000 by the plaintiffs having obtained a reduction from defendant No. 2 on account of it when satisfying the mortgage-decree.

The lower Court passed a decree against defendant No. 1 on the ground of his having derived benefit from the payment. Defendant No. 1 appeals and the plaintiffs ask for a decree against defendant No. 2 if defendant No. 1's appeal succeeds.

The ground of defendant No. 1's liability stated in paragraph 9 of the plaint is not supported in this Court.

It is first contended on behalf of defendant No. 1 that there is no warrant of title in an auction-sale in execution, and defendant No. 1 took his chance of being

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either the gainer or the loser by the transaction of the sale and that as if he lost he had no remedy against any body, so if he gained he could not be asked to give up the benefit. The argument based upon the absence of a warrant of title, however, is not applicable, for the gain or loss in this case is not connected with the title to the property.

It is next contended that defendant No. 1 cannot be said to have benefited by the payment as he had to pay interest in addition to the principal and had, besides, bought a hazardous and insecure title. Defendant No. 1 was taking no chance as to the amount which he would have to pay on account of the incumbrance. The amount payable on the date of the sale, though not calculated and stated exactly in the proclamation, was yet ascertainable. We are of opinion that defendant No. 1 has received benefit to the extent of Rs. 18,000 from the fact that the payment of that sum was not certified to the Court. Assuming that the proper price of the property was what defendant No. 1 paid in cash, plus the amount required to discharge the incumbrance, defendant No. 1 did benefit by getting a reduction of Rs. 18,000 from the amount of the incumbrance.

Reliance is next placed on *Izzatun-Nisa Begam v. Pertab Singh* (1) and it is contended that the observations of their Lordships of the Privy Council, at page 589*, apply to the circumstances of this case, and that the plaintiffs are not entitled to claim anything from defendant No. 1. In our opinion this contention must be upheld. The case cited was one where the mortgages, subject to which the sale was made turned out to be invalid, and the auction-purchaser had to pay nothing on account of them. Here the incumbrance is only reduced to a comparatively small extent. At page 589* their Lordships say:—

“On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be whether the price be settled by private bargain or determined by public competition, to-

(1) 3 Ind. Cas. 793; 31 A. 583; 13 C. W. N. 1143; 10 C. L. J. 313; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 19 M. L. J. 682; 36 I. A. 203 (P. C.).

*Page of 31 A.—[Ed.]

gether with an indemnity against the encumbrances affecting the land. The contract of indemnity may be expressed or implied. If the purchaser covenants with the vendor to pay the encumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the encumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property. The notion that after the completion of the purchase the purchaser is in some way a trustee for the vendor of the amount by which the existence, or supposed existence, of encumbrances has led to a diminution of the price, and liable, therefore, to account to the vendor for anything that remains of that amount after the encumbrances are satisfied or disposed of, is without foundation. After the purchase is completed, the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase.”

The present case is sought to be distinguished from the above case on two grounds. The first is, that the benefit obtained by the auction-purchaser was by reason of a payment made by the judgment-debtor. We do not see how this circumstance makes any difference to the application of the rule as stated by their Lordships. The second ground is this. It is pointed out that the plaintiffs brought the fact of the payment to the notice of the Court, *vide* Exhibit P-3, before the confirmation of the sale and defendant No. 1 opposed the application for setting aside the same. By his conduct in opposing the application defendant No. 1 must be deemed to have agreed to pay the amount to the plaintiff. We fail to see how any implied agreement to pay can be inferred from defendant No. 1's conduct. He merely contended that the fact of the payment was not a sufficient ground for setting aside the sale and was raising a legal defence that he was entitled to raise. He cannot be said to have agreed to re-pay the amount if given credit for by defendant No. 2 after the sale was confirmed. In our opinion, there was neither an implied agreement to re-pay

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nor any estoppel on defendant No. 1's part. Admittedly, defendant No. 1 was not responsible for the incorrectness of the amount mentioned in the proclamation as due under the mortgage-decree.

The mere fact that defendant No. 1 received the benefit from the plaintiffs' payment does not entitle the plaintiff to sue for it. The question is, whether there was any obligation on defendant No. 1's part to re-pay it: *Ram Tuhul Singh v. Biseswar Lal Sahoo* (2). We hold there was none.

We now come to the plaintiff's alternative claim against defendant No. 2. It is said that it was the statutory duty of defendant No. 2 to get the payment certified to the Court and the failure to certify was a breach of duty or of an implied agreement to certify which resulted in the right amount not being entered in the sale-proclamation and thus caused loss to the plaintiff. No doubt it was defendant No. 2's duty to certify the payment under O. XXI, r. 2, First Schedule to the Civil Procedure Code, but is he liable to be sued merely because he failed to certify the payment before the sale? No period is fixed by law within which defendant No. 2 was bound to certify. He had not attempted to execute his decree ignoring the payment. As a matter of fact, he admitted the payment in an affidavit dated the 11th September 1919—Exhibit P.3—before confirmation of the sale and gave credit to defendant No. 1 for it in the final account of the mortgage-decree. He committed no fraud. The plaintiffs' cause of action against defendant No. 2 may be based on the ground of negligence on his part or on a breach of an implied agreement by him to certify the payment and make it effectual in execution. Failure to certify within a particular time where no time is fixed cannot be treated as negligence or a breach of agreement, and gave the plaintiffs no cause of action. We are inclined to think that, even if there was a breach of agreement on the part of defendant No. 2, the loss to the plaintiff was more directly due to his own negligence in not attending the hearing at which the sale-proclamation was prepared and not seeing that it was properly

prepared than to defendant No. 2's failure to certify. It would seem, moreover, that the implied agreement to certify was an agreement to certify it for a particular purpose, namely, to make the payment effectual in execution. There has been no breach of such agreement for the payment has not been rendered ineffectual in execution by the failure to certify.

We hold that the plaintiffs are not entitled to claim the amount either from defendant No. 1 or defendant No. 2. We set aside the decree of the lower Court against defendant No. 1 and dismiss the plaintiffs' claim against defendant No. 1 with costs in both Courts. The costs of defendant No. 2 in this Court will be paid by the plaintiffs. The decree of the lower Court with respect to defendant No. 1 stands.

G. R. D.
N. H.

Decree set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1612 OF 1920.

December 13, 1922.

Present :—Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Wallace.

E. VENKATARAMA IYER—APPELLANT
versus
A. ELUMALAI NAICKER AND ANOTHER
—RESPONDENTS.

Execution sale—Identification and sale of wrong property, effect of—Misdescription of property sold, effect of—Auction-purchaser, position of.

If the description of a piece of land in a Court sale is such that it identifies the land, for instance, if the description would apply to some other land than that which it was intended to sell, the purchaser at Court-auction can get no other land than that so identified. If on the other hand, the land is clearly identified but wrongly described, the misdescription must be treated merely as an irregularity and the sale at the auction will stand good. [p. 465 col. 1.]

Raja Thakur Barnha v. Jiban Ram Marwari, 21 Ind. Cas. 936; 41 C. 590; 18 C. W. N. 313; 15 M. L. T. 137; 12 A. L. J. 156; 19 C. L. J. 161; 26 M. L. J. 89; 16 Bom. L. R. 156; (1914) M. W. N. 118; 41 I. A. 38 (P. C.), distinguished.

Second appeal against a decree of the Court of the Subordinate Judge, Chingleput, in Appeal Suit No. 112 of 1919 (A. S. No. 439 of 1919 on the file of the District Court) preferred against the decree of the Court of the District Munsif, Poonamallee, in O. S. No. 351 of 1919.

Mr. L. A. Govindaraghava Iyer, for the Appellant.

(2) 2 I. A. 131 at p. 143; 15 B. L. R. 208; 23 W. R. 355; 3 Ser. P. C. J. 477; 3 Suth. P. C. J. 136 (P. C.).

CHAGAN LAL, V. ABOOBAKAR ABDUR RAHMAN & CO.

JUDGMENT.

Schwabe, C. J.—The plaintiff claims a certain land which he says he purchased at a Court-auction. The land purchased was mortgaged by the judgment-debtor, the second defendant, to the decree-holder, who obtained a mortgage-decree and brought the land to Court-auction. The land was described probably in the mortgage as '*Nanja*' 55 though it is not quite clear that the word "*Nanja*" in the mortgage itself necessarily applied to the number 55: but it was certainly so described in the decree, in the notice of sale and, in the certificate of sale. Before the sale and after the suit, the first defendant, the appellant, bought from the judgment-debtor, his brother-in-law, the land described as No. 55 *Punja*. In this village the numbers used for description of lands run consecutively irrespective of whether the land is *Punja* or *Nanja*. There is no other No. 55 in this village. The land is in fact *Punja* and not *Nanja*. In my judgment the word '*Nanja*' used in the mortgage and in the decree and in the documents relating to the auction is merely an inaccurate description of the land properly described as No. 55 and thus identified and in my judgment that land was mortgaged and was the subject of the decree, and was the land that was sold. If the description of the land given is such that it identifies the land, for instance, if the description used would apply to some other land than that which it was intended to sell then, according to the judgment of the Privy Council in *Raja Thakur Barmha v. Jiban Ram Marwari* (1), the purchaser at Court-auction can get no other land than that so identified. If, on the other hand, the land is clearly identified, but wrongly described, the misdescription is to be treated as an irregularity and the sale at the auction stands good. As this land was the subject for the mortgage suit, although there was an error in the description of it, in my judgment, section 52 of the Transfer of Property Act applies, and during the pendency of that suit, the first defendant would get no title to it. Further, it was ordered in this case

that the description '*Nanja*' should be altered into '*Punja*' and the various documents from the mortgage-deed onwards be rectified accordingly. It was argued that, under the Specific Relief Act, rectification could not be ordered where rights of third parties intervene. It is said that the purchase by the first defendant was a *bona fide* purchase for value without notice and the rectification cannot be made so as to affect the right which he has acquired. The answer given on this point by the Subordinate Judge is that the first defendant was not a *bona fide* purchaser for value. That, I think, is a question of fact, and there being evidence to support it, it is not open to this Court on second appeal to re-consider it, but I think it right to say that the fact of relationship of the first and the second defendants, the suspicious circumstances as to the consideration and the fact that the first defendant never even asked to see the title-deed before purchasing the land amply warrant the Subordinate Judge and the District Munsif in arriving at the conclusion which they did on this point. In view of what I have said about the application of section 52 of the Transfer of Property Act, this point does not arise.

This appeal must be dismissed.

Wallace, J.—I agree.

V. N. V.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 25-B OF 1921.

October 4, 1922.

Present:—Mr. Kotwal, A. J. C.

CHAGAN LAL—APPELLANT
versus

MESSRS. ABOOBAKAR, ABDUR RAHMAN & CO. OF BOMBAY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20—Contract for sale of goods—Suit for damages—Parties residing in different Provinces—Cause of action—Jurisdiction.

(1) 21 Ind. Cas. 936; 41 C. 590; 18 C. W. N. 313; 15 M. L. T. 137; 12 A. L. J. 156; 19 C. L. J. 161; 26 M. L. J. 89; 16 Bom. L. R. 156; (1914) M. W. N. 118; 41 I. A. 38 (P. C.).

CHAGAN LAL, V. ABOOBAKAR ABDUR RAHMAN AND CO.

P. residing at Y. informed D. that he had certain goods to be sold at B. where D. carried on business, and inquired on what terms D. would be prepared to effect the sale; D. signified his willingness to sell the goods and intimated his terms. P. despatched the goods to D. who sold them at B. P. instituted the present suit at Y. against D. for damages occasioned by D.'s conduct owing to which he failed to realise the proper value of the goods: the question was whether the suit was triable at Y.

Held, that the contract for the sale of the goods which was part of the cause of action, was formed at Y. and that the Court at Y. had jurisdiction to try the suit under section 20 of the Civil Procedure Code. [p. 467, col. 1]

Appeal from a decree of the Sub-Judge, Yeotmal, dated the 29th September 1920, in Civil Suit No. 202 of 1919.

Messrs. M. Gupta and G. L. Subhedar, for the Appellant.

Messrs. M. R. Bode and G. R. Deo, for the Respondents.

JUDGMENT.—The plaintiff is a resident of Yeotmal. The defendants carry on business in Bombay as commission agents. The plaintiff sent some bales of cotton to the defendants for sale in Bombay. He alleged that the defendants did not sell the bales on the day on which they were instructed to sell them, that they described them as of a quality inferior to their real quality and that they thus failed to realise their proper value. He sued for damages occasioned by the defendants' conduct in the Court of the Subordinate Judge, Yeotmal. The defendants took a preliminary objection that the suit was not triable in Yeotmal. This objection having succeeded the plaintiff appealed to this Court. Some letters which the Trial Court did not have before it were admitted in this Court and the case was remanded for the point of jurisdiction being tried after examining the parties and considering such documentary evidence as they might produce. The Trial Court has again held that the case was not triable in Yeotmal and returned the plaint for presentation to the proper Court. The plaintiff again appeals.

The question to be decided is whether the cause of action or any part of it arose in Yeotmal. For this purpose the correspondence between the parties must be referred to in some detail. The correspondence opened with Exhibit D-1, a letter

written by the plaintiff to the defendants on the 3rd February 1919. The plaintiff stated that he wished to send 100 bales "ready for sale" and enquired how much he could draw as advance and what would be the incidental charges. Exhibit P-4, dated the 5th February 1919, is the reply to this letter. The defendants enclosed in this letter a printed form, Exhibit P-5, containing the required information and expressed their willingness to send such further information as may be desired. On the 6th February 1919 the plaintiff wrote Exhibit D-2 asking for further information. From the terms of this letter as also from Exhibit D-3 it appears that the plaintiff had not received Exhibit P-4 when he wrote Exhibit D-2. Exhibit P-6 dated the 8th February 1919 is the reply to Exhibit D-2 and supplies the further information wanted by the plaintiff. For practical purposes, Exhibits D-1 and D-2 may be treated as one enquiry and Exhibits P-4 and P-6 as one answer thereto. Thereafter, on the 11th February 1919, the plaintiff wrote Exhibit D-3. The material part of this letter is as follows:—

"I am in receipt of your letters dated 5th and 8th instant and contents noted.

"In reply I am glad to inform you that I have sent you *via* Dhamangaon 122 bales full press cotton, and the Railway receipt for the same will be sent to you in a day or two. Kindly arrange for the transit insurance from Dhamangaon to Bombay and inform me accordingly.

"To-day I have drawn on you one *hundi* for Rs. 10,500 in favour of Sheikh Mahboob Sheikh Samusbbhai of Digras dated 15th February 1919. So kindly pay the draft and debit to my account. Please note the above *hundi* will be paid in Bombay on the 17th February 1919 and in the meantime that is before above date you will receive my Railway receipt for 122 bales from Dhamangaon.

"As advance you have informed me that you will pay 75 per cent. that I come to know but kindly arrange to give 80 per cent after deducting Railway fare as you give to Seth Ramkumar and Ramdial of Yeotmal and I am sending you these bales by the recommendation of them.

SHAMAL DAS V. PHANINDRA NATH ROY.

"Please note in the meantime if the market will go down I am ready to send you back. Now on receipt of this kindly inform me how many thousands *hundi* I may draw on you for the above 122 bales.

"Here the Railway is not open for Colaba, therefore, I am sending you bales from Bhamangaon which please note."

Exhibit P-7 is the reply to Exhibit D-3.

"Letter received. Draw *hundi* at 16,000 on 100 bales. Railway Transit Insurance effected."

It seems to me that the suit lies in the Court of Yeotmal. The plaintiff had informed the defendants that he had a particular item of work to be done in Bombay and asked on what terms the defendants were prepared to do that work. The defendants' letters, Exhibits P-4 and P-6, must be taken as the signification of their willingness to do that work on the terms given therein with a view to the plaintiff assenting to that work being done on those terms by them. The letters, Exhibits P-4 and P-6, therefore, constitute a proposal. Exhibit D-3 and the despatch of goods were the assent of the plaintiff to the proposal. The proposal having thus been accepted became a promise. The contract which is a part of the cause of action was thus formed at Yeotmal and the Court at Yeotmal had jurisdiction to try the suit under section 20, Civil Procedure Code.

I am not prepared to accept the defendants' argument that Exhibits D-1 and D-2 constitute a proposal and P-4 and P-6 an acceptance. The contract could not be complete until the defendants' terms of agency were accepted by the plaintiff. He had not agreed to accept whatever the defendants' terms might be without knowing them beforehand. Neither Exhibits D-1 and D-2 constitute a proposal, nor P-4 and P-6 an acceptance as interpreted in section 2 of the Contract Act. Nor do I agree with the defendants' contention that Exhibits P-4 and P-6 were mere quotations and nothing more. Reading them together with Exhibit D-1 they amount, in my opinion, to an offer to do the particular work referred to in Exhibit D-1 on certain terms. I hold that the suit is triable at Yeotmal. The plaint which is filed in this Court will be forwarded to the lower Court which is hereby directed

to receive it and proceed with the trial of the case according to law. Costs to date will abide the result.

W. C. A.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 282 OF 1921.

June 23, 1922.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

SHAMAL DAS KSHETTRY AND OTHERS
—PETITIONERS—APPELLANTS

versus

PHANINDRA NATH ROY CHOUDHURI
AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 28, sub-ss. (3), (6)—Insolvency of mortgagor in possession—Mortgagee, position of.

Having regard to the provisions of section 28, clause (6) of the Provincial Insolvency Act, the reputed ownership clause in sub-section (3) of that section can have no operation to affect the power of a secured creditor. Consequently, the principle that if goods have been mortgaged, the mortgagee is the true owner, and if he allows the mortgagor to continue in possession of the goods until his bankruptcy the goods pass to the trustee, is not applicable to a case under the Act. [p. 469, col. 2; p. 470, col. 1.]

Appeal against the decree of the District Judge, 24-Pergunnahs, dated the 26th of September 1921.

Babu Dwarkanath Chakraborty (with him Babu Kali Kinkar Chakraborty), for Appellant:—One Sarada entered into an agreement with the appellants by which we were to advance money to him on the security of jute kept in our godowns. We were given no control over the business but the key of the godowns was with us. In August 1920 we stopped further payments and in January 1921 Sarada applied for insolvency. The adjudication was made and a Receiver was appointed. Our dues amount to Rs. 38,500. We filed a claim as secured creditor. The learned Judge held that we were the reputed owners of the jute. Our case is that there was an agent of mine called Rajani and also a Darwan who were both to be paid by Sarada. There was nothing to

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show that these were my paid servants. (Reads and discusses the evidence). The principles of reputed ownership do not apply. The mortgagee is not the owner of the property. Here we allowed the insolvent to deal with the property. Section 28 (3) applies when the real owner allows the insolvent to deal with the property in such a manner as to create a belief that the insolvent was the owner of the property. Here the facts are quite different. We are secured creditors and as such are entitled to the benefit of section 28 (3) of the Provincial Insolvency Act. See also sections 2 (1) (e), 28 (6) of the Provincial Insolvency Act.

Babu Monmohan Bose (with him Babus Asiranjjan Chatterjee, Narendra Nath Chowdhury, Nalin Chundra Pal Anilendra Nath Rai Chowdhury), for the Respondents:—The principle of reputed ownership has been rightly applied. See Halsbury's Laws of England, Vol. II, 177. Section 28 (6) of the Provincial Insolvency Act merely enables the creditor to proceed against the property of the insolvent in or out of Court as distinguished from the rights of the ordinary creditors who do not have such right. If effect be given to section 28 (6) then the clause (3) to the section would be rendered nugatory. I submit the Court below passed the proper order upon the facts and circumstances of the case.

Babu Dwarka Nath Chakrabarty, replied in brief.

JUDGMENT.—This appeal is against an order of the District Judge of the 24-Pargunnahs in an insolvency case.

One Sarada Prosad Ghosh was a dealer in jute. He entered into an agreement with a certain person called Khettry under which the latter was to make advances to Sarada on the security of jute kept in his godown. By the agreement, the key of the godown was to be kept by Khettry but was to do the buying and selling independently and Khettry was to have no control over that. Further, Sarada was to have the delivery of the jute. In this manner Khettry used to finance Sarada until August 1920 when he stopped further advances. On the 19th January 1921 Sarada presented a petition of insolvency. The adjudication order was made on the

21st January 1921 and a Receiver was appointed.

Khettry claimed to be a secured creditor in respect of the jute which lay in the godown. His dues were about Rs. 38,500. The dues of other creditors amount in all to about Rs. 53,000 and out of this amount something over Rs. 25,000 represents the dues of traders in jute dealing with Sarada.

The question was investigated by the learned District Judge and upon a consideration of the evidence, he came to the conclusion that the jute was in the possession, order and disposition of Sarada by the consent or permission of Khettry and in such circumstances that Sarada was the reputed owner.

The evidence has been placed before us, and, so far as this finding goes, we see no reason to differ from that arrived at by the learned Judge.

Although the other creditors impugned the *bona fides* of the agreement with Khettry in their petitions, their Pleader in the lower Court stated that his clients recognised that the agreement, Exhibit A, was executed in good faith, with the intention that it should be given effect to but that it was not acted upon.

Khettry's case was that Rajani, the Sircar in the jute godown, was his agent, that there was a Darwan also who acted for him and kept the key of the godown for him, and that the Pay of Rajani and the Darwan was to be paid by Sarada and deducted from the amount due to Khettry. There is, however, nothing to show that it was deducted from the amount due to Khettry.

It is admitted that the Darwan had no badge and there was nothing to show that the Darwan was the servant of Khettry.

On behalf of the other creditors, a large number of witnesses have been examined and they say that Rajani was the Sircar of Sarada and that they were not aware that Rajani was the Sircar of Khettry. Most of the witnesses were, no doubt, interested as creditors; but at least three of them had only a very small amount, a few rupees, due to them and the learned Judge before whom the witnesses were examined believed their evidence which showed that Sarada was in control of the buying, selling and of delivery of the jute and upon a con-

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sideration of the entire evidence the Court below came to the conclusion that the jute was in the possession, order and disposition of Sarada by the consent or permission of Khettry and in such circumstances that Sarada was the reputed owner.

We need not discuss the evidence in detail, because we must set aside the judgment of the lower Court upon a construction of section 28 of the Provincial Insolvency Act. We may state that this point was taken almost at the conclusion of the argument before us.

Now, section 28, clause (2) lays down: "On the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

Section 28 clause (3) says: "For the purposes of sub-section (2) all goods being, at the date of the presentation of the petition on which the order is made, in the possession, order or disposition of the insolvent in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall be deemed to be the property of the insolvent."

Then, section 28 clause (6) provides: "Nothing in this section shall affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

Under section 2 (1) (e) of the Act a "secured creditor" means "a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor."

It is true that a mortgagee has been held to be the true owner and where he allows the mortgagor to be in possession of the goods mortgaged, the principle of reputed owner-

ship has been applied, see Halsbury's Laws of England, Volume II, 177, where it is stated that if the goods have been mortgaged, the mortgagee is the true owner, and if the mortgagee allows the mortgagor to continue in possession of the goods until his bankruptcy, the goods pass to the trustee.

The question is whether this principle is applicable to the case having regard to the provisions of section 28, clause (6) of the Provincial Insolvency Act.

The English Bankruptcy Act (4 & 5 Geo. V, Ch. 59) section 7 (1) lays down: "On the making of a receiving order an Official Receiver shall be thereby constituted Receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the Court and on such terms as the Court may impose."

Clause (2) says: "But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

It may be pointed out that section 7 of the English Bankruptcy Act corresponds to section 17 of the Presidency Town Insolvency Act. The reputed ownership clause is contained in section 38, clause (c), of the English Bankruptcy Act and section 52; clause (2)(c), of the Presidency Towns Insolvency Act. The difference between the English Bankruptcy Act on the one hand and the Provincial Insolvency Act on the other upon this point is that in the former there is only a receiving order. It is true that, under sub-section (2) of section 7 of the Bankruptcy Act, such receiving order shall not affect the powers of any secured creditor to realize or otherwise deal with his security; but an order of adjudication is not the same as a receiving order. Under sub-section (2) of section 28 of the Provincial Insolvency Act, the whole of the property of the insolvent vests, in the Court or in a Receiver, that is to say, under the Provincial Insolvency Act, it starts with the adjudication

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order and sub-section (6) of the same section lays down that nothing in the section "shall affect the power of any secured creditor to realize or otherwise deal with his security, in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

It is contended that sub-section 28 (6) merely gives the powers to proceed against the property of the insolvent in or out of Court, as distinguished from the rights of ordinary creditors who cease to have any right to proceed against the property of the insolvent in or out of Court.

If, however, a secured creditor can proceed to realize his security or deal with it in the same manner as he would have been entitled to do had section 28 not been passed, we do not see how the reputed ownership clause in sub-section (3) of section 28 can have any operation.

It may be pointed out that the amount due to Khettry exceeds the value of the jute in the godown which has been taken charge of by the Receiver. Therefore, there can be no question of having a surplus in favour of the general body of creditors after satisfying the debts of the secured creditor (Khettry). It may be said that this interpretation of the section would be against the spirit and object of the reputed ownership clause in sub-section (3) of section 28, but having regard to the express terms of clause (6) of the section, we are bound to give effect to the provisions of that sub-section and we are constrained to hold that the order of the lower Court must be set aside and the appeal allowed. We direct that each party do bear his own costs in both Courts.

RULE NO. 681 M OF 1921.

The Rule is discharged.

We direct that the Government Promissory-notes of the face-value of Rs. 25,000 (Rupees twenty-five thousand) deposited by the appellant as security in this Court be returned to the appellant.

B. N.

Appeal allowed.

Rule discharged.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 203 OF 1922.
February 23, 1923.

Present :—Mr. Kanhaiya Lal, J. C.
MAHABIR PANDE AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

MATHURA PRASAD AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—Gift by co-parcener—Consent of other co-parceners—Gift, validity of.

A gift by one co-parcener, with the consent, express or implied, of the other co-parcener, is recognised by the Mitakshara law and passes a good title to the donee. It is by no means void *ab initio*, and, in the absence of repudiation by any of the members of the family, cannot be regarded as voidable. [p. 471, col. 2.]

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 44 I.A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.), referred to.

Hanuman Kamat v. Hanuman Mandur, 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.), *Ram Bhajan Lal v. Chhote*, 4 O. & A. L. R. 429, and *Shambhu v. Nand Kumar*, 58 Ind. Cas. 963; 23 O. C. 284 at p. 285, followed.

Lachhman Prasad v. Sarnam Singh, 40 Ind. Cas. 284; 44 I. A. 163; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 39 A. 500 (P. C.), *Raghubar Pande v. Gokul Prasad Patil*, 65 Ind. Cas. 107; 24 O. C. 307 and *Gajodhar Bakhsh v. Gauri Shankar*, 61 Ind. Cas. 205; 8 O. L. J. 81, distinguished.

Second appeal against a decree of the District Judge, Fyzabad, dated the 1st April 1922, upholding that of the Additional Subordinate Judge, Fyzabad, dated the 1st April 1921.

Mr. Niamat Ullah, for the Appellants.

Mr. Bisheshar Nath Srivastava, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit for pre-emption which was dismissed by the Courts below on the ground that the vendee was a co-sharer of the vendors from before the date of the sale sought to be pre-empted, and that the plaintiffs had no preferential right of purchase. The sale in question was effected by defendants

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Nos. 2 to 8 in favour of Mathura Prasad on the 16th July 1919. It comprised a one-third share out of certain superior proprietary rights in *Mahal Tikra* of the village Kundhana Khurd. One of the vendors, Jagpat Singh, had, prior to that sale, conveyed by gift 7 *biswas* out of plot No. 199 *khassra*, forming part of the same *mahal*, to Mathura Prasad on the 15th July 1919. That deed was registered along with the sale-deed on the 17th July 1919.

The plaintiffs had admittedly no share or interest in *Mahal Tikra*. They are under-proprietors in another *mahal* in the same village, and claim to be entitled to pre-emption by reason of their being members of the village community. Their claim was resisted by the vendee on the ground that he was a co-sharer in *Mahal Tikra*. The deed of gift above-mentioned was filed by him in support of his alleged pre-existing title. The plaintiffs denied that any such gift had been made. The Trial Judge, however, found that the execution of the deed of gift had been proved, and that the mutation of names had been effected on its basis. The land comprised in the deed of gift is said to have been granted to Mathura Prasad for the purpose of planting a grove, but no grove has yet been planted. The learned Judge, however, finds that the deed of gift had been acted upon, that the vendee had obtained possession and mutation of names on its basis.

It is urged on behalf of the plaintiffs, that they had no opportunity of establishing that the deed of gift was a fictitious and fraudulent transaction, because no issue was directed on that point. The issue framed by the Trial Court, namely, whether the defendant-vendee had a preferential right of pre-emption against the plaintiffs was, however, sufficient to cover the matter in controversy, and the plaintiffs had an ample opportunity of controverting the gift relied on by the vendee and showing that it was a fraudulent and fictitious transaction. It is also urged on their behalf, that the deed of gift was invalid because it was granted by one of the members of a joint family without the consent of the other male members. The family

evidently comprised three male members including the donor. One of them, Raj Hans Singh, filed a written statement wherein he admitted the title of the defendant-vendee as a co-sharer in *Mahal Tikra* to a preferential right of purchase as against the plaintiffs. The remaining male member, Sheo Shanker Singh, is the son of the donor. He did not appear to contest the sale or the gift. The inference, therefore, is that they have no objection to the sale or gift, and as the said deed of gift has been found to have been acted upon, and was followed by the mutation of names in favour of the donee, it is not open to the plaintiffs to question its validity. As observed by their Lordships of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (1), the Law of the Mitakshara recognises that the joint family property can be made the subject of a gift, sale or mortgage by one co-parcener with the consent, express or implied, of the other co-parceners. By the sale now sought to be pre-empted, to which all the male members of the family were parties, such rights as the family possessed in the property sold were conveyed to Mathura Prasad: and it was stated that the family had no interest left therein.

If the members of the family never sought to repudiate the deed of gift, it can afford a good basis of title to the person in whose favour the gift was made and the gift cannot be regarded as void or voidable. In *Hanuman Kamat v. Hanuman Mandur* (2) their Lordships of the Privy Council regarded a sale effected by a member of a joint Hindu family as not necessarily void, but only voidable, if an objection was taken to it by the other members of the joint family. The decision in *Lachhman Prasad v. Sarnam Singh* (3) does not apply, because the mortgage

(1) 39 Ind. Cas. 280; 44 I.A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437 (P. C.).
 (2) 19 C. 123; 18 I. A. 158; 6 Sar P. C. J. 91; 9 Ind. Dec. (N.S.) 527 (P. C.).
 (3) 40. Ind Cas. 284; 44 I. A. 163; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom L. R. 646; 26 C. L. J. 971 (1917) M. W. N. 516; 6 L. W. 334; 39 A. 500 (P. C.).

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in that case became void on its having been challenged by the other members of the family who were no parties to it. On the same principle, where a sale effected by one member of a joint family is set aside at the instance of another member, because the whole of its consideration was not taken for family necessity, no mesne profits were awarded inasmuch as the sale in such a case is not void *ab initio* but becomes void from the date when it is avoided and such amount as was taken for legal necessity is re-paid. A reference has also been made to the decision in *Raghubar Pande v. Gokul Prasad Patak* (4) and *Gajodhar Bakhsh v. Gauri Shankar* (5). But the question for consideration in the former case was whether certain members of a joint Hindu family could be made to re-pay the consideration which had been paid by a vendee for the sale of an interest in the joint family property effected by certain other members: and in the latter, all that was laid down was, that when a mortgage was effected by certain members of the family and repudiated by others and no family necessity was proved, it became void as against them from its very inception.

In any case, the view taken by their Lordships of the Privy Council in *Hanuman Kamat v. Hanuman Mandur* (2), which has been followed by this Court in *Ram Bhajan Lal v. Chhote* (6) and *Shambhu v. Nand Kumar* (7), governs the decision in the present case, and the other members of the family must be deemed to have consented to what was done by Jagpat Singh, when they followed the deed of gift and the sale-deed to be registered together at one and the same place.

The appeal, therefore, fails and is dismissed with costs.

G. H.

Appeal dismissed.

(4) 65 Ind. Cas. 107; 24 O. C. 307.

(5) 61 Ind. Cas. 205; 8 O. L. J. 81.

(6) 4 O. & A. L. R. 429.

(7) 58 Ind. Cas. 963; 23 O. C. 284 at p. 285.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 614 OF 1922.

November 28, 1922.

Present:—Justice Sir N. R. Chatterjea, Kt.,
and Mr. Justice Cuming.

HRIDOY MOHINI DASÍ—PETITIONER

versus

SECRETARY OF STATE FOR INDIA
IN COUNCIL—OPPOSITE PARTY.

Court-Fees Act (VII of 1870), s. 19-H, proceedings under—Costs, award of.

A Court has no power to award costs in a proceeding under section 19-H. of the Court-Fees Act for ascertaining the valuation of properties in respect of which Letters of Administration have been granted. There is no provision for the realisation of any costs which may be incurred in connection with such an enquiry. [p. 473, cols. 1 & 2.]

Rule against an order of the District Judge, Faridpore.

Babu Sarat Chandra Ray Chaudhury (with him Babus Dinesh Chandra Ray, Phanindra Lal Moitra and Bansori Lal Sarkar), for the Petitioners:—The testator, Kisor Lal Sarkar, died on 22nd December 1914. The application for Probate was made on 15th March 1922. One of the sons objected to the inclusion of a house at Deoghar which was subsequently given up. Then there was an enquiry by the Collector under section 19-H of the Court-Fees Act. The Collector required additional Court-fees to be deposited. On moving the District Judge the amount was reduced. The Court-Fees Act is a complete Act in itself. The Court below has awarded costs. There is no provision for costs in the Act. Refers to section 35, Civil Procedure Code. The provisions of the Code do not apply. Refers to section 27, Land Acquisition Act: *In the goods of James Raley Augustus Stevenson* (1).

Babu Dwarka Nath Chakrabarty (with him Babu Surendra Nath Guha), for the Secretary of State:—The enquiry was a part of the proceedings under the Probate and Administration Act. Refers to section 55 of the Probate and Administration Act.

[CUMING, J.—Look at section 99 of the Act.]

But enquiry has to be held in case of further valuation. The Collector will call

(1) 6 C. W. N. 898.

JAGANNATH V. BEHARI LAL.

upon the parties to pay costs. The Collector has power to award costs.

Babu Sarat Chandra Ray Chaudhury, in reply:—The Collector may only recover costs as part of the land revenue. He cannot execute the decree for costs as he was no party to the proceedings.

JUDGMENT.—This Rule arises out of a reference under section 19 of the Court-Fees Act, 1870.

It appears that, after Letters of Administration had been granted to the petitioner, a question arose as to the valuation of the properties in respect of which they were granted. The Collector made a valuation, which was not accepted by the petitioner. The Collector thereupon moved the District Judge to hold an inquiry into the true value of the properties under sub-section (4) of section 19-H of the Court-Fees Act. The District Judge modified the Collector's valuation, and directed the petitioner to pay Rs. 191 annas 6 pies 6 as costs of the inquiry into the question of valuation.

It is contended on behalf of the petitioner that the Court had no power to award costs in a proceeding under section 19-H of the Court-Fees Act.

There does not appear to be any provision in the Act for awarding costs in such a proceeding. Section 19-J provides that any excess fee found to be payable on an inquiry held under section 19-H, sub-section (6) may be recovered from the executor or administrator as if it were an arrear of land revenue by any Collector in any part of British India. There is no provision for the realisation of any costs which may be incurred in connection with an inquiry under section 19-H, and this indicates that the Act does not contemplate the awarding of costs in such a proceeding. Only the excess fee is to be realised as an arrear of land revenue under the Statute. The costs cannot be so recovered as there is no provision for it and we do not see how the Collector, who is no party to the Probate proceeding, can recover the costs from the executor or administrator as an ordinary suitor, in the absence of any provision to that effect in the Statute.

Reliance is placed on behalf of the opposite party on section 53 of the Probate and Administration Act which lays down that the District Judge shall have the like po-

wers and authority in relation to the granting of Probate and Letters of Administration and all matters connected therewith as are by law vested in him in relation to any civil suit or proceeding depending in his Court. But the granting of Probate is not affected by the valuation proceedings under section 19-H of the Court-Fees Act, as section 19-I, sub-section (2), lays down that the grant of Probate or Letters of Administration shall not be delayed by reason of any motion made by the Collector under section 19-H, sub-section (4).

It is contended, however, that the words "and all matters connected therewith" include proceedings under section 19-H of the Court-Fees Act. We do not think that they do. We think that those words have reference to matters such as the revocation of Probate, the production of accounts, and similar other matters. A proceeding under section 19-H merely decides a revenue dispute between the Collector and the holder of Probate.

We are of opinion that the Court has no power to award costs in a proceeding under section 19-H of the Court-Fees Act. The order of the Court below is accordingly set aside and the Rule is made absolute.

We make no order as to costs.

B. N.

Rule made absolute.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 544 OF 1921.

February 9, 1923.

Present :—Mr. Batten, J. C.

JAGANNATH—JUDGMENT-DEBTOR—
APPELLANT

versus

BEHARI LAL AND ANOTHER—DECREE-
HOLDERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11—
Limitation Act (IX of 1908), Sch. I, Art. 182—
Execution application erroneously held not in
accordance with law—Order not appealed against
—Order, whether can be questioned subsequently—
Res judicata, principles of—Application to exe-
cution proceedings.*

When a competent Court has decided even though wrongly that an execution application is not in accordance with law, that order cannot be questioned in subsequent execution proceedings.

Mungul Pershad Dicht v. Grija Kant Lahiri, 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar.

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P.C.J. 249; 4 Ind. Dec. (N. S.) 32, (P.C.), and *Joyanuddin Khan v. Jamiruddin Sarkar*, 37 Ind. Cas. 916; 21 C. W. N. 835, relied on.

Though orders in execution proceedings do not come directly within the language of section 11 of the Civil Procedure Code, yet such orders, if not appealed from, are binding on the parties in subsequent proceedings on principles analogous to those of *res judicata* strictly so-called.

Ram Kirpal v. Rup Kuari, 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.), relied on.

Appeal against the order of the District Judge, Saugor, dated the 2nd August 1921, in Civil Appeal No. 71 of 1921.

JUDGMENT.—The appellant had a decree final for sale of immoveable property. The last application for execution was filed on the 1st September 1920, and the question whether it is within time depends on whether or not the last previous application, made on the 18th February 1918, was an application for execution in accordance with law within the meaning of clause 5 of Art. 182 of the Limitation Schedule. The application was for Form C to be sent to the Collector for sale of the property mortgaged and no inventory of the property was needed as the decree showed what property was to be proceeded against. Nevertheless, the Court passed the following order on the 21st February 1918:—"Decree-holder No. 2 in person. There is no inventory of the property at the foot of the application in accordance with order and is rejected as such with costs on applicant."

2. The decree-holder acquiesced in this order, that is to say, he did not appeal against it. In dealing with the present application for execution the Executing Court held that the application of February 1918 was not in accordance with law and dismissed the execution application as time-barred. The District Judge held that the application of 1918 was in accordance with law and directed the execution to be proceeded with. Neither Court adverted to the effect of the Munsif's order quoted above. The learned Counsel for the appellant, the judgment-debtor, concedes that the application of 1918 was according to law and that the Munsif's order was wrong, but he contends that as the Munsif rejected the application as not being in accordance with law, his decision is final and cannot be re-opened.

3. This is not a case where the application was returned for amendment, but was not re-presented. There is a conflict of authority as to whether or not in such cases there was a decision that the application was not in accordance with law. The facts here are quite different; the application was definitely rejected as not being in accordance with law. That is to say, it was rejected under r. 17 (1) of O. XXI which provides that "the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it."

4. Sub-rule (2) provides that where an application is amended under the provisions of sub-rule 1, it shall be deemed to have been an application in accordance with law. It seems to follow that if an application is rejected under sub-rule (1) it is rejected because it is not "in accordance with law" which are also the words used in Art. 182 (5) of the Limitation Schedule. Therefore, the Munsif rejected the application because he decided that the application was not "in accordance with law." No doubt, the order of rejection was a wrong one; the application fell under sub-rule (2) (j) (ii) of r. 11, of O. XXI, being for the sale of property, without attachment, and rule 13 prescribing a description of the property applies only where there is an application for attachment. Still less does rule 12, which prescribes an "inventory" of moveable property to be attached, apply. Nevertheless, the Munsif had jurisdiction to decide that the application was not according to law, and we have to see whether his decision can be re-considered now.

5. In *Ram Kirpal v. Rup Kuari* (1) their Lordships of the Privy Council held that though orders in execution proceedings do not come directly within the language of what is now section 11 of the Civil Procedure Code, yet such orders, if not appealed from, are binding on the parties in subsequent proceedings on principles analogous to those of *res judicata* strictly so called. In

(1) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.).

UMAPATI SAMANTA v. SHEIKH MOSEETULLA.

Mungul Pershad Dichit v. Grija Kant Lahiri (2) their Lordships held that when a competent Court had decided, even though wrongly, that an execution application was not time-barred, that order could not be questioned in subsequent execution proceedings. In *Joyanuddin Khan v. Jamiruddin Sarkar* (3) it was held that when an application had been rejected on the ground that it was not in accordance with the decree the application could not be regarded as one in accordance with law and one that would save limitation. In arriving at the conclusion that a rejection means that the application was not in accordance with law the same arguments were used as I have employed in paragraph 4 above.

6. Finally, it must be considered whether the question is affected by the fact that the order of the Munsif was passed against the decree-holder without any notice having been issued to the judgment-debtor. In the case dealt with in *Vyapuri Koundan v. Chidambara Mudaliar* (4) the Court without issuing notice to the judgment-debtor directed the decree-holder to amend his execution application by reducing the amount claimed, and the decree-holder did not appeal against the order or amend his petition which was accordingly rejected. It was held that the decree-holder was debarred from claiming the larger amount in a fresh execution application and it was observed that the fact that the defendants were not called on to appear and answer the plaintiff's claim was immaterial, and the bar of former adjudication cannot be avoided by a party who had the opportunity of pleading his case and of appealing.

7. For all these reasons, I am of opinion that the order of the Munsif that the application of the 18th February 1918 was not in accordance with law must be regarded as final. I set aside the order of the District Judge and restore the order of the Subordinate Judge, dated the 18th April 1921, dismissing the execution application as time-barred.

W. C. A.

Order set aside.

(2) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

(3) 37 Ind. Cas. 916; 21 C. W. N. 835.

(4) 18 Ind. Cas. 607; 37 M. 314; 24 M. L. J. 26.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

NO. 1029 OF 1920.

May 22, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

UMAPATI SAMANTA AND OTHERS—

—DEFENDANTS—APPELLANTS

versus

SHEIKH MOSEETULLA AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 4 (3)—Guardian of minor—Consent, whether essential—Invalid appointment of guardian—Decree against minor, whether void or voidable.

No person can be appointed a guardian *ad litem* of an infant without his consent.

When a guardian has not been validly appointed in respect of a minor defendant, he is not a party to the suit and is not bound by the decree made against him. The decree is void and not merely voidable. [p. 476, col. 2.]

Appeal against the decree of the District Judge of Bankura, dated the 29th of January 1920, affirming the decree of the Munsif, 3rd Court, at Bishenupur, dated the 26th February 1918.

Babu Peary Mohun Chatterjee, for Appellants:—I beg to submit that the guardian did not file her consent, she did not show any willingness to act as a guardian. Refers to *Narsing Narain v. Jahi Mistry* (1) and *Krishna Chandra Mandal v. Jogendra Narain Roy* (2). She was appointed guardian after arguments were heard. So the judgment and the decree of the Court below will have to be modified. The plaintiff cannot be entitled to a decree as regards the share which belonged to the three infants.

Babu Rishindranath Sarkar, for the Respondents:—The decree cannot be void but is voidable at the instance of the minors in a separate suit: *Munnu Lal v. Ghulam Abbas* (3). The presumption is that guardian was properly appointed. There was no affidavit, no application to show that the guardian did not give her consent. The plaintiff did all that he could for the appointment of the guardian. The presumption as to proper

(1) 13 Ind. Cas. 414; 15 C. L. J. 3.

(2) 27 Ind. Cas. 139; 19 C. W. N. 537; 20 C. L. J. 469.

(3) 6 Ind. Cas. 788; 32 A. 287; 11 C. L. J. 557; 12 Bom. L. R. 439; 14 C. W. N. 744; 8 M. L. J. 571; 20 M. L. J. 895; 37 I. A. 77; 13 O. C. 123 (P. C.).

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appointment of guardian is in my favour unless it is rebutted.

[MOOKERJEE, J.—She could not be appointed guardian unless she gave her consent.]

According to *Munnu Lal v. Ghulam Abbas* (3) the appointment must be presumed to have been properly made unless the contrary is proved. There is nothing in the record to show that the appointment was not properly made. The decree can be set aside by the minors but not at the instance of a third party.

Babu P. M. Chatterjee, replied briefly and cited *Surendra Nath Bose v. Aghore Nath Bose* (4).

JUDGMENT.—This is an appeal by the defendants in a suit for recovery of possession of land on declaration of title. The property belonged admittedly to one Sobban who had mortgaged it to the plaintiff. The plaintiff instituted a suit on the 1st August 1913 to enforce his security. The parties, defendants to that suit, were the representatives of the mortgagor who had died meanwhile. These representatives were his widow, his eldest son who was *sui juris* and three infant sons. The mother of the infants was apparently proposed for appointment as a guardian *ad litem* and we shall assume for our present purpose that the requisite notice was duly served upon her. There is no evidence to show that she entered appearance and accepted the guardianship. At the trial the suit was defended by the eldest son alone and there was no appearance on behalf of the widow either for self or as guardian of her infant sons. The trial was concluded, the arguments were heard and the judgment was reserved. Thereafter, an order was recorded in the order-sheet to the effect that the widow be appointed guardian *ad litem* of her infant sons. The suit was then decreed on contest against the eldest son and *ex parte* against the other defendants. This decree was made on the 25th February 1914. The decree was executed and at the sale which followed the plaintiff became the purchaser. In the interval the appellant had purchased the property from the representatives of the mortgagor on the 4th November 1913 and they resisted the plaintiff when he proceeded to take possession. This is the gene-

sis of the present suit. The Court of first instance decreed the suit and that decree has been affirmed by the District Judge. On the present appeal it has been contended that the decree cannot be maintained beyond 11-32nd share and that the plaintiff is not entitled to a decree in respect of 21-32nd share which belonged to the three infants. In our opinion this contention is well-founded.

It is now firmly established that no person can be appointed a guardian *ad litem* of an infant without his consent. In the present case, the mother of the infants was appointed without her consent. She never entered appearance and it is consequently needless to consider what the position would have been if she had defended the suit on behalf of the minors without a formal order for appointment. In the events which have happened, it is plain that the infants were not represented at all and they were in no sense parties to that litigation. Consequently, they were not affected by the mortgage-decree. This view is in accord with the rule enunciated in *Narsing Narain v. Jahi Mistry* (1) and *Krishna Chandra Mandal v. Jogendra Narain Roy*, (2) and *Surendra Nath Bose v. Aghore Nath Bose* (4).

We have been pressed to hold, however, that the decree against the infant was not void but voidable, and that only at the instance of the infants themselves. In support of this view, reliance has been placed upon the decision in *Tangor Majhi v. Jaladhar Deari* (5). But that case cannot be treated as good law in view of the later decision of the Judicial Committee in *Rashid-un-nisa v. Muhammad Ismail Khan* (6), namely, that when a guardian has not been validly appointed in respect of a minor, he is not a party to the suit and is not bound by the decree made against him. This view is in no way inconsistent with the decisions of the Judicial Committee in *Waliam v. Banke Behari Pershad Singh* (7), *Munnu Lal v. Ghulam Abbas* (3). In *Waliam v. Banke Behari Pershad Singh* (7)

(5) 5 Ind. Cas. 691; 14 C. W. N. 322.

(6) 3 Ind. Cas. 864; 10 C. L. J. 318; 13 C. W. N. 1182; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 31 A. 572; 36 I. A. 168 (P. C.).

(7) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).

(4) 62 Ind. Cas. 464; 25 C. W. N. 525.

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the person who acted as guardian *ad litem* was not formally appointed, but he was recognised as guardian *ad litem* by the Court. In these circumstances, the Judicial Committee held that after such recognition and such representation of the interest of the infant, it was too late to dispute his appointment. In *Munnu Lal v. Ghulam Abbas* (3) objection was taken on the ground that there was no affidavit filed before the guardian was appointed. It was ruled that the absence of the affidavit did not invalidate the appointment of the guardian. The case before us, however, is of an entirely different description. Here the record of the mortgage-suit makes it abundantly clear that the infants were really no parties to the suit and are not bound by the decree made therein.

The result is that this appeal is allowed in part. The decree made in favour of the plaintiff will be restricted to 11-32nd share of the property which represents the interest of the widow and the eldest son of the mortgagor. Each party will pay his own costs throughout the litigation.

B. N.

*Appeal partly allowed.***LAHORE HIGH COURT.**

CIVIL APPEAL No. 2030 OF 1920.

May 16, 1922.

Present.—Mr. Justice Broadway.**BANARSI DAS—DECREE-HOLDER—****APPELLANT***versus***RAMZAN AND ANOTHER—JUDGMENT-****DEBTORS—RESPONDENTS.**

Civil Procedure Code (Act V of 1908), s. 48 (1) (b), O. XX, r. 11, O. XXIII, r. 4—Execution of decree, application of—Compromise—Decree made payable by instalments—Dismissal of execution application—Dismissal order, whether one "directing payment of money"—Limitation, whether extended.

The provisions contained in O. XXIII of the Civil Procedure Code are, by virtue of r. 4 of the Order, inapplicable to any proceeding in execution of a decree or order [p. 478, col. 1.]

To render the provision contained in clause (b) of sub-section (1) of section 48 of the Civil Procedure Code applicable to a case there must be an order directing the payment of money on a certain date. Such an order can only be passed under O. XX, r. 11 of the Civil Procedure Code. [p. 478, col. 1.]

Before any order can be passed under O. XX, r. 11 of the Civil Procedure Code, the application on which it is made must be within time. [p. 478, col. 2.]

Jholi Sahu v. Bhubun Gir, 11 C. 143; 5 Ind. Dec. (N. S.) 854 and *Perumal Naicker v. Davood Rowther*, 34 Ind. Cas. 393, referred to.

In execution of a decree the parties filed a compromise whereby the decretal amount was to be paid by instalments and on default in payment of a certain number of instalments the decree-holder was to be at liberty to execute the decree for the full decretal amount. The Executing Court thereupon dismissed the execution proceedings, but did not embody the terms of the compromise in its order.

Held, that the order made by the Court did not amount to a subsequent order directing payment of money at a certain date within the meaning of section 48 (1) (b) of the Civil Procedure Code, so as to extend the period laid down by the section after which a decree cannot be executed. [p. 478, col. 2.]

Miscellaneous second appeal from the order of the District Judge, Ferozepore, dated the 21st April 1920, affirming that of the Subordinate Judge, 2nd class, Ferozepore, dated the 18th November 1919.

Lala Fakir Chand, for the Appellant.

Mr. S. A. Razaq, for Mr. Zafurulla Khan, for the Respondents.

JUDGMENT.—On the 20th of March 1906 one Banarsi Das obtained a decree against Ramzan, etc., for Rs. 796-14-3 and costs. On the 7th of August 1907, Banarsi Das proceeded to execute this decree and applied to the Court for the attachment and sale of certain lands belonging to the judgment-debtors. Notice was issued to them and on the 28th of August 1907 they asked for and obtained time in order to come to a settlement.

On the 18th of November 1907 a compromise was filed in Court by the decree-holder and the judgment-debtors according to which it was agreed that the decretal sum should be paid in half-yearly instalments of Rs. 50, the first payment to be made in *Hari* 1965. It was also provided that, in the event of there being a default in four payments, the whole sum would be recoverable at once.

The parties' statements were recorded and the following order passed:—

"In accordance with the compromise the proceedings be filed as unsatisfied, as the decree-holder says; that he will now act on the new contract."

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On the 29th of May 1912 the decree-holder applied for execution of the decree alleging that there had been default in the payment of four instalments which gave him the right to recover the whole amount at once. Before notice was issued the Court, on the 5th of July 1912, passed an order to the effect that the application was within time having regard to the instalments agreed on as well as having regard to the decree itself. It was also held that the decree-holder was bound by the terms of the compromise and that default had not then been made of the necessary four instalments. The proceedings were finally filed on the 25th of July 1912.

On the 10th of February 1919 the decree-holder filed the present application for execution which the Courts below have held to be barred by limitation as having been made more than 12 years from the date of the decree, i.e., 20th March 1906. Against this decision Banarsi Das has come up to this Court in second appeal through Mr. Fakir Chand and I have heard Mr. Abdul Razaq for the judgment-debtors-respondents. The amount alleged to be due was Rs. 468-14-3.

For the appellant it has been urged that the order of the Court, dated 18th November 1907, amounted to a subsequent order "directing payment of the decretal amount on certain dates in accordance with the compromise that had been sanctioned and that such an order was covered by section 48 (b), Civil Procedure Code. It was also contended that a compromise was not barred by O. XXIII, r. 4, Civil Procedure Code. In the latter contention I am unable to agree, as O. XXIII, r. 4, Civil Procedure Code, corresponding to section 375 (a) of the Code of 1882, is explicit in its terms and specially declares O. XXIII to be inapplicable to any proceedings in execution of a decree or order.

It remains to be seen how far the order of the 18th November 1907 can be regarded as extending the period of limitation. Section 48 of the present Code is similar in terms to section 230, paragraphs 3 and 4 of the Code of 1882. To render section 48 (b) applicable, there must be an order directing the payment of money on a certain date and such an order could in this case have only been passed under section 210 of the old Code. It has been urged that although

the order passed on the 18th November, 1907, is not explicit in its terms, nevertheless it should be regarded as one having been made under section 210. Mr. Fakir Chand referred to *Kedar Nath Banerjee v. Kulman Sardar* (1), in which it was laid down that in construing pleadings, judgments and decrees in this country, the most liberal construction must always be accepted. With this dictum I have no quarrel, but it seems to me that before any order could be passed under section 210 (new O. XX, r. 11) the application on which such an order is made must be within time. It is true that in *Jhoti Sahu v. Bhubun Gir* (2), very liberal construction was placed on an order under section 210 and that ruling was cited with approval in *Perumal Naicker v. Davood Rowther* (3). It was, however, pointed out in the later ruling that the learned Judges responsible for *Jhoti Sahu v. Bhubun Gir* (2) had apparently lost sight of the provisions of Article 175 of the Limitation Act. While I would be quite prepared to give the widest possible construction to the order in this case, (dated 18th November 1907), it seems to me that it cannot be regarded as an order passed under section 210, Civil Procedure Code, inasmuch as the Court on that date had no jurisdiction to pass an order under that section more than six months having elapsed from the date of decree.

It was next contended by Mr. Fakir Chand that, inasmuch as the compromise had been acted on, the judgment-debtors were estopped from denying their liability, and reliance was placed on *Bunwari Lal v. Abdul Ghafur Khan* (4). That decision, however, does not appear to me to afford the appellant any assistance, for it appears that the agreement in that case was accepted by the Court and embodied in the decree, although from the report of the case all the facts are not ascertainable. I am, therefore, unable to hold that by the filing of this compromise the time for execution of the decree was in any way extended.

Finally, it was argued that the order passed in 1912 referred to above must be

(1) 5 C. L. J. 25.

(2) 11 C. 143; 5 Ind. Dec. (N. S.) 854.

(3) 34 Ind. Cas. 393.

(4) 1 Ind. Cas. 48; 5 P. L. R. 1909; 4 P. W. R. 1909.

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regarded as *res judicata* although it was passed *ex parte*, and in support of this contention my attention was drawn to *Periakaruppan Chetty v. Chidambara Tambiran* (5). Doubtless there are instances where an *ex parte* order may operate as *res judicata*, but I am unable to see that in 1912 any order was passed which can be regarded as extending the time. All that that order, as I read it, amounts to is that the parties are bound by the compromise arrived at, and it is not denied by the judgment-debtors-respondents, that they are not bound by the terms of the settlement of the 18th November 1907.

It seems to me that the question is really concluded by a decision of this Court reported as *Nanak Chand v. Anant Ram* (6). As pointed out by the learned District Judge the facts in that case and in the present one, are almost identical and following that decision I dismiss this appeal with costs.

Z. K.

Appeal dismissed.

(5) 33 Ind. Cas. 443; 3 L. W. 339; (1916) 2 M. W. N. 64.

(6) 26 P. R. 1894.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 790 OF 1918 and 2670 OF 1917.

August 21, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

IN NO. 790 OF 1918

MIDNAPORE ZEMINDARY COMPANY LIMITED—APPELLANTS

versus

ISHAN CHANDRA CHOWDHURY AND OTHERS—RESPONDENTS.

IN NO. 2670 OF 1917.

MIDNAPORE ZEMINDARY COMPANY LIMITED—APPELLANTS

versus

DAYADRA NATH BHOWMIK AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 11—Appeal against decree for possession in favour of several persons—Death of one of several respondents—Representative not brought on record within time—Appeal, whether entertainable.

Where an Appellate Court is called upon to set aside a decree for possession of land in favour of several persons one of whom has died and his representative-in-interest has not been

brought on the record within the time allowed by law, the appeal is infructuous and cannot be entertained inasmuch as even if the appeal were to succeed, the representative-in-interest of the deceased respondent would not be bound by the judgment of the Appellate Court and would be at liberty to execute the decree in its entirety as one of several joint decree-holders.

Kali Dayal v. Nagendra Nath, 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44, followed.

IN NO. 790 OF 1918.

Appeal against the decree of the District Judge of Nadia, dated the 10th of September 1917, modifying the decree of the Subordinate Judge, Nadia, dated the 13th of March 1916.

IN NO. 2670 OF 1917.

Appeal against the decree of the District Judge, Nadia, dated the 10th of September 1917, affirming the decree of the Subordinate Judge, Nadia, dated the 13th of March 1916.

Babu Dwarkanath Chakraburty (with him Babus Brojo Lal Chakraburty, Krishnakamal Moitra and Narendra Kumar Bose), for the Respondents:—I have a preliminary objection to the hearing of the appeal. The appeal is infructuous inasmuch as plaintiff No. 4 who died in 1920 has not been substituted. They obtained a Rule which was discharged. The decree of the lower Appellate Court will remain in favour of the representatives of the dead plaintiff. See *Kali Dayal v. Nagendra Nath* (1).

Mr. U. N. Sen Gupta (with him Babu Probodh Kumar Das), for the Appellants:—The appeal will proceed inasmuch as the plaintiffs are jointly entitled to the property. Hence decree is not separable.

JUDGMENT.

SECOND APPEAL NO. 2670 OF 1917.

This appeal is directed against a decree for possession and mesne profits, made in the following terms: "The plaintiffs will recover their possession of 2 annas 17 *gunidas* 2 *kara* 1 *kranti* share in the Mehal with mesne profits and interest at 6 per cent from which their share of the purchase price of Rs. 1,366-9-16-2-2 will be deducted. The plaintiffs will also be entitled to recover their costs throughout from defendant No. 1 with interest at 6 per cent, except the costs incurred in the Court of first instance."

(1) 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44.

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In this appeal, which has been preferred by the first defendant, the respondents are the plaintiffs. One of these plaintiffs, Taran Krishna Bhomik, died on the 4th January 1920 during the pendency of the appeal. No steps were taken to set aside the abatement within the time allowed by law; and in answer to a Rule obtained to amend the record, it was pointed out by the respondents that the Rule had been granted on a petition which contained statements substantially untrue. The Rule was thereupon discharged. The position is, that we are now called upon to set aside a decree for possession which enured to the benefit of four persons, one of these persons is dead and his representative-in-interest has not been brought on the record. In these circumstances, it is impossible for us to hear the appeal against the decision of the District Judge. Even if the appeal were to succeed, the representative-in-interest of the deceased plaintiff would not be bound by our judgment and would be at liberty to execute the decree in its entirety as one of several joint decree-holders. The appeal has consequently become infructuous. This view accords with that adopted in the case of *Kali Dayal v. Nagendra Nath* (1) which follows a long line of decisions in this Court. The appeal is accordingly dismissed with costs. The cross-objection is not pressed and is, therefore, dismissed.

SECOND APPEAL NO. 790 OF 1918.

This judgment, it is conceded, will govern the other appeal Second Appeal No. 790 of 1918 which is also dismissed with costs.

R. N.

Appeals dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL N. 1749 OF 1919.

July 8, 1922.

Present:—Mr. Justice Scott-Smith and

Mr. Justice Brasher.

WALLI AND OTHERS—DEFENDANTS

—APPELLANTS

versus

KHUDA BAKHSH—PLAINTIFF

—RESPONDENT.

Colonisation of Government Lands (Punjab) Act (V of 1912), s. 19—Registration Act (XVI of 1908), s. 17—Limitation Act (IX of 1908), Sch. I, Arts. 63, 115—Government tenant—Agreement to pay share of produce or certain sum of money, validity of—Registration, whether necessary—Suit to recover amount payable on default—Limitation.

Defendant, a Government tenant, agreed, for consideration received, to pay to plaintiff half the produce of certain land and in default to pay a sum of money annually. Defendant having made default plaintiff sued to recover the amount payable under the agreement:

Held, (1) that the agreement did not transfer any of the tenancy rights of the defendant to the plaintiff, nor could it be said to create a charge thereon, and that, therefore, it did not offend against the provisions of section 19 of the Colonisation of Government Lands (Punjab) Act; [p. 481, col. 2.]

(2) that the agreement did not create any rights in the future produce of the land in the plaintiff and, therefore, did not require registration under section 17 of the Registration Act; [p. 481, col. 2.]

(3) that the suit was not one for the recovery of interest but for compensation for the breach of the agreement to pay a share of produce and fell within the purview of Article 115 and not Article 63 of Schedule I to the Limitation Act. [p. 481, col. 2.]

Second appeal from the decree of the District Judge, Shahpur, at Sargodha, dated the 19th June 1919, reversing that of the Junior Subordinate Judge, Sargodha, dated the 12th April 1919.

Lala Fakir Chand, for the Appellants.

Messrs. Nanak Chand and M. A. Ghani, for the Respondent.

JUDGMENT.—This is a second appeal by Wali and his two brothers, the sons of Jalal, from the order of the District Judge, of Shahpur, decreeing plaintiff-respondent's claim for Rs. 1,400. Jalal was a Government tenant under Act III of 1893 and it appears that Khuda Bakhsh, respondent, advanced him various sums of money in order to enable him to comply with the terms of his tenancy. The tenancy was what is called a horse-breeding one,

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and Jalal had to keep a mare for the purposes of breeding. On the 9th of March 1906 Jalal executed two documents in favour of Khuda Bakhsh (P-3 and P-4). Exhibit P-3 was a bond in which he admitted that he owed Khuda Bakhsh Rs. 798-11-0 and promised to pay the same to him on demand without interest. Exhibit P-4 was an agreement by Jalal in favour of Khuda Bakhsh in which he stated that he owed him Rs. 798-11-0 for which he had given him a bond. He went on to say that he would pay Khuda Bakhsh half the produce of the square which was in his name in *Chak* No. 98. If he made default in giving the produce, Khuda Bakhsh would be entitled to realise the sum of Rs. 798-11-0 together with Rs. 200 on account of *munafa* annually. So long as Jalal paid the *batai*, Khuda Bakhsh was not to be entitled to realize the principal sum due. Jalal is said to have complied with the terms of the agreement and to have paid Rs. 200 annually to Khuda Bakhsh. After his death, the tenancy was entered in the name of Wali as appears from the agreement P-5. On 6th March 1912 Wali executed the two deeds, P-5 and P-6, in favour of Khuda Bakhsh. P-6 was a bond in which the executant acknowledged the debt of Rs. 798-11-0 due from his father but it contained no promise regarding payment. P-5 is an agreement which refers to the previous agreement of 1906 executed by Jalal and goes on to say at the end:—"Now, upon the death of my father, Jalal, the square has been entered in my name. Therefore, I am executing a new agreement according to previous conditions and I promise that I shall accept and agree to the former conditions which my father agreed to." In this deed it is stated in the preamble that one of the conditions which his father agreed to was that if he failed to pay half share of the produce yearly, he would pay Rs. 400. The first Court found that the deeds were duly executed but that the plaintiff's suit was barred by time. The lower Appellate Court held that the suit was not barred by time and that it was really one for interest and was governed by Art. 63 of the Limitation Act. It also held that the agreement sued upon was not in contravention of section 19 of

Punjab Act V of 1912, and that it did not require registration. On these findings the suit was decreed.

The first point taken in appeal is, that the agreement is contrary to the provisions of section 19 of Punjab Act V of 1912, and is, therefore, void. In our opinion the decision of the lower Courts on this point is correct. It cannot, we consider, be said that under the agreement either of 1906 or of 1912, the tenant transferred or charged any of the rights or interests vested in him under the Government Tenants Act, 1893. All that the executant of either of these agreements did was to agree, for consideration received, to pay to Khuda Bakhsh half of the produce of certain lands and if he failed to pay the produce to pay a sum of money annually. Neither agreement transfers any of the tenancy rights to Khuda Bakhsh nor can it be said to create a charge thereon.

The next point urged was, that the registration of the agreement is compulsory as it created or declared rights in immovable property of the value of more than Rs. 100. Here, again, we agree with the lower Courts that registration was not compulsory. The agreement does not create any rights in the future produce in favour of Khuda Bakhsh. All that it does is to promise to pay a share of the crops or a certain sum of money.

The point of limitation was only raised by appellants' Counsel to this extent that he urged that the suit was governed by Art. 115 and not by Art. 63 of the Second Schedule to the Indian Limitation Act. It cannot be said that the suit is one for interest. The agreement did not provide for the payment of interest at all. The suit is clearly one for compensation for the breach of the agreement to pay a share of produce and falls within the purview of Art. 115 and the limitation is three years. Plaintiff can, therefore, recover three years arrears of the sum promised to be paid.

It was next urged that the terms of the agreement executed by Wali in 1912 are unconscionable and that Khuda Bakhsh being a Lambardar exercised undue influence in order to make him execute it. Now, undue influence was never pleaded. It

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is quite clear that under the deeds of 1906 Khuda Bakhsh had a good cause of action against the estate of Jalal and this was a sufficient consideration for Wali to execute a fresh agreement. It is clear, however, from a perusal of P-5 that Wali agreed to the same conditions as his father had agreed to. Now, his father agreed to pay half the produce or Rs. 200 a year, whereas in the preamble of P-5 it is recited that Jalal had agreed to pay Rs. 400 a year if he failed to pay a share of the produce. This was a mis-statement of fact which has not been considered by either of the lower Courts. We, therefore, hold that while Wali executed the agreement (P-5) he only agreed to be bound by the same conditions as his father, one of which was to pay Rs. 200 a year if he did not pay the share of the produce. Khuda Bakhsh is, therefore, entitled to receive from him Rs. 200 yearly and not Rs. 400 as claimed.

The next point is, whether Wali's brothers Malli and Gullu are liable. In our opinion they are not liable. The agreement (P-5) shows that Wali was entered in the records as tenant in place of his father and it is quite clear that Wali executed the agreement on his own behalf alone and not on behalf of either of his brothers. The decree against Malli and Gullu must, therefore, be set aside as a whole. The plaintiff is entitled to recover from Wali Rs. 600 in lieu of three years' share of produce and from this sum has to be deducted Rs. 65 annually on account of Gangwal land less Rs. 15-12-0 land revenue. Wali is, therefore, entitled to a net reduction of Rs. 49-4-0 annually from the Rs. 200 due by him.

We, therefore, accept the appeal and dismiss the suit of the plaintiff as against Malli and Gullu *in toto* and reduce the decree against Wali to one for Rs. 452-4-0. Plaintiff has made an extravagant claim and has also, it appears, acted fraudulently in getting Rs. 400 per annum instead of Rs. 200 entered in the agreement (P-5). We are, therefore, not prepared to allow him any costs and we direct that the parties bear their own costs in all the Courts.

Z. K. Appeal accepted.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 294 OF 1921.

February 22, 1922.

Present:—Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

VELAYUDA MUDALIAR—DEFENDANT
—APPELLANT

versus

SUNDARASAM PILLAI AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, rr. 8, 13, O. XVII, r. 3—Dismissal for default—Appeal—Procedure—Jurisdiction, want of—Objection whether can be taken by way of appeal.

Where after striking issues in a suit the Court passed the order, "The plaintiffs are absent. The suit is dismissed with costs."

Held, that the order was one under O. IX, r. 8 and not under O. XVII, r. 3 of the Civil Procedure Code.

Prativadi Bhayankaram Pichamma v. Kamiseti Sreeramula, 43 Ind. Cas. 566; 41 M. 286; 34 M. L. J. 24; 23 M. L. T. 1; (1918) M. W. N. 92 (F. B.), referred to.

An order under O. IX, r. 8 of the Civil Procedure Code can be displaced only by an order under O. IX, r. 13, or by a successful appeal from an order under the latter rule.

Gilkinson v. Subramania Ayyar, 22 M. 221; 8 M. L. J. 287; 8 Ind. Dec. (N. S.) 158 and *Parbati v. Torisi Kapri*, 20 Ind. Cas. 1; 18 C. L. J. 128; 18 C. W. N. 604, relied upon.

It is the practice of the Madras High Court to allow an objection to be taken to an order on the ground of want of jurisdiction by way of appeal.

Appeal against an order, dated the 9th July, 1921, of the Court of the Third Additional Subordinate Judge, Tanjore, at Mayavaram, in Appeal Suit No. 108 of 1920 (A. S. No 569 of 1920 of the District Court, Tanjore) preferred against the decree of the Court of the Principal District Munsif, of Tiruvalur, in Original Suit No. 296 of 1918.

Mr. K. Bhashyam Aiyangar, for the Appellant.

Mr. K. Sankara Sastri, for the Respondents.

JUDGMENT.—In this case the District Munsif, after framing issues, ended his judgment, "The plaintiffs are absent. The suit is dismissed with costs." The respondents, plaintiffs before us then brought a regular appeal against the dismissal by the District Munsif. The Subordinate Judge dealt with this as a regular appeal, allowed it and remanded the case for fresh disposal after taking any evidence which might be adduced

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by both sides. That order is objected to here as without jurisdiction in the supplementary grounds of appeal which have been filed before us. It is, we believe, the practice in this Court to allow an objection to be taken to an order on the ground of want of jurisdiction by way of appeal. In any event, in the present case we should be ready to treat the appeal as a petition for revision and use our revisional powers.

The objection to the lower Appellate Court's disposal of the matter as an appeal is that the dismissal by the District Munsif was, we must hold with reference to the wording of his order, under O. IX, r. 8; and could, therefore, be displaced only by the District Munsif under O. IX, r. 13, or a successful appeal from an order under that provision. This is in accordance with *Gilkinson v. Subramania Ayyar* (1), no doubt a decision under the former Code, and also with *Parbati v. Toolsi Kapri* (2) a decision under the Code now in force. We respectfully follow these decisions.

The argument of the plaintiffs-respondents before us is only that the dismissal was really under O. XVII, r. 3. It does not appear to us in view of the wording of the District Munsif's judgment to have been so; and there is nothing before us on which we can find that there were facts to bring what happened within O. XVII rather than O. IX. In any case, the decision in *Prativadi Bhayankaram Pichamma v. Kamiseti Sreeramulu* (3) is clear that it was open to the District Munsif in case of default, and we must consider this as a case of default by the plaintiffs, even after the first hearing, to apply the provisions of O. IX. Taking this view we allow the appeal, set aside the order of the lower Appellate Court and restore the decision of the District Munsif with costs throughout.

V. N. V.

Z. K.

Appeal allowed.

(1) 22 M. 221; 8 M. L. J. 287; 8 Ind. Dec. (N. S.) 158.

(2) 20 Ind. Cas. 1; 13 C. L. J. 128; 18 C. W. N. 604.

(3) 43 Ind. Cas. 566; 41 M. 286; 34 M. L. J. 24; 23 M. L. T. 11 (1918) M. W. N. 92 (F. B.).

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 147 OF 1922.

February 28, 1923.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

SURJAN SINGH AND OTHERS—PLAINTIFFS
—APPLICANTS

versus

WAZIR SINGH AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 152—Property misdescribed in plaint—Court, power of, to correct.

Where through an accidental mistake the property in a suit is misdescribed in the plaint, and the misdescription is carried forward in the decree and *dakhlanama*, the Court has jurisdiction under section 152, Civil Procedure Code, to correct the mistake.

Civil revision from an order of the Second Subordinate Judge, Cawnpore, dated the 7th October 1922.

FACTS.—One Musammatt Kausalia Kunwar, a Hindu widow, in possession of the property of her husband, Likha Singh, in certain villages, having died, there was a dispute regarding the inheritance among Likha Singh's reversioners. The defendants having succeeded in having their names mutated in the Revenue Courts, the plaintiffs sued them for recovery of their share, and succeeded in getting a decree. In the plaint, however, through error the property was described to be situated in Mahal Likha Singh instead of Mahal Kausalia Kunwar which was the description given in revenue papers. The same description of the property found place in the decree and the *dakhlanama*. At the time of mutation of plaintiff's names, the Revenue Court objected to the entry being made until the property was correctly described in the Civil Court decree. Thereupon the plaintiffs applied to the Civil Court under section 152, Civil Procedure Code, for the necessary correction being made in the plaint decree and *dakhlanama*, and filed an affidavit explaining that the mistake was committed owing to wrong information and to the fact that the property originally belonged to Likha Singh. The Court below rejected the application with the remark that "the applicant has not produced any papers in support of the application nor has satisfied if there is any law justifying the

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amendment of the plaint at this stage. File." Hence the Civil Revision.

Mr. *Harnandan Prasad*, for the Applicant.

JUDGMENT.—It is very unfortunate that the learned Judge did not appreciate the substance and importance of the application which was made to him. There has been an unfortunate error—for our purpose it does not matter very much—in the paper record of the case owing to a misdescription of a certain locality in the plaint. That error, unless corrected after discovery, must necessarily be carried forward into the decree and either injuriously affect the rights of the plaintiff or misrepresent the true state of facts. In either case a Court, when that condition of things is present, has jurisdiction under section 152 of the Code to correct it. The application was a perfectly proper one made under the right section and describing in paragraph 5 the nature of the accident which had led to the misdescription. It was supported by the affidavit of one Surjan Singh, the plaintiff himself. There was no possible legal objection which could be raised to the application. Unfortunately, the learned Judge has decided:

(1) that the applicant had not produced any paper before the Court, whereas he had produced a very important paper, namely, his affidavit;

(2) that he had not satisfied the learned Judge that there was any law justifying the amendment of the plaint.

Section 152 is the widest possible law justifying the amendment of any particular proceedings due to mistake of this kind. The matter must go back to the learned Judge with directions to correct the plaint in accordance with the application of the plaintiff and, after notice to the other side, to correct the decree and, unless anything has happened between the plaintiff and the decree to affect his judgment on the substance of the dispute, the decree must follow the corrected plaint.

M. A. A.

Case sent back.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 431 OF 1922.

July 31, 1922.

Present :—Mr. Justice Broadway.

ALI BAKHSH—PLAINTIFF—APPELLANT
versus

GHULAM MUHAMMAD AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Pre-emption—Pre-emptor, whether bound by personal covenant between vendor and vendee.

A pre-emptor stands in the shoes of the vendee and is bound by all the conditions and obligations by which the vendee is bound, but these conditions and obligations must be found in the deed of sale and cannot be looked for in any subsequent document (though entered into immediately after the execution of the sale-deed) which does not create any interest in the land sold.

A pre-emptor is not, therefore, bound by a personal agreement to re-convey, entered into by the vendee in favour of the vendor after the execution of the sale-deed.

Second appeal from the decree of the Additional District Judge, Jhelum, dated the 23rd November 1921, affirming that of the Junior Subordinate Judge, Jhelum, dated the 3rd March 1921.

Mr. *Ghulam Rasul*, for the Appellant.

JUDGMENT.—On the 29th January 1913 one Ali Bakhsh sold certain lands to Allah Dad for Rs. 650 and executed a deed of sale which was duly registered.

On the same day an agreement was executed by Allah Dad in favour of Ali Bakhsh under which he undertook to re-convey the said lands to Ali Bakhsh if he repaid him the sum of Rs. 650 within a period of 10 years. This document was drawn up on an eight-annas stamped paper but was not registered.

One Ghulam Muhammad brought a suit for possession of the lands so sold claiming to be entitled to pre-empt and was granted a decree.

On the 7th February 1920 Ali Bakhsh brought a suit against Ghulam Muhammad and Allah Dad asking for a decree for specific performance of the agreement to re-convey entered into by the original vendee, Allah Dad, urging that it was binding on the pre-emptor, Ghulam Muhammad.

The Trial Court held that the agreement was entirely separate from the sale and did not in any way affect it, and that it was not binding on Ghulam Muhammad being a personal covenant affecting Ali

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Bakhsh alone. It also held that the document was inadmissible in evidence for want of registration and that the *bona fides* of the transactions was doubtful. The plaintiffs' suit was, therefore, dismissed and he appealed to the District Court.

The learned District Judge, without going into the question of the admissibility or otherwise of the said agreement, held that the pre-emptor was only bound by the liabilities and obligations created by the deed of sale and upheld the decree of the Trial Court.

Ali Bakhsh has now come up to this Court in second appeal through Mr. Ghulam Rasul. It seems to me that the view taken by the learned District Judge is correct. The sale of the land was an out and out one as evidenced by the deed. No doubt the pre-emptor stands in the shoes of the vendee and is bound by all the conditions and obligations by which the vendee is bound. It seems to me, however, that these conditions and obligations must be found in the deed of sale and cannot be looked for in any subsequent document which does not create any interest in the lands sold.

In the present case it is admitted that the agreement does not create any right, title or interest in the land and is purely a personal covenant. It is on this ground that immunity from registration is claimed for the document.

Mr. Ghulam Rasul, however, contended that it was the intention of the vendor and vendee to create a mortgage by conditional sale, but that as that was illegal and prohibited by the law in the Punjab, this device was entered into. If I am to be guided by the intention, then it seems to me that I am bound by the finding of the learned District Judge on the question and he has held that the parties intended and effected a sale.

In any event, I am of opinion that the sale was a complete transaction in itself and that any subsequent agreement (though entered into immediately after the execution of the sale-deed) cannot be read into the conveyance so as to vary its terms and in fact conditions or obligations which would be binding on the pre-emptor. In this view I am supported to some extent by the decision of a

Division Bench of this Court reported in *Muhammad Mir v. Faizul Hassan* (1), as also by *Gurunath Balaji Mutalik v. Yamanappa Nalarao* (2). I consider the agreement in this case only created a covenant personal to the vendee, Allah Dad, and quite separate from the sale transaction itself, and was, therefore not binding on Ghulam Muhammad. I accordingly dismiss this appeal, but as no one has appeared for the respondents. I make no order as to costs.

Z. K.

Appeal dismissed.

(1) 47 Ind. Cas. 418; 74 P. R. 1918; 163 P. W. R. 1918.

(2) 10 Ind. Cas. 814; 35 B. 258; 13 Bom. L. R. 240.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

December 20, 1922.

Present:—Lord Atkinson, Lord Sumner, Lord Carson and Mr. Ameer Ali.
HURNANDRAI FULCHAND.

APPELLANT

versus

PRAGDAS BUDHSEN—RESPONDENT.

Construction of document—Contract for sale of goods—Breach—Frustration of contract—Business bargain, interpretation of.

Where an agreement for the sale of future goods, to be manufactured at and obtained from named Mills, provides that "the same are to be taken delivery of as and when the same may be received from the Mills," these words cannot be construed as if they were "the same are to be taken delivery of, if and when the same may be received from the Mills," for that is to convert words, which fix the quantities and times for deliveries by instalments, into a condition precedent to the obligation to deliver at all and virtually to make a new contract. [p. 486, col. 2.]

If a contract is for the sale of a fixed quantity of goods, to be manufactured and obtained from named Mills, and less than that quantity is delivered within the time fixed, the sellers must either find in the contract some matter of excuse or discharge or they must pay damages. If sellers fail to perform the contract, because the Mills execute an order placed with them by the Government in preference to the one by the sellers, it does not amount to a discharge or frustration of the contract. [p. 485, col. 2.]

Taylor v. Caldwell, (1863) 3 B. & S. 826; 32 L. J. Q. B. 164; 8 L. T. 356; 11 W. R. 726; 27 J. P. 710; 122 E. R. 309; 149 R. R. 573. *Krell v. Henry*, (1903) 2 K. B. 740; 72 L. J. K. B. 794; 89 L. T. 328; 52 W. R. 246; 19 T. L. R. 711. *Civil Service Co-operative Society v. General Steam Navigation Company*, (1903) 2 K. B. 756; 72 L. J. K. B. 933; 89 L. T. 429; 52 W. R. 181; 9 Asp. M. C. 477; 20 T. L. R. 10, referred to.

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To interpret a business bargain, expressed in the language of commerce, it is no doubt important to appreciate the methods and the point of view of business-men, but this is merely a prudent way of qualifying the mind to construe their words, and so to determine their meaning, and is a very different thing from postulating that reasonable men would have been likely to agree to one kind of liability and not to another, and from thus concluding that, whatever the words of the contract say, that kind of liability, and that alone, is the obligation of the contract. [p. 487, col. 1.]

Appeal from the Bombay High Court.

Messrs. Upjohn, K. C., Raikes and Choudhri, for the Appellants.

Messrs. Dunne, K. C., K. Brown and Ky Hin, for the Respondents.

JUDGMENT.—Though there is some difference between the various texts of the agreement, on which this action was brought, there is no doubt as to its substantial terms. It is an agreement for the sale of future goods, to be manufactured at and obtained from named Mills. It provides for the quantity and descriptions of these goods, for the prices at which the different descriptions are sold, and for the time and rate of the delivery. To some minor and independent provisions and to the fact that some of the words are interlineated, no importance attaches. The agreement is simple and of a common type, and the whole question in dispute is, whether it is an absolute contract to deliver the whole of the goods mentioned, or whether the sellers are relieved from their obligation to deliver a part of them in the events which happened.

In the text adopted by the Courts below the provision as to delivery, after the words which complete the description of the goods, viz., "goods under manufacture are sold," runs as follows: "the same are to be taken delivery of as and when the same may be received from the Mills. Delivery is to be caused to be given in full by the 31st December in the year 1918." An endeavour was made in argument to treat these words as a further part of the description of the subject-matter of the contract, so as to confine the goods to such as might be received from the Mills during the remainder of the year 1918. In their Lordships' opinion this attempt failed. The goods to be manufactured are already very elaborately described and the goods which are to be delivered are the 864 bales

so described. It was also suggested that the words "as and when same may be received from the Mills" should be construed, as if they were "if and when the same may be received from the Mills." This is to convert words which fix the quantities and times for deliveries by instalments into a condition precedent to the obligation to deliver at all, and virtually makes a new contract. The words certainly regulate the manner of performance, but they do not reduce the fixed quantity sold to a mere maximum, or limit the sale to such goods, not exceeding 864 bales, as the Mills might deliver to the defendants during the remainder of the year.

If the contract is for a fixed quantity and, as was the case, less than that quantity was delivered within the time fixed, the sellers must either find in the contract some matter of excuse or discharge, or they must pay damages.

The High Court of Bombay found this excuse in the fact that the Mills failed to perform their contract to manufacture and deliver the goods to the respondents in the circumstances of the case. As a matter of fact, the Mills remained in existence and at work, and the looms which could otherwise have manufactured goods deliverable under this contract were fully occupied in making goods for the Government of India. The utmost that the evidence on this point amounts to is to be found in the following evidence given by a witness from the Mills:—

"I know of contracts with the defendants up to March 1918, delivery was up to date. After that Government contract work began, and defendant's *dhoties* were not proceeded with. The Mills were commandeered by Government. I had no personal knowledge of what took place between the agents and Government."

No evidence was given of the powers of Government to require their contract work to take precedence of other contract work, nor do the judgments of the High Court allude to the existence of such powers. No evidence was given that the Mills were requisitioned. It is clear that the Government did not take possession of them and, in spite of the use of the word "commandeered," it is the plain result of the evidence that the Government placed an order

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with the Mills for goods to be manufactured, and it was executed in preference to the order of the defendants. Whether the manufacturers' motives were patriotic or commercial does not matter. It was not suggested that there would be anything illegal in the receipt of these goods by the defendants, if they could have got them, or in the delivery of them over to the plaintiffs. Accordingly, having failed to perform their bargain the respondents must pay damages.

The High Court of Bombay appear to have been guided by considerations which seem to their Lordships to have been mistaken. They interpreted the contract by asking themselves what it was likely that a reasonable business-man would have bound himself to do; they thought that there had been what is called "frustration of the contract;" and they held that the case fell within the principle of *Taylor v. Caldwell* (1) and that a condition of things had failed to subsist at the time of performance, which had been mutually contemplated by the parties and finally agreed to be essential to the obligation of the seller to deliver.

On the first point the learned Judges, no doubt by inadvertence, expressed a different proposition from that which they must have had in mind. To interpret a business bargain, expressed in the language of commerce, it is no doubt important to appreciate the methods and the point of view of business-men, but this is merely a prudent way of qualifying the mind to construe their words, and so to determine their meaning, and is a very different thing from postulating that reasonable men would have been likely to agree to one kind of liability and not to another, and from thus concluding that, whatever the words of the contract say, that kind of liability, that alone, is the obligation of the contract. As a matter of fact, there is nothing surprising in a merchant's binding himself to procure certain goods at all events. It is a matter of price and of market expectations. No doubt, it is a speculation, but many dealings even in cotton goods are of that character.

(1) (1863) 3 B. & S. 826; 32 L. J. Q. B. 164; 8 L. T. 356; 11 W. R. 726; 27 J. P. 710; 122 E. R. 309; 29 R. R. 573.

As to the doctrine of "frustration," the High Court of Bombay had not the advantage, at the time, when the appeal was heard before them, of several discussions and decisions which have taken place in England since then in the House of Lords as well as in the Court of Appeal. The adventure, of which the commercial purpose is suggested to have been frustrated, is, of course, the purchase and sale of these goods between the parties to this contract, and this adventure was not frustrated. All that happened was, that the defendants failed to perform their contract. When they have paid the damages, one commercial purpose at any rate will, so far from being frustrated, have been fulfilled. Their Lordships think it unnecessary to enlarge upon the recent authorities.

The Mills from which the goods were to come, no doubt were contemplated as continuing to exist, though it does not follow that, in a bargain and sale such as this, the closing or even the destruction of the Mills would affect a contract between third parties, which is in terms absolute; but the Mills did continue to exist and did continue to manufacture the goods in question, only they were made for and delivered to somebody else. This is completely outside the principle of *Taylor v. Caldwell* (1) (*supra*) or of the *Coronation cases* [*Krell v. Henry* (2)], *Civil Service Co-operative Society v. General Steam Navigation Company* (3).

The parties having failed to agree on the damages, the case must be remitted to the Court of the Trial Judge to assess them and to increase the amount adjudged to the plaintiffs accordingly, the appeal being allowed with costs here and below, and their Lordships will humbly advise His Majesty accordingly.

N. K.

Appeal allowed.

Solicitors for the Appellant:—Messrs. T. L. Wilson & Co.

Solicitors for the Respondent:—Messrs. Sanderson & Orr Dignam.

(2) (1903) 2 K. B. 740; 72 L. J. K. B. 794; 89 L. T. 328; 52 W. R. 246; 19 T. L. R. 711.

(3) (1903) 2 K. B. 756; 72 L. J. K. B. 933; 89 L. T. 429; 52 W. R. 181; 9 Asp. M. C. 477; 20 T. L. R. 10.

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MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 320 OF 1921.
November 21, 1922.

Present.—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

AIYAPURAJU *alias* AYYAPPA—COUNTER-PETITIONER NO. 2—APPELLANT
versus

VEEVA VENKATAKRISHNAYYA AND OTHERS—PETITIONER AND COUNTER-PETITIONER NO. 1—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 6 (4) (c)—Provincial Insolvency Act (V of 1920), s. 78—General Clauses Act (X of 1897), s. 6—Limitation Act (IX of 1908), ss. 5, 14—Petition presented under old Act—Delay, whether can be excused.

A petition of insolvency presented more than three months after the date of the act of insolvency on which it is grounded is incompetent under section 6 (4) (c) of the Provincial Insolvency Act of 1907. Neither section 5 nor section 14 of the Limitation Act is applicable to a petition presented under the Provincial Insolvency Act of 1907. [p. 489, col. 1.]

Kopparthi Lingayya v. Araveti Chinna-rayana 44 Ind. Cas. 805; 41 M. 169; 33 M. L. J. 566; 7 L. W. 443 (F. B.), followed.

Section 78 of the Provincial Insolvency Act of 1920 has not the effect of empowering the Court to extend the period of limitation in respect of a petition presented under the Act of 1907 more than three months after the date of the act of insolvency on which it is grounded. [p. 490, col. 2.]

Per Spencer, J.—The provision contained in section 6 (4) (c) of the Provincial Insolvency Act of 1907 is quite independent of the Limitation Act and is absolute. [p. 489, col. 2.]

Per Venkatasubba Rao, J.—The intention of the Law of Limitation is not to give a right where there is none, but to interpose a bar after a certain period to a suit to enforce an existing right. [p. 491, col. 2.]

Mohender Prosad Singh v. Nand Prosad Singh, 20 Ind. Cas. 183; 17 C. W. N. 1043 and *Khunni Lal v. Gobind Krishna Narain*, 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.), relied upon.

Appeal against an order of the District Court, Godaveri, at Rajahmundry, in Insolvency Petition No. 37 of 1919.

Mr. T. S. Raghunatha Row, for the Appellant.—An insolvency petition was presented by a creditor to the Court of District Munsif of Razole. That Court had no jurisdiction to entertain it. It was thereafter presented to the District Court which had jurisdiction but by that time it was more than three months from the commission of the act of insolvency. At the time the petition was presented, Act III of 1907 was in force.

Neither section 5 nor section 14 of the Limitation Act is applicable to such a case. See *Kopparthi Lingayya v. Araveti Chinna-rayana* (1). Section 78 of the new Act (Act V of 1920) does not govern the case, as the new Act had not come into force at the time of the presentation of the petition. See *Mohender Prosad Singh v. Nand Prosad Singh* (2) and *Khunni Lal v. Gobind Krishna Narain* (3).

Where the right to put in a petition under the old Act is barred, the right cannot be revived. Section 6 of the General Clauses Act applies. See *Arayil Kali Amma v. Pelappakkara Manakal Sankaran Nambudripad* (4) and *Tirumalaisami v. Naidu Subramaniam Chittiar* (5). Even if section 5 is held to be applicable where proceedings are prosecuted in a wrong Court, it is not sufficient ground for excusing the delay. See *Trasi Deva Rao v. Paramesh-raya* (6).

Mr. G. Lakshmanna, for the Respondents.—Section 78 of the new Act (Act V of 1920) applies. Where the period of limitation expired prior to the passing of the new Act and there were no proceedings concluding the rights of the parties, the provisions contained in the new Act can be availed of.

If the Court to which petition was originally presented had insolvency jurisdiction but not of a specific character, any order passed by such a Court could not be said to have been made without jurisdiction. It was only an order made in excess of jurisdiction.

Section 5 of the Limitation Act applies. There was good cause for excusing the delay in this case and the District Judge was right in entertaining the petition. The application to excuse delay was filed on 21st February 1921 after the new Act had come into force and a fresh insolvency

(1) 44 Ind. Cas. 805; 41 M. 169; 33 M. L. J. 566; 7 L. W. 443 (F. B.).

(2) 20 Ind. Cas. 183; 17 C. W. N. 1043.

(3) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.).

(4) 5 Ind. Cas. 420; 34 M. 292; 7 M. L. T. 1151; 20 M. L. J. 347; (1910) M. W. N. 516.

(5) 45 Ind. Cas. 109; 40 M. 1009.

(6) 27 Ind. Cas. 144; 29 M. L. J. 541; 39 M. 74.

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petition should be deemed to have been presented on that day.

JUDGMENT.

Spencer, J.—This is an appeal against an order of adjudication under the Provincial Insolvency Act. The insolvency petition, from which originated the District Judge's proceedings, was one presented by a creditor under section 6 (4) of Act III of 1907.

It was first presented on June 28th, 1919, to the District Munsif of Razole who had no jurisdiction to entertain it. Having been returned by that Court on September 22nd, 1919, it was re-presented to the District Court on October 1st, 1919, which had jurisdiction under section 3. One of the pre-requisites for the valid presentation of a creditor's petition is that contained in sub-clause (c) to clause (4) of section 6, namely, that the act of insolvency which forms the ground of the application should have occurred within three months of the date of presentation of the petition. The act of insolvency put forward in this case as the basis of the petition was a transaction of sale of the debtor's property on March 31st, 1919, alleged to have been made with the intent of defeating his creditors. The Razole District Munsif had been invested under section 3 of the Act with jurisdiction only over debtors' insolvency petitions. When this creditor's petition was presented to a Court having jurisdiction, more than three months had elapsed since the commission of the act of insolvency upon which the petition was grounded. Thus the petition was liable to be rejected as out of order. But the District Judge, on a petition to excuse delay being presented on February 21st, 1921, acted under section 5 of the Limitation Act, and, holding that there was "sufficient cause" for the petition not being presented earlier, excused the delay and proceeded to enquire into the merits of the case. In *Kopparthi Lingayya v. Praveeti Chinnarayana* (1), a Full Bench of this Court laid down that the general provisions of the Indian Limitation Act, which include section 5, were not applicable to petitions under the Provincial Insolvency Act (III of 1907).

After the pronouncement, however, a new Provincial Insolvency Act (V of 1920) was passed and came into force on February

25th, 1920, the old Act being simultaneously repealed.

The new Act contained a new provision (section 78) which runs thus:—

"The provisions of sections 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose of the said section 12, a decision under section 4 shall be deemed to be a decree."

The question of law to be decided now is, whether the District Judge acted legally in excusing the delay upon sufficient cause being shown and admitting a petition which at the date of its presentation failed to comply with one of the conditions of a legal presentation under the Act in force at the time when it was presented.

I hold for two reasons that he had no power to excuse the delay.

In the first place, section 6, clause (4) of Act III of 1907, which was applicable on the date (October 1st, 1919) when the insolvency petition was presented, makes the occurrence of an act of insolvency within three months of the date of presentation one of three conditions precedent to a lawful presentation.

If any of these conditions are unfulfilled, the petition is an incompetent one.

The English Bankruptcy Act of 1914 contains a similar provision in section 4 re-produced from the Bankruptcy Acts of 1883 and 1890.

"A creditor shall not be entitled to present a bankruptcy petition against a debtor unless

(a) * * * *

(b) * * * *

(c) The act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition."

This provision appears to be quite independent of the Statute of Limitations in both countries and to be absolute. This view can be held consistently with what was said in *Kopparthi Lingayya v. Araveti Chinnarayana* (1). I was one of the Referring Judges in that case, and the first thing we had to decide was, whether the appeal to the High Court was in time. This depended on the questions (1) whether the time occupied in obtaining a copy of the District Judge's order could be excluded

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under section 12 of the Limitation Act, and (2) if not, whether we had power under section 5 to excuse the delay.

The difficulty caused by the last date for the presentation of the creditor's application to the District Court having fallen on a date when that Court was closed for the vacation could have been overcome by the application of section 10 of the General Clauses Act, if the District Judge had not been of opinion that a question of limitation was involved.

Whether the District Judge's opinion was right or wrong did not require consideration till it was decided whether the appeal was in time.

When the amendment of the Provincial Insolvency Act was under the consideration of the Legislative Council, this High Court drew the attention of Government to the Full Bench decision in *Kopparthi Lingayya v. Araveti Chinnarayana* (1), and I feel no doubt that it was in order to meet the doubts and difficulties that had been experienced in admitting appeals against orders of Insolvency Courts that the Legislature in passing the new Insolvency Act of 1920 introduced section 78 which made section 5 and 12 of the Limitation Act applicable to appeals and applications while omitting other general provisions of the Limitation Act such as sections 4 and 14.

Secondly, assuming for the purpose of argument that section 5 purports to provide a period of limitation for the presentation of insolvency petitions, and that the sections in the body of the Limitation Act which deal with the computation of periods of limitation can be invoked for extending a period of this kind, under the law prevailing when this petition was presented the District Judge had no power to apply section 5, as the Full Bench had declared it to be inapplicable to petitions and appeals under the Provincial Insolvency Act. The introduction of Act V of 1920 with its new section 78 did not alter the law prevailing at the date of the presentation of the petition which alone governed the question of its admissibility. The law in force when the District Judge passed his order has no bearing on this question, for section 6 of the General Clauses Act prevents the repeal of the previous Act having the effect of reviving a petition that had become barred before the later Act came into force, or affecting

the rights and liabilities of creditors and debtors under the earlier Act. Section 14 of the Indian Limitation Act, which is the appropriate section for excluding time spent in prosecuting another proceeding in a Court which had no jurisdiction to entertain it has not been made applicable to insolvency petitions either by the Act of 1920, or previously. Consequently, the act of presenting a petition by a creditor to a District Munsif's Court which had no jurisdiction was a nullity and had no effect on the subsequent proceedings in a competent Court.

The proviso in clause (2) of section 6 of the Provincial Insolvency Act of 1907, even if read with section 21 of the Code of Civil Procedure, cannot be of any avail to the petitioner, as the jurisdiction there referred to is local jurisdiction, not inherent jurisdiction.

The appeal must, therefore, be allowed with costs in this Court and the Court below to be paid to appellant by first respondent, and the adjudication is annulled, and the petition dismissed.

Venkatasubba Rao, J.—I am also, of the opinion that the order of the District Judge adjudicating the first respondent an insolvent must be set aside.

The act of insolvency relied on occurred on the 31st March 1919, and the insolvency petition was presented on the 1st October 1919: that is, after the lapse of three months from the occurrence of the act of insolvency on which the petition was grounded. The Provincial Insolvency Act in force on the date of the presentation of the petition was Act III of 1907. It is not disputed that under that Act the creditor had no right to present the petition. It was held by a Full Bench of this Court in *Kopparthi Lingayya v. Araveti Chinnarayana* (1) that in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act, III of 1907, recourse should not be had to the general provisions of the Limitation Act, IX of 1908.

The District Judge, however, purported to act under section 78 of the Provincial Insolvency Act V of 1920 which repeated the previous Insolvency Act and excusing the delay in the presentation of the petition held that the creditor's

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right subsisted and passed an order of adjudication. The District Judge made the order on the 26th April 1921, that is, on a date subsequently to the coming into force of Act V of 1920.

Section 78 referred to, enacts *inter alia* that the provisions of section 5 of the Indian Limitation Act, 1908, shall apply to appeals and applications under the Act (Act V of 1920). There is no corresponding section in the repealed Act, and as pointed out above this Court held that the general provisions of the Limitation Act of 1908 were inapplicable to applications and appeals presented under the old Provincial Insolvency Act. Section 5 of the Limitation Act is one of such general provisions. Under section 5 the Court may extend the period of limitation on sufficient cause being shown for not making the application within the period allowed by law.

Was the District Judge right in acting under section 78 of the new Act? The application to excuse delay was filed on the 21st February 1921, and it was suggested that a fresh insolvency petition should be deemed to have been filed on that date, that is, after the new Act had come into force. Whether the District Judge purported to make an order excusing the delay in the course of an insolvency petition presented under the old Act or on a petition presented under the new Act, the action of the District Judge seems to be equally unjustifiable. Section 6 of the General Clauses Act, Act X of 1897, clearly provides that when any Act of the Governor-General in Council repeals any enactment, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect or affect any right or privilege acquired under any enactment so repealed. The right of the creditor became barred under the Act of 1907, and section 78 of the new Act cannot be invoked for the purpose of reviving a right which had become barred. The right acquired by the debtor to have no insolvency petition against him grounded on the act of insolvency referred to above, cannot be affected by section 78.

In *Hari Nath Chatterjee v. Mohunt Mothurmohun Goswami* (7) their Lordships of the

(7) 20 I A. 183 at p. 192; 21 C. 8; 17 Ind. Jur. 481; 8 Sar. P. C. J. 334; 10 Ind. Dec. (N. S.) 638 (P. C.)

Judicial Committee observe at page 192: "The intention of the Law of Limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right." See also *Khunni Lal v. Gobind Krishna Narain* (3).

I am, therefore, of the opinion that the order of the District Judge adjudicating the first respondent an insolvent cannot be supported.

In this view, it is unnecessary to decide the other question whether the provision that the presentation of a petition is not valid unless the act of insolvency has occurred within three months before it, is a rule of limitation or independent of the Statute of Limitations. The question is a difficult one, and I do not propose to express an opinion upon it.

In the result, I concur in the order proposed by my learned brother.

V. N. V.

Z. K.

*Appeal allowed;
Petition dismissed.*

ALLAHABAD HIGH COURT.

SECOND APPEAL NO. 1466 OF 1922.

January 5, 1923.

Present:—Mr. Justice Rafique and
Mr. Justice Piggott.

HARI SINGH—PLAINTIFF—APPELLANT
versus

HARBANS LAL—DEFENDANT—
RESPONDENT.

Wajib-ul-arz, construction of—Custom or contract.
A *wajib-ul-arz, prima facie*, is to be construed as embodying a record of custom, but this presumption must give way if the language of the document itself indicates that the record is not one of custom but of contract.

The introduction to a *wajib-ul-arz* contained the following recital, "The agreement between us proprietors and *Lambardars* is that so long as this Settlement lasts the following conditions shall be binding on us"

Held, that whatever usages were recorded in the *wajib-ul-arz* were recorded as usages of contract and not of custom. [p. 492, col. 1.]

Raturaji Dubain v. Pahalwan Bhagat, 7 Ind. Cas. 680; 7 A. L. J. 1040; 33 A. 196 (F.B.), distinguished.

Asa Ram v. Kanhaya, 6 Ind. Cas. 129; 7 A. L. J. 365; 32 A. 399, followed.

Second appeal against the decree of the Subordinate Judge, Meerut, dated the 21st of August 1922.

Mr. Kailas Chandra Mital, for the Appellant.

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JUDGMENT.—These three second appeals arise out of three suits for pre-emption brought in respect of three separate transfers. The first question before the Courts below was, whether or not a custom of pre-emption existed in the villages in which the property is situate. Both the Courts below have found that no such custom is proved to exist and consequently the suits of the plaintiff have been dismissed.

It has been argued before us that the decision of the Courts below on the question of the existence of custom is erroneous and we have been referred by the learned Counsel to a Full Bench ruling reported in *Returaji Dubain v. Pahalwan Bhagat* (1). The full *wajib-ul-arz* was before the Court of first instance and the learned Munsif has quoted from the preamble of this *wajib-ul-arz* the following words:—

“The agreement between us proprietors and *Lambardar* is that so long as this Settlement lasts the following conditions shall be binding on us.”

It may be conceded that, in view of the Full Bench ruling just referred to, a *wajib-ul-arz*, *prima facie*, is to be construed as embodying a record of custom, but it is quite clear that this presumption must give way if the language of the document itself indicates that the record is not one of custom but of contract. While it may be the case that the word “*iqrar*” which is often interpreted “agreement” is an ambiguous word we have in the present case to take notice of the words “so long as this Settlement lasts the following conditions shall be binding on us.” These words appear to us clearly to indicate that whatever usages were recorded in this document were recorded as usages of contract and not of custom. We think the first Court was justified in relying on the case of *Asa Ram v. Kanhaya* (2), where the introduction to the *wajib-ul-arz* was couched in similar language. We can find nothing in the Full Bench ruling above referred to which contradicts anything which is set out in the judgment at Volume VII of the Allahabad Law Journal Reports page 365 [*Asa Ram v. Kanhaya* (2)].

We think, therefore, that both the Courts

(1) 7 Ind. Cas. 680; 7 A. L. J. 1010; 33 A. 196 (F. B.)

(2) 6 Ind. Cas. 129; 7 A. L. J. 365; 32 A. 399.

below were justified in holding that this *wajib-ul-arz*, which was an important document in the case, did not prove the existence of the custom of pre-emption. The plaintiff might, of course, have produced evidence to show that a custom really did exist notwithstanding what is set out in the *wajib-ul-arz* but both the Courts are agreed that the evidence of the two witnesses whom he put forward was of no value at all. This being so, we hold that the decision of the Court below in all three cases is correct. We dismiss these appeals under O. XII, r. 11.

W. C. A.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 916 OF 1921.

February 15, 1923.

Present.—Mr. Justice Ross.

FOUJDAR SINGH AND OTHERS—

DEFENDANTS—APPELLANTS

versus

BAIJU MAHTON AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20 (2)—*Ijara lease*—*Ijaradar* allowed to hold over after expiry of lease and to receive produce in lieu of interest—*Limitation, whether extended*.

After the expiry of an *ijara lease* the *ijaradar* was allowed to continue in possession of the land and to receive the produce in lieu of interest payable on the *zar-i-peshgi*. On being dispossessed from the land, the *ijaradar* brought a suit to recover the *zar-i-peshgi*.

Held, that the receipt of produce in lieu of interest fell within section 20(2) of the *Limitation Act* and operated to save limitation [p. 494, col. 2.]

Kariyappa v. Rachapa, 24 B. 493; 2 Bom. L. R. 378; 12 Ind. Dec. (N. S.) 860, *Ragho Shitaram v. Hari*, 24 B. 619; 2 Bom. L. R. 452; 12 Ind. Dec. (N. S.) 942 and *Mylan v. Annani*, 29 M. 254; 16 M. L. J. 99, relied upon.

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Krishnaji Sahkaram v. Kashim Mchiddinsahab, 57 Ind. Cas. 76; 44 B. 500; 22 Bom. L. R. 385. *Pichandi v. Kandasami*, 7 M. 539; 2 Ind. Dec. (N. S.) 958 and *Venkaji Babaji Naik v. Shidramapa Balapa Desai*, 19 B. 663; 10 Ind. Dec. (N. S.) 444, distinguished.

Appeal from a decision of the Subordinate Judge, First Court, Patna, dated the 19th January 1921, affirming that of the Munsif, Barh, dated the 29th April 1920.

Mr. Atul Krishna Roy, for the Appellants.

Mr. Lachmi Narain Singh, for the Respondents.

JUDGMENT.—The plaintiffs sued for the recovery of money advanced on an *Ijara* lease executed by defendants Nos. 2 to 15 and their predecessors on the 3rd of May 1901, in favour of the plaintiffs' father by which 4 *bighas* 17 *kathas* of land was leased at an annual rental of 12 annas for a term of seven years from 1309 to 1315 with a proviso that in the event of non-payment of the *zar-i-peshgi* the settlement would stand until 1317. In 1319 the lessors sold their interest to defendant No. 1. In 1320, 1321, 1322, 1323, 1324 and 1325 the plaintiffs demanded payment from the purchaser but the purchaser had no money and allowed the plaintiffs to hold over the *kasht* land from year to year, and, in lieu of the interest on the debt, told the plaintiffs to retain possession of the lease-hold property. In 1326 the plaintiffs were dispossessed and, therefore, brought this suit claiming first a mortgage-decree; second, alternatively, a decree for money and, thirdly, in the alternative possession of the land.

The defence was that the suit was barred by limitation that the *Ijara* lease became null and void at the end of Jeth 1317 and that the *zar-i-peshgi* (money) had been paid.

The Munsif found that the plea of payment was false, that the plaintiffs' allegation of possession and dispossession was proved, and that the debtors asked the plaintiffs to hold over till re-payment and that the suit was not barred by limitation because the enjoyment of the usufruct of the land was appropriation of interest on money due and time would only run from the date when the payment of interest ceased; that is, Jeth 1326. He also held that the lease was a lease only and not a mortgage and,

therefore, passed a decree for money. The Subordinate Judge on appeal agreed with these findings. On the question of limitation he held that on the findings of fact Art. 116 of the Limitation Act had no application, that the terms of the lease were changed by subsequent oral agreement and that the parties must be held to be bound by the new contract. He also held that the plaintiffs were getting the usufruct of the land in lieu of interest and applied section 20(2) of the Limitation Act. He further held that, even on the construction of the lease itself, the plaintiffs had no right to sue until they were dispossessed.

The contention on behalf of the defendants, who are the appellants, is that this is a lease and not a mortgage and that, therefore, section 20(2) of the Limitation Act has no application; that the usufruct of the land is not payment of interest within the meaning of section 20; that if there was a new contract, it was a lease from year to year and required to be made by a registered instrument and on the true construction of the lease the cause of action arose in 1317 and the suit is barred by six years' limitation.

I shall deal first with the construction of the lease. After reciting that the lease expires at the end of Jeth 1315, but if the *zar-i-peshgi* is not paid it is to continue until 1317, that is, for nine years, the instrument proceeds as follows:—"The term of this deed shall after nine years totally cease to continue and we shall enter upon *seer* possession and occupation of the *kasht* land; and if even till then we fail to pay the *zar-i-peshgi* or if the lessee be dispossessed from the lease-hold property on any account whatsoever, the lessee shall be at liberty without waiting for the expiry of the term to institute a suit in the Civil Court and to recover the *zar-i-peshgi* with damages on account of loss of produce from the date of dispossession to the date of realization of the money with costs." Now, it seems to me that on the language of the deed the appellant is right in his contention that the lease absolutely determined in 1317 and if the suit was on the original contract it ought to have been brought within six years from that date. It is true that the language

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is not altogether accurate. Two contingencies are set forth: (1) if payment is not made by 1317; (2) if the lessee is dispossessed from the property. The result is stated in a comprehensive clause giving the lessee liberty, without waiting for the expiry of the term to institute a suit and to recover the *zar-i-peshgi* with damages on account of loss of produce from the date of dispossession to the date of realization. Part of this language is only applicable to the second contingency; but this inconsistency does not, in my opinion, modify the express stipulation that the lease determined in 1317.

But the Courts below have both found that there was a new contract each year, the plaintiffs demanded their money from defendant No. 1 and each year they were asked to remain in possession in lieu of interest. This possession continued till 1326. This is not a lease from year to year requiring registration, and the only question is whether the usufruct of the land received in this way is equivalent to the payment of interest. The learned Vakil for the appellants contends that so to hold is to make section 20(2) of the Act unnecessary and that the express provision, that in the case of a mortgagee in possession the receipt of the produce shall be deemed to be a payment for the purposes of sub-section (1), leads by necessary implication to the inference that such receipts are not such payments in other cases. He relies on *Krishnaji Sakharani v. Kashim Mohiddin-saheb* (1). In that case, however, all that was held was that as the mortgage was only good as a mortgage for the term of the mortgagor's life, the possession of the mortgagee after his death was the possession of a trespasser and section 20(2) had no application. In the present case the plaintiffs were not trespassers after the term of the lease expired. They continued in possession at the request of defendant No. 1, who was unable to pay his debt. The other cases on which the learned Vakil relies are *Pichandi v. Kandasami* (2), *Venka Babaji Naik v. Shidramapa Balapa Desai* (3).

These were both cases of invalid mortgage. The first case simply decided that the plaintiff could not claim to have received profits of the mortgaged property nor to have received them as mortgages. In the second case it was argued that the Court ought to infer that the tenants paid the rent to the plaintiffs as interest on the bond. This argument was not overruled on the ground that the receipt of rent could not be treated as payment of interest, but on the ground that on the admissible evidence the inference could not be drawn. This case is really against the appellants. On the other hand, *Kariyappa v. Rachapa* (4), *Ragho Shitaram v. Hari* (5), *Mylan v. Annavi Madan* (6) are clear authorities in support of the view contended for by the respondents. In my opinion, limitation is saved in this case by the receipts of the produce of the land which the plaintiffs continued to occupy in lieu of interest at the request of the defendant No. 1 owing to his inability to pay his debt. There can be no ground in reason why the produce of the land should not be accepted in lieu of interest if the parties have so arranged. In this case this was the arrangement, as has been found by both the Courts.

The appeal is dismissed with costs.

Z. K.

Appeal dismissed.

(4) 24 B. 493; 2 Bom. L. R. 378; 12 Ind. Dec. (N. S.) 860.

(5) 24 B. 619; 2 Bom. L. R. 452; 12 Ind. Dec. (N. S.) 942.

(6) 29 M. 234; 16 M. L. J. 99.

(1) 37 Ind. Cas. 76; 44 B. 500; 22 Bom. L. R. 385.

(2) 7 M. 539; 2 Ind. Dec. (N. S.) 958.

(3) 19 B. 663; 10 Ind. Dec. (N. S.) 444.

SABURI PANDE *v.* RAM KHELAWAN PANDE.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 162
OF 1920.

February 22, 1922.

Present:—Mr. Justice Das and Mr. Justice
Kulwant Sahay.SABURI PANDE AND ANOTHER—DEFEND-
ANTS NOS. 1 AND 2—APPELLANTS*versus*RAM KHELAWAN PANDE *alias* RIKHAI
PANDE—PLAINTIFF AND OTHERS—DE-
FENDANTS NOS. 3 TO 7—RESPONDENTS.*Declaratory suit—Property in custody of Court—
Court-fees.*

Where property is in the custody of the Court a person who lays claim to it need do no more than sue for a declaration of his title to it and pay Court-fee accordingly.

A suit by the heir of a lunatic for a declaration that he is entitled to the property of the lunatic which is in the custody of the manager is a suit of this description and need bear a Court-fee requisite for a suit for declaration.

Administrator-General of Bengal v. Bhagaban Chandra Roy Chowdhuri, 10 Ind. Cas. 531; 15 C. W. N. 758, distinguished.

Appeal from a decision of the Subordinate Judge, First Court, Arrah, dated the 27th April 1920.

FACTS.—Full facts appear from the following order of the Taxing Officer, dated the 19th August 1920:—

This is a Court-fee matter. It appears that in Shahabad there was a lunatic named Ram Nihora Panday in respect of whom the Collector applied for an inquisition under Act IV of 1912. Ram Nihora Panday was found to be a lunatic; but there was a dispute amongst his relations regarding the person who should be appointed manager of the property. Claims were put forward by Saburi Panday, Gayadin Panday and two persons named Ram Khelawan Panday one of whom was otherwise known as Rikhai Panday. The District Judge finally nominated a committee consisting of Ram Khelawan Panday, (not Rikhai), Saburi Panday and Deonath Panday, son of Gayadin, who continued to manage the lunatic's property until his death occurred in 1918. On July 18th, 1919, the District Judge directed the managers to make over the property to Rikhai Panday, the nearest relation of the deceased lunatic within one month. The managers objected to this pointing out that Rikhai Panday had already instituted a suit against them in the Court of the Subordinate Judge at

Arrah. It is from this suit that the present appeal arises. The Subordinate Judge decreed the suit in favour of Rikhai Panday; and the present appeal has been instituted on behalf of the defendants Saburi Panday and Gayadin Panday.

The appellants at first prayed that the District Judge might be directed to abstain from handing over possession to Rikhai Panday until the decision of the appeal. But on May 17th last, the District Judge directed the managers to make over the property of the deceased lunatic to the successful litigant, Rikhai Panday, who is accordingly now in possession.

The plaint bore a Court-fee stamp of ten Rupees and there is a similar stamp on the memorandum of appeal. *Inter alia* the plaintiff Rikhai Panday prayed that it might be declared that he was the heir of the deceased lunatic; and that he was entitled to obtain possession of all the lunatic's property. In the alternative he prayed that he might be declared entitled to joint possession with the defendants third party. The question of the sufficiency of the Court-fee stamp was raised by the Subordinate Judge's Sharistadar at a very early stage of the proceedings; but the learned Subordinate Judge found that as the property was in possession of trustees under the District Judge it was not necessary for the plaintiff to ask for anything more than a declaratory decree. He based his decision upon the ruling in the case of *Administrator-General of Bengal v. Bhagaban Chandra Roy Chowdhuri* (1) where the plaintiffs sought a declaration in respect of land which had been attached under section 146 of the Criminal Procedure Code. I think that a case more directly in point is that of *Rani Kamal Mukhi Kuer v. Udit Narain Singh* (First Appeal No. 102 of 1920). In that case the Court of Wards was in possession of the property in suit as stake-holder under section 13 of the Court of Wards Act. But in spite of this fact the learned Taxing Judge of this High Court, by his decision of January 14th, 1920, decided that the plaintiffs must pay *ad valorem* Court-fees, because in their plaint they prayed in the alternative that their suit might be treated as one for possession.

(1) 10 Ind. Cas. 531; 15 C. W. N. 758.

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It does not appear to me that the present case differs in any essential from the ordinary title suit in which there is a dispute regarding succession to property, and the plaintiff prays for declaration of title and recovery of possession. It is true that the defendants, when the suit was actually instituted, enjoyed possession only in the capacity of trustee. But they also claimed the property in their private capacity; and Rikhai Panday could not obtain possession of it before his title was declared. It has been repeatedly held that a plaintiff cannot avoid liability to pay *ad valorem* Court-fee by attempting to put his consequential relief in a declaratory form. I think, therefore, that when the plaintiff asked that he might be declared entitled to possession he was liable to pay *ad valorem* Court-fee as if he had prayed for recovery of possession. This is the rule which was laid down in the case of *Deokali Koer v. Kedar Nath* (2). The learned Vakil for the appellants argues that even if *ad valorem* Court-fee was properly payable on the plaint, he is himself appealing only from a declaratory decree; and until the plaint is amended he should not be required to pay *ad valorem* Court-fee. In this connection, it is to be noticed that the respondent Rikhai Panday has now obtained possession of the property in suit, and if the appellants should win their appeal they will certainly seek to dispossess him on the strength of the decree which they will obtain. The suit is clearly other than a purely declaratory suit; and *ad valorem* Court-fee was properly payable on the plaint. In any case, *ad valorem* Court-fee is properly payable on this memorandum of appeal.

It is to be noted that one of the grounds of appeal raises the question of whether on the plaint as it was originally framed, section 42 of the Specific Relief Act is not a bar to the suit. If it should be decided that the suit is a purely declaratory suit, properly instituted, and that the plaint was sufficiently stamped the appellant will be able to obtain refund of any Court-fee paid in excess. On the other hand it is obvious that no orders can be passed by the Bench for the payment of *ad valorem* Court-fees on the plaint until the appeal is admitted; and the appeal cannot be admitted until it is properly stamped. Thus the

payment of proper Court-fee on the memorandum of appeal must precede the exaction of deficit Court-fees on the plaint.

The value of the suit is eight thousand rupees and Court-fee payable is Rs. 395. The sum of ten rupees has been paid; and there is a deficit of Rs. 385 on the memorandum of appeal.

Mr. *Susil Madhab Mullick* for Mr. *Siveshwar Dayal*, for the Appellants.

Mr. *Parneswar Dayal*, for the Respondents.

JUDGMENT.

Das, J.—The only question raised in this appeal is whether the plaintiff has established the pedigree on which he relies. The plaintiff has examined himself in support of his case and also an old *Purohit* of the family 75 years of age. It is quite true that the plaintiff is not a very trustworthy person; and, if his evidence had not received corroboration, I would hesitate to accept it. But his evidence has received very strong corroboration from the evidence of the old *Purohit* of the family. The learned Subordinate Judge has accepted that evidence and I see no reason whatever to differ from him on this point. The appellants are after all the managers of the estate of the lunatics who are now dead. This case decides no issue as between the plaintiff and the defendants in their personal capacity. In my opinion the plaintiff has established his title to the property as against the defendants, who are the managers of the estate of the lunatics. I would accordingly dismiss this appeal with costs.

The office reports that there is a deficiency of Court-fee to the extent of Rs. 385 on the plaint filed by the respondents in the Court below. I am of opinion that the Court-fee of Rs. 10 was sufficient. The position is this. The property was in the custody of the Court and all that the plaintiff had to do was to establish his title to the property. Therefore, it was necessary for him to file a suit for declaration of his title to the property, but not for recovery of possession. In my opinion, the principle of the decision in *Administrator-General of Bengal v. Bhagabun Chandra Roy Chowdhuri* (1) applies to this case.

Kulwant Sahay, J.—I agree.

Z. K.

Order accordingly.

(2) 15 Ind. Cas. 427; 39 C. 704; 16 C. W. N. 838.

MANICKA PADAYACHI, *In re*.**MADRAS HIGH COURT.**CRIMINAL APPEALS NOS. 259 AND 260
OF 1921.

REFERRED TRIAL NO. 36 OF 1921.

August 24, 1921.

Present:—Mr. Justice Oldfield.

June 21, 1921.

Present:—Mr. Justice Ramesam and
Mr. Justice Odgers.*In re* MANICKA PADAYACHI AND AN-
OTHER—PRISONERS—ACCUSED NOS. I AND 2.*Evidence Act (I of 1872), s. 30—Trial of several
accused for major offence—Confession by one as
to minor offence, whether admissible against others—
Corroboration.*Per Oldfield and Odgers, J.J., (Ramesam J., dis-
senting):—Under section 30 of the Evidence Act
where two accused are tried jointly for a major
offence, a confession by one of them implicating
himself in a minor offence is admissible in evi-
dence against the other accused.Per Ramesam, J.—A confession of guilt of a
lesser offence in the course of a trial for a major
offence does not satisfy the requirements of section
30 of the Evidence Act.Per Oldfield, J.—Persons under trial for a major
offence are also being charged with and tried for
any minor offence or offences constituted by the
particular ingredients of the major offence which
may be proved, and it makes no difference that
the conviction of one accused of a minor, after
trial for a major offence takes place only in appeal,
when the course of the proceedings has been the
same against them both.A conviction cannot be based exclusively on
the testimony of a person, who cannot be cross-
examined, if he is uncorroborated or corroborated
only by an accomplice. [p. 506, col. 2.]The corroboration of a confession must be on
material particulars and taken with the confession
must justify belief in the substantial truth of
the latter. [p. 506, col. 2.]*Imperatrix v Pitamber Jina*, 2 B. 61; 1 Ind.
Dec. (N. S.) 469, *Queen v Belat Ali*, 19 W. R. Cr.
67; 1 B. L. R. 453, *Empress of India v Gan-
rai*, 2 A. 444; 4 Ind. Jur. 581; 1 Ind. Dec. (N. S.)
853, *Kutir Bap v Emperor*, 21 Ind. Cas. 378;
18 C. L. J. 590; 14 Cr. L. J. 586, *Queen-Em-
press v Jagrup*, 7 A. 646; A. W. N. (1885) 131;
4 Ind. Dec. (N. S.) 799, *Queen v Naga*, 23 W. R.
Cr. 24, *Queen Empress v Nur Mahomed*, 8 B.
223; 4 Ind. Dec. (N. S.) 522, *Reg. v Amrita Govinda*,
10 B. L. R. 497, and *Upendra Nath Das v
Emperor*, 46 Ind. Cas. 842; (1918) Pat. 175; 19 Cr.
L. J. 826, referred to.Trial referred by the Court of Session of the
South Arcot Division for confirmation of the
sentence of death passed upon the said Pri-
soners in Case No. 11 of the Calendar for
1921.Mr. C. Narasimha Chari, for Accused
No. 1.Mr. K. S. Jayaram Aiyar, for Accused
No. 2.

The Public Prosecutor, for the Crown.

This case first came on for hearing
before Mr. Justice Ramesam and Mr.
Justice Odgers who delivered the following**JUDGMENT.****Ramesam, J.**—These cases arise out of
Sessions Case No. 11 of 1921 on the file
of the Sessions Court of South Arcot. The
appellant in Criminal Appeal No. 259 of
1921 is the first accused in it and was charged
with the murder of one Ambalvana Pada-
yachi by mixing a poisonous drug in the
arrack intended to be drunk by him. The
appellant in Criminal Appeal No. 260 of
1921 and another (third accused) were charg-
ed with abetment of the offence. The learned
Sessions Judge convicted the appellants
of the offences with which they were charged
and sentenced them to be hanged. Hence
these appeals.I may clear the ground by stating some
facts which are beyond controversy.(1) The Sessions Judge finds, and I think
it is amply proved, that the first accused
purchased a tumbler of arrack in the arrack-
shop of prosecution witness No. 2, and after
mixing a substance containing corrosive
sublimite or perchloride of mercury, gave
the arrack to the deceased who drank it
with fatal consequence. This conclusion
rests on the evidence of prosecution witness
No. 2 and prosecution witness No. 3 and
of that of the Sub-Assistant Surgeon (pro-
secution witness No. 1) and on the dying
declaration, Exhibit C. It is not necessary
to elaborate it further as it was not seriously
attacked by the Vakils for the appellants.
It is also supported by the statement of
the second accused before the Village Munsif
(Exhibit D) which, though retracted before
the Sessions Judge, is corroborated by the
other evidence referred to above. The ques-
tion—of what offence can the first accused
be convicted?—will be dealt with later on.(2) A drug called '*Viram*' in Tamil was
purchased by the third accused from prose-
cution witness No. 7 a few days (3 or
4) before the occurrence. The Sub-Assist-
ant Surgeon says that '*Viram*' corresponds
to perchloride of mercury. Its more proper
indigenous name is *Savutram* and the follow-
ing extract from page 845 of Dr. Maclean's

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Manual, Volume III, Glossary, describes it from the point of view of its indigenous use "as sold in Bazaars is less crystalline and more dull and opaque than the salt in use in hospitals and occasionally contains a small quantity of subchloride or calomel. The following process for making it is taken from the Pōorna Sootram * * * Veidyans use this internally, in small and continued doses, alterative, stimulating the urinary, cutaneous and salivary secretions; in large doses powerful irritant poison; externally, stimulant and mildly caustic, remedy in secondary syphilis, etc., * * * Used generally by natives in too strong doses, which are sometimes, when the preparation is pure and active, attended with dangerous effects; causes severe ulceration of gums and cheeks resulting finally in permanent cartilaginous adhesions between the gums and cheeks. The mode of administering: *Sev veeram* according to Pōorna Sootram is as follows * * * The pure drug is deadly poison, $7\frac{1}{2}$ grains being a fatal dose (prosecution witness No. 1) and is apparently not used internally in allopathy."

I will now discuss the evidence bearing on the connection of the second accused with the death. According to the Sessions Judge (page 7), "the evidence against the second accused consists in (1) the statement made by the first accused to the Monigar of Nattamalai; (2) the presence in the second accused's house of the vegetable cutter, the pestle and the grinding stone on which were found traces of mercury, and (3) the evidence of the shopkeeper who says that second accused was present when the third accused purchased the drug."

I take each of these points in their order.

(a) The statement to the Monigar is Exhibit D. The question arises whether it can be taken into consideration under section 30 of the Evidence Act. It is the statement of a co-accused. Is it a confession within the meaning of that section? It is certainly an admission by the first accused that he administered the drug, but not a confession of the offence he was charged with. The learned Public Prosecutor contends that the admission of the physical act (apart from intent or knowledge) is enough to satisfy the requirements of section 30. This contention must be negatived as it is obviously untenable [see *Queen-Empress v.*

Jagrup (1)]. But still, the further question arises whether Exhibit D may be taken into consideration on the ground that it is not fully exculpatory. I think that Exhibit D, though not a confession of guilt of the offence of murder, is yet a confession of guilt of the lesser offence under section 328, Indian Penal Code. If so, does it satisfy the requirement of section 30? In my opinion, it does not, in view of the following decisions:—

In *Queen v. Belat Ali* (2) Phear, J., says: "before a confession of a person jointly tried with the prisoner can be taken into consideration against him, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried."

In *Queen v. Naga* (3) the same learned Judge says: "this Court has already had occasion in more than one case to point out that confessions which are made use of under section 30 of the Evidence Act, in the first place, can only be so used; so far as they make the confessing prisoner guilty of the offence for which all are being tried."

In *Empress of India v. Ganraj* (4), Straight, J., says at page 446: "it seems to me that the test section 30 of the Evidence Act intended should be applied to a statement of one prisoner proposed to be used in evidence as against another, is to see whether it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with the other person or persons against whom it is tendered". The underlined words were italicised by the learned Judge himself. According to these decisions the word "confession" in section 30 of the Act must be construed to mean "confession of the offence charged." I agree with this construction and I think Exhibit D cannot be considered against the second accused. I come to this conclusion apart from the fact that it is a retracted confession and requires strong corroboration.

(b) Exhibit A the certificate of the Chemical Examiner shows that grains of corrosive

(1) 7 A. 646; A. W. N. (1885) 131; 4 Ind. Dec. (N. S.) 799.

(2) 19 W. R. Cr. 67; 10 B. J. R. 453.

(3) 23 W. R. Cr. 24.

(4) 2 A. 414; 4 Ind. Jnr. 581; 1 Ind. Dec. (N. S.) 853.

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sublimate were found in the undrunk second draught of arrack poured into the same tumbler, and in the washings of the tumbler; but only tracing of mercury were found in the washings of the vegetable cutter (M. O. 2) the pestle (M. O. 3) and the sandal stone (M. O. 4) found in the house of the second accused. It is clear from this that the Chemical Examiner sought for corrosive sublimate and not merely for mercury and that, even from a washing or a solution of the corrosive sublimate, grains of it can be isolated. The only inference that can be drawn from the certificate is that mercury but not corrosive sublimate was found in the "scanty brownish incrustation" on the sandal stone, in the "brownish stain" on the pestle and in the "brownish stain" on the vegetable cutter. There is no evidence in the case that corrosive sublimate decomposes by mere keeping so that the metal mercury is precipitated and the chlorine escapes. On the other hand, the lump of *Viram* (M. O. 5) (*vide* prosecution witness No. 7) kept in the records of these proceedings shows that such is not the case. (See also Encyclopedia Britannica, XI Edition; Volume VI 'chlorine,' where it is said "it attacks mercury." (page 255). If so, it is impossible to infer from the tracings of mercury only on the material objects 2, 3 and 4, that the second accused had at any time in his possession any '*Viram*' or corrosive sublimate especially as pure mercury is commonly used externally by Indians for various purposes. It is a case of want of such legal evidence as enables one to draw the adverse inference. In view of this conclusion, I do not dwell on the absence of the mention of a white powder on the sandal stone in the search list Exhibit H while the presence of the powder on the vegetable cutter and the pestle was mentioned in the search list, Exhibit G, prepared an hour and a half earlier. I will only say that Exhibit H is suspicious (being prepared in the absence of the Magistrate unlike Exhibit G) and ought not to be acted upon.

(c) Prosecution witness No. 7 says in chief examination, referring to the third accused: "he bought *Viram* saying he wanted to make a preparation of it. He bought 3 *Varahan edais* from me for 9 annas. The second accused was standing there near

my shop." In cross-examination, he says "second accused was standing, 8 feet away when I sold the drug. He was standing in the *koradu*." The person who wanted to make a preparation was the third accused himself. The witness does not say that the second and third accused came together or returned together or that the second accused was standing as if he was waiting for the third accused or that the drug was handed over to the second accused after the purchase. In my opinion the bare statement that the second accused was standing near by is not legal evidence from which one can infer that the purchase was made for him.

Thus, it seems to me there is no legal evidence, or, in other words, evidence which can be put to an English Jury, on any of the three points, *viz.*—

(1) The purchase of the drug by or on behalf of the second accused.

(2) The possession by the second accused of a drug containing corrosive sublimate (as opposed to mere mercury).

(3) The second accused gave it to the first accused to administer it to the deceased.

The last point is most important. If there is credible evidence on the third point, the absence of evidence on the other two is immaterial and cannot affect the case for the prosecution. Conversely, the absence of evidence on the last point is fatal. Even if the other two points are proved against the second accused he cannot be convicted. Even if a person has corrosive sublimate in his possession, he cannot be convicted of the murder unless the drug administered can be traced to him; for, if it were otherwise, the third accused may be convicted with greater reason than the second, seeing that it is clearly proved in the case that the third accused purchased '*viram*' and, therefore, had it in his possession at least for some time. Even this circumstance is wanting against the second accused. *Cf.* *Kusir Bap v. Emperor* (5), where the arsenic was actually found in the house of Kusir Bap.

The only other point that has to be noticed is a statement in the evidence of P. W. No. 8, the Police Sub-Inspector, in answer to the Court. "*first accused said the substance was placed on the plank of the vegetable cutter and powdered and given*

(5) 21 Ind. Cas. 378; 18 C. L. J. 590; 14 Cr. L. J. 586.

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to him (section 27) * * * The second accused said he had powdered the substance on the sandal grinding stone M. O. 4 first." If what was meant by the deposition is merely that the second accused said that there was a sandal stone in the house used for grinding substances, there is nothing in the statement to be used against second accused. I believe this is all the information given by the second accused (see also prosecution witness No. 13, page 24, lines 18-19). Probably this is all that the Sub-Inspector meant; but, if he meant more, *i.e.*, that the second accused told them that the substance given to the first accused was first ground on the sandal stone and again on the vegetable cutter with the pestle, then I disbelieve the Sub-Inspector's statement; for it is most unlikely that the second accused would have made a confession. The statement was not relied on as a confession in the Court below and could not be used as such, for it was not recorded under the provisions of sections 164 and 364 of the Criminal Procedure Code. Any how, the Sub-Inspector is not supported by prosecution witness No. 13 who is a signatory to Exhibit H. It is significant that the Sub-Magistrate is not examined by the prosecution. If the statement is not relied on as a confession but merely as a piece of information that led to the discovery of the stone (section 27) the portion of the information which identifies the substance ground on the stone with that ground on the cutter and with the substances handed over to the second accused is inadmissible under section 27. All that then remains is that a substance was ground on the cutter, and a substance was ground on the sandal stone. This is useless against the second accused as the washings show merely tracings of mercury.

It is true I entertain suspicion against the second accused, but when I find that these are based on Exhibit C (the dying declaration of the deceased containing his opinion as to the cause of death and inadmissible in evidence on that point) and on Exhibit D, the suspicion has to remain a bare suspicion. The existence of a motive (as to which I agree with my learned brother) cannot make any difference when there is total lack of evidence connecting second accused with the cause of death. In this respect the

case closely resembles *Kusir, Bap v. Emperor* (5) and I hold that the second accused must be acquitted.

As to the first accused, he admits that the powder having been taken by him from the person who gave it to him was administered to the deceased with a view to cause purging. One suspects the statement in so far as it denies a more culpable intention but, in the absence of evidence to show any other intention or even motive (so far as the first accused is concerned), or knowledge that the drug he used was a highly dangerous drug or was *Viram*, one cannot infer that the first accused was actuated by any intention or knowledge more culpable than he chooses to admit. Even if he knew it to be *Viram* (of which there is no evidence) it is difficult to attribute to him either an intention to cause death, or knowledge that it is likely to cause death in view of the extracts I made in the earlier part of the judgment showing the ignorance among the people as to the nature of the drug. I think the utmost that can be done is to convict the first accused under section 328 of the Indian Penal Code. I accordingly do so and sentence him to ten years' rigorous imprisonment under that section.

The case illustrates the necessity of some legislation to regulate the sale of poisons in the Bazars of the country.

Odgers, J.—In this case there were originally three accused. Accused No. 1 was charged with the murder of one Ambalavana Padayachi by administering poison to him, and accused Nos. 2 and 3 were charged with abetment. Accused Nos. 1 and 2 were convicted and sentenced to death. Accused No. 3 was acquitted. The prosecution story is, that accused No. 3 purchased about one *tola* weight of perchloride of mercury (corrosive sublimate) from a grocer in Lalpet at the request of accused No. 2. The latter powdered the crystalline substance purchased by accused No. 3 on his behalf, made the powder into a packet which he handed to accused No. 1 telling him to take deceased to a toddy shop to drink arrack and to put the contents of the packet into his arrack. This was done and the deceased was taken ill and died. There is not the slightest doubt that the deceased died in consequence of the administration to him of perchloride of mercury

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by accused No. 2. The evidence is perfectly clear and it is not contended that he is innocent by his Vakil. There is, however, some little doubt as to whether accused No. 1 knew the stuff given to him by accused No. 2 to be a poison. In Exhibit D, which I shall have to examine in greater detail later on accused No. 1, says he asked accused No. 2 if the drug was for killing him (deceased), the answer was it would only bring on purging and with the deceased so reduced, he could be persuaded to return to the house of accused No. 2, who was his brother, which he had left. I myself have the very gravest doubts as to whether accused No. 2 did not actually know the nature of the drug, as he calls it, he was asked to administer so secretly and mysteriously. He does not appear to be a relative of accused No. 2 and deceased or to have had any other connection with them.

There is, however, a possibility that he did not actually know, though he must at the least have had very good grounds for suspecting the deadly nature of the powder handed to him by accused No. 2. I am, therefore, not prepared to differ from the judgment of my learned brother, which I have had the advantage of perusing, in finding accused No. 1 guilty only of administering a poison knowing it to be likely that he will cause hurt and would sentence him to 10 years' rigorous imprisonment under section 328, Indian Penal Code.

A case of greater difficulty arises in the case of accused No. 2. On this part of the case I have the misfortune to differ from the judgment of my learned brother and I need not say I do so with much diffidence.

Accused No. 2 neither bought the poison nor administered it. The dying declaration of the deceased, Exhibit C, taken down by the Village Munsif (prosecution witness No. 5) states that there was enmity between deceased and accused No. 2 his younger brother. Some 10 to 20 days before the date of the crime the deceased and his second wife moved from the family-house and went to live in Muthu Chetty's house (referred to as the oil-monger). As already stated, according to Exhibit D, accused No. 2 told accused No. 1 that the object of giving the drug was to get deceased to come back and live in the family-house again. There

is evidence (prosecution witness No. 6) that accused No. 2 was intimate with deceased's wife. This witness says accused No. 2 used to come to his house, but never when deceased was present. Once this happened after the wife had gone to bed. This is, of course, denied by the widow (prosecution witness No. 11), but I am not prepared to disbelieve it. No other reason is alleged or proved for deceased having moved from his own house and I think there probably was undue intimacy between the deceased's wife and accused No. 2, and that was the reason of the move. This would also furnish a reason for the enmity and a motive for the crime. The learned Vakil for the second accused tried to minimise the effect of this evidence by saying that, even if the two brothers were not on speaking terms that is no reason why the wife of the one should not talk to the other brother. This is unlikely and I imagine especially so among the Hindus whose women do not usually take a course independent of their men, unless there is some special reason for it and especially, as in this case, where the parties are living in different houses. Thus, in my opinion, we have a motive for this crime established. Next, we have the evidence of the grocer, prosecution witness No. 7, that accused was standing near his shop, 8 feet away, when third accused bought the poison. The latter was a regular customer and the witness said he could not remember if accused No. 3 had bought *Viram*, i.e., perchloride of mercury, before. Third accused used to buy medicinal drugs often from the witness. It seems to me a fair inference from this that the probability is that accused No. 3 had not bought this particular poison there before. The poison supplied to accused No. 3 came from a stock got in by the witness's father who died $1\frac{1}{4}$ years before and was thus apparently a thing for which there was very little sale in that village and it is most unlikely that the grocer would not remember a previous sale to the accused No. 3 if such had taken place. The learned Vakil for the accused No. 2 says that the latter's presence close to the shop at the very moment when accused No. 3 was buying the poison was accidental. It is a curious coincidence but one which may have a perfectly innocent explanation. The second

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accused has not attempted any, and in the absence of this I think an inference may fairly be drawn against accused No. 2 from his presence just outside the grocer's shop at the very moment when the poison was being purchased.

Next, three articles were discovered in accused No. 2's house, a vegetable cutter, a pestle and a sandal grinding stone. The evidence of prosecution witness No. 8, Sub-Inspector, is to the effect that in consequence of information received from accused No. 1 the house of accused No. 2 was searched (search list Exhibit G) in the presence of the Sub-Magistrate and the vegetable cutter and the pestle were discovered. It is curious that, if, as urged, there was no connection between first and second accused, that the former should give information as to articles subsequently found in accused No. 2's house in consequence of such information. The evidence is that the first accused said that the substance was placed on the plank of the vegetable cutter and powdered and given to him. The house of accused No. 2 was searched at about 5-30 P. M. and the vegetable cutter and the pestle were seized. The Sub-Inspector says there was a whitish tinge on them. The Chemical Examiner's report (Exhibit A) is that the pestle (M. O. 8) had a brownish stain, the vegetable cutter (M. O. 9) had also brownish stains. Traces of mercury were found in the washings of these articles. The sandal grinding stone was discovered in consequence of information received from accused No. 2. He said in the presence of the Magistrate (who, as I understand, was present when the information was given by accused No. 1 also) that he had powdered the substance on the sandal grinding stone first, i.e., before powdering it on the vegetable cutter. In consequence of this information, a further search (Exhibit H) was made at 7 P. M. that night not in the presence of the Magistrate and the grinding stone was found concealed under a mat in the house. Prosecution witness No. 13 who signed Exhibit H says that there was white mark on one part of the circumference of the stone when it was found. This was sent to the Chemical Examiner as No. 7 and the washings show traces of mercury. The second accused denied all knowledge of the vegetable cutter and says the pestle

and grinding stone had soap-nut paste on them. The searches were conducted in the presence of several persons, one is dead and one has been called as prosecution witness, No. 13. The deceased's younger brother, prosecution witness No. 12, says there was some dispute over money between the deceased and Anantha Pillai, the first of these persons to sign the search lists who has since died. He alleges nothing against prosecution witness No. 13 who was present at both the searches. It was attempted to be argued for the second accused that the discovery of mercury on these articles was not in consequence of information given within section 27, Evidence Act. I should be inclined to hold that these statements made in the presence of a Magistrate were confessions (section 26) but whether they are strictly so or not there can be no doubt that it was in consequence of these statements made by accused Nos. 1 and 2 that the three articles were found and subsequently the traces of mercury were discovered by the Chemical Examiner. The vegetable cutter was found in the cook-room, the pestle in the adjoining room and the grinding stone, as stated, under a mat in the north-west portion of the house. Now, it is said for the second accused, first, there could have been no white marks on the articles discovered. The Chemical Examiner says "brownish incrustations or stains." The answer to this is that the white powder, if fairly free, might have been shaken off in the course of handling; secondly, the second search is suspicious as the Magistrate was not there, and the substance containing the mercury might have been introduced by the Police. There seems hardly time or opportunity for this. The first search had been completed 1½ hours after the second accused, then in custody, gave information about the grinding stone, which apparently first accused knew nothing about, and the Police say they had no information then about it. If the mercury on the grinding stone is a concoction, it is curious it was not more thorough and the washing did not give positive traces of perchloride of mercury instead of only mercury. Further, "the scanty brownish incrustation" is similar to the "brownish stains" on the other two articles and it is not suggested that there was any tampering

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with these. Thirdly, and most strongly, it is argued that assuming the three articles did contain traces of mercury it is a common drug in every Indian household and the traces discovered may have had an innocent source. Mercury in various forms can apparently be obtained even in small villages; there is no evidence that it is usual or unusual to powder medicines on the foot-rest of a vegetable cutter with a pestle used, I presume, to pound rice or other articles of food. The evidence of prosecution witness No. 12 is that the grinding stone in question was used to grind soapnuts which, I assume, do not contain mercury. I understand that stones are used not only for grinding sandal but for various other things such as pepper. Now, this is an article of food and I do not think it probable that mercury or its compounds would have been powdered in the ordinary course on articles which are used in the preparation of food. It is true that no perchloride of mercury was found in the washings. There is no chemical evidence as to what happens to the chlorine in perchloride, whether it is volatile or disappears in any and what combinations or in water. The fact remains that traces of mercury, the base of perchloride of mercury were found on these articles seized in the house in which accused No. 2 was living.

If the articles had been recently used for powdering some other compound of mercury for the use of the inmates of the house, it could have been explained by the accused. There is no evidence that any of the inmates was ill or was taking preparations of mercury medicinally. All this could have been explained if the presence of the mercury on the articles was innocent. No attempt to do so was made, and I cannot resist the inference against the accused.

We have then, apart from Exhibit D, which I will deal with later, these facts which, in my opinion, tell against the second accused and have not been explained by him. (1) Intimacy between second accused and deceased's wife and consequent motive for the crime. (2) Presence of second accused near the shop when the poison was being bought. (3) Information by the first accused leading to the discovery of the two articles, *viz.*, vegetable cutter and pestle, in the house of the second accused which strengthens the inference of the

connection between first and second accused. (4) The information given by the second accused leading to the discovery of the grinding stone. (5) The discovery of traces of mercury the base of the poison proved to have killed the deceased on all the three articles.

I now pass to Exhibit D. It is a statement made by the first accused to the Village Munsif of the village where the administration of the poison took place, it is proved by the Village Munsif, prosecution witness No. 5 — was retracted in the Sessions Court. Two points, both legal, arise with regard to it. Is it a confession, and, if it is, can it be taken into consideration against second accused? The substance of Exhibit D is as follows. "Second accused took first accused aside, gave him a rupee and told him to give arrack to the deceased. Second accused took first accused to the former's house and handed a packet to him. He told him to put the contents of the packet into his brother's arrack when first accused asked if it was to kill the deceased. Second accused said it was only a purge. "I accordingly did so," *i.e.*, he took the packet from second accused, took the deceased to an arrack shop some distance away, where both first accused and deceased were unknown to the arrack seller, prosecution witness No. 2, and administered the powder in this arrack. First accused does not say in Exhibit D that he did not know that the powder was a poison or that he is innocent of killing the deceased or of any other offence or that he tried to dissuade the second accused from doing anything to his brother. Nobody could expect a confession to say, "I thereby committed a crime under section so and so of the Penal Code." The packet which the first accused received from the second accused contained poison which was administered to the deceased by the first accused according to the directions of the second accused. First accused is clearly guilty of murder unless this offence can be reduced by his want of knowledge or intention. He was charged with murder and Exhibit D is, in my opinion, clearly a confession, in that it states or suggests the inference that the second accused committed the crime with which he was charged.

The next question is, if, being a confession by the first accused, it can be taken into

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consideration against the second accused under section 30 of the Evidence Act. Both first and second accused were tried for the same offence, as abetment of an offence is included by virtue of the explanation to the section. Several cases were quoted by the Vakil for the second accused and I will briefly dealt with them.

The earliest case is reported as *Queen v. Mohesh Biswas* (6). It says that under section 30 the statement of fact which amounts to a confession of guilt may be taken into consideration only so far as that particular statement of fact itself extends against the other prisoners. Here the only use sought to be made of Exhibit D is to establish the connection between accused Nos. 1 and 2 by the giving and receiving of the packet of poison. In the same Volume, at page 67, [*Queen v. Belat Ali* (2)] it is laid down that the confession must implicate the person making it to the same extent as it implicates the person against whom it is to be used. In that case the confessors distinctly kept themselves out of all complicity in the actual facts charged against all the prisoners jointly. It seems to me that Exhibit D implicates the first accused at least as much as if not more than the second accused. Moreover, in *Queen Empress v. Nur Mahomed* (7) it was held that when two persons are accused of an offence of the same definition arising out of a single transaction the confession of the one may be used against the other though it inculcates himself through acts separable from those ascribed to his accomplice and, therefore, capable of constituting a separate offence from that of the accomplice (per West, J.). Again, in *Reg. v. Amrita Govinda* (8) it is laid down that the statement must be a confession in its inherent quality and not a statement as in that case of withdrawal before actual preparation of the crime. The case reported as *Queen v. Naga* (3) merely emphasises the infirmity of such confessions. In *Empress of India v. Ganraj* (4) the alleged confessions sought to be used against the other accused tried to fix the guilt on the others and to excuse the confessor. It was, therefore, held barred under the rule laid down in

Queen v. Belat Ali (2). The test of section 30 is to see if it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with the other person or persons against whom it is tendered.

There is no exculpatory statement in Exhibit D, which, if sufficiently corroborated, would be sufficient to convict accused No. 1 provided he knew the powder given to him was a poison likely to cause death. The case in *Empress of India v. Ganraj* (4) seems to be inapplicable to the present. *Queen Empress v. Jagrup* (1) lays down that a confession in the Evidence Act is not a mere inculpatory admission which falls short of an admission of guilt. In that case the confessor admitted he was present at the time of the crime but tried to prevent its commission. As stated above, in my opinion, Exhibit D is an admission of guilt.

Finally, in *Upendra Nath Das v. Emperor* (9) the confession sought to be used tried to make out that the confessor was almost an unconscious instrument in the hands of the other conspirators. As stated above, Exhibit D is a retracted confession and must be received with caution and used, if at all, only in so far as it is corroborated. At the same time it appears to me that Exhibit D complies with the requirements of section 30 of the Evidence Act and may be taken into consideration as against the second accused. This does not, of course, mean that it is enough to convict him, but taken along with the other corroborating circumstance, viz., the presence of the second accused at the time the poison was purchased, the possession of the poison by the first accused and its administration of it to the deceased who died in consequence, together with the further circumstances of the motive and the discovery of mercury on the three articles seized in the house of the second accused, I consider these facts establish the guilt of the latter beyond any reasonable doubt. The murder was deliberately planned and brought about by the second accused. I can find no extenuating circumstances whatever, and I would confirm the conviction and sentence on the second accused and dismiss his appeal.

(6) 19 W. R. Cr. 16; 10 B. L. R. 455 n.

(7) 8 B. 223; 4 Ind. Dec. (N. S.) 522.

(8) 10 B. H. C. R. 497.

(9) 46 Ind. Cas. 842; (1918) Pat. 175; 19 Cr. L. J. 826.

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By the Court.—We direct that the papers be placed before His Lordship the Chief Justice for orders.

(This case came on for hearing under section 378 of the Code of Criminal Procedure on the 12th and 16th of August 1921, before Oldfield, J.)

Mr. K. S. Jayarama Aiyar, for the Accused.

Mr. V. L. Ethiraj, for the Public Prosecutor, for the Crown.

JUDGMENT.—In this case it has been found that first accused bought a tumblerful of arrack of second prosecution witness and after mixing *Viram*, or corrosive sublimate, with it gave it to deceased, who was taken ill immediately and eventually died. First accused was charged with and convicted of murder and has been found guilty in this Court of administering an unwholesome drug with intent to cause hurt to deceased, an offence punishable under section 328 of the Indian Penal Code. The case comes before me in consequence of a difference of opinion as to second accused, who was charged with and convicted of abetting first accused.

The main evidence against second accused is an alleged confession by first accused, Exhibit D, and the first question is whether that confession is admissible at all. It is urged that it is not, because, in the words of one of the learned Judges before whom the case originally came, it does not satisfy the requirements of section 30 of the Indian Evidence Act inasmuch as it is a confession of guilt only of the lesser offence under section 328, not of the offence of murder, for which alone, it is said, second accused was being tried. With all respect, I cannot follow the reasoning involved. Section 30, no doubt, provides that the confession of one accused can be taken into consideration against another, only when they are being tried jointly for the same offence, the offence (as the explanation shows) including abetment or attempt. But it is not possible to hold that persons tried jointly for a major offence and eventually convicted of a minor offence, as first accused has been and second accused may be here, with reference to section 328 of the Criminal Procedure Code are not tried for the latter also. For, otherwise, their conviction of the latter,

which, it is not disputed, would be legitimate, would be had after no trial at all. The correct view is clearly that persons under trial for a major offence are also being charged with and tried for any minor offence or offences, constituted by the particular ingredients of the major offence which may be proved; and it can make no difference that the conviction of one accused of a minor offence takes place only in appeal, when the course of the proceedings has been, as in the present case, the same against them both.

No authority regarding the application of section 30 to cases in which a conviction of a minor, after trial for a major, offence is in question, has been cited; and it will serve no useful purpose, in view of the foregoing, to go in detail through the cases relied on before me and in the referring orders of the learned Judges, since they deal with issues which do not at present arise. For they support one or other of two distinct principles, of which neither is relevant to this case. Firstly, they are decisions, such as *Imperatrix v. Pilamber Jina* (10), that the accused are not being tried jointly for the same offence, when the offences charged against each and the ingredients thereof are different. Secondly, there are others, such as *Queen v. Belat Ali* (2) and *Empress of India v. Ganraj* (4), in which the so-called confessions did not implicate both accused concerned equally, because they were not really confessions at all, but were made to show that the deponents were not parties to the crime charged and to shift responsibility for it to the others tried with them. One case of this kind, *Kusir Bap v. Emperor* (5), has been particularly relied on, because the facts in it are said to be similar to those before me; the statement, the admissibility of which was disputed, having been made by one accused, who gave her husband poison, that she received it from another; but there was actually no admission by her of any offence; since, unlike first accused in the present case, she did not admit knowledge that what she administered would cause hurt or have any physical effect. In fact, these decisions merely require a strict interpretation of the references in section 30 to a joint trial "for the same offence" and a "confession"

(10) 2 B. 61; 1 Ind. Dec. (N. S.) 469.

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and do not affect the conclusions at present material that Exhibit D was, as its terms will show, a confession and that the two accused were tried jointly for the minor offence punishable under section 328, when they were so tried for the major offence of murder.

Before stating the terms of Exhibit D, I deal with the other objection to it that it was never really given by first accused or, if given, is entitled to no weight against second accused, because the former afterwards denied having given it. It is true that he did so before the Sessions Judge, who questioned him directly regarding it, and that before the Committing Magistrate, who did not do so, he admitted only having been drinking with deceased, but denied having put anything in his arrack and gave no explanation for its effect. But Exhibit D was taken by fifth prosecution witness the Monigar of the village, where the arrack shop, at which first accused and deceased were drinking is situated, and it is not suggested that he had any reason for creating evidence against either. The suggestion made by first accused at Sessions, that he may have desired to exculpate the shop-keeper, is unsupported and is not probable. Fourth prosecution witness, a man of some credit who attested Exhibit D, did not admit anything, which detracted from its weight. It no doubt is referred to in fifth prosecution witness's evidence only as a note of what first accused said and it was not sent with the first report, Exhibit E, but there is no reason for doubting that it is a correct record of the substance of what was said and what was given to the Police on their arrival. There is nothing improbable in first accused making such a statement, when he found the effect of the drug on deceased so much greater than he had expected. There is, in my opinion, no reasonable doubt that Exhibit D was given as it purports to have been. The objection that it was not given voluntarily is supported only by the suggestion that the words used by fifth prosecution witness in inviting first accused to give it must be taken with reference to the former's official position as holding out an inducement. They were according to fifth prosecution witness, who alone speaks to them, that first

accused should tell the truth and that to tell the truth was always good; and they involve no inducement, express or implied. In these circumstances, Exhibit D must be treated as admissible evidence to be taken, in the words of section 30, into consideration against second accused; and its weight is not, in my opinion, materially affected by the fact that first accused later denied having given it.

First accused in Exhibit D said that (1) he administered to deceased in arrack a drug which he had received from second accused (2) the drug was to make deceased purge in order that second accused, his brother, might carry him back to the family home, which, contrary to the former's wish, he had left. Exhibit D accordingly contains a full admission of first accused's liability under section 328; and the question is then of its effect against second accused when, as section 30 permits, it is taken into consideration against him. This portion of the section has been construed in many decisions. But their result, so far as it is definite, seems to be only what in the present case would be clear independently of them, that a conviction cannot be based exclusively on the testimony of a person, who cannot be cross-examined, if he is uncorroborated or corroborated only by an accomplice. No further general rule as to the extent or nature of the corroboration to be required emerges from the judgments, which naturally deal directly with the particular circumstances on each occasion before the Court; and it can, therefore, be said only that the corroboration must be on material particulars and taken with the confession must justify belief in the substantial truth of the latter.

Of the four headings of the prosecution evidence relied on for this purpose, the first that regarding motive, affords corroboration, both generally and with reference to first accused's account of the reason second accused gave him; and it, in my opinion, goes as far as is necessary in this direction. It is alleged that it establishes a liaison between the wife of deceased and second accused and that this explains the latter's desire to induce deceased, his brother, to return to the family house, which he had left about ten days earlier. The suggestion against de-

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ceased's wife may be true. But the evidence for it is indirect and in some respects defective; and it is, therefore, safer to reject it.

There is, however, no sufficient reason for doubting the evidence that second accused, as first accused said in Exhibit D, desired his brother's return and there is no improbability in his having hoped to compass it by bringing him back when he was ill and helpless. It is urged that this motive is disproportionate to the means employed; but the objection can be accepted only on the assumption, which is negatived by the judgments in the case of first accused, that the causing of more serious harm than a temporary physical disturbance was intended.

Next, there is the evidence of 7th prosecution witness who deals in medicines, that shortly before the date of the death he saw second accused outside his shop, when he was selling *Viram*, or corrosive sublimate, to third accused, who has been acquitted. There is no reason for doubting the independence of the witness or the truth of his evidence. There is, however, no corroboration, and it is argued further that second accused might have come to the village, the ordinary shopping-resort for the neighbourhood for his own purposes and his presence outside the witness's shop may have been a mere coincidence; and it is true that no actual conversation or other intercourse between him and third accused is alleged. But, on the other hand, he is referred to as standing only eight feet from 7th prosecution witness on the *koradu*, he has made no attempt to show on what other business he was there; and he did not call third accused, who was acquitted under section 289 (2), Criminal Procedure Code at the conclusion of the prosecution case and who could have supported his denial of any connection between them. It seems to me very probable that 7th prosecution witness's evidence is true. But it is merely consistent with the prosecution case and does not advance it appreciably on the material points, to which I now turn, second accused's possession of corrosive sublimate and his having given it to first accused.

The evidence as to possession is that in consequence of statements to the Police Sub-Inspector, 18th prosecution witness by first accused and afterwards by second accused, the latter's house was searched twice, a vegetable cutter and a pestle being found on

the first occasion and a grinding stone on the second, all these bearing, as analysis has shown, traces of mercury; and at the trial the statement of second accused just referred to, which no doubt is alleged to have been made in presence of the Sub-Magistrate, but was not separately recorded, was relied on as an admission of the identity of the mercury then found with that administered by second accused. As regards this statement, its details were no doubt elicited on second accused's behalf in cross-examination of 7th prosecution witness; but it must be conceded that the effect of what he said is not clear, and before me the attempt to argue from it was abandoned. The evidence regarding the finding of the grind stone has also been attacked; but it is unnecessary to consider whether the attack was successful, because the argument from the presence of mercury on the stone is similar to that relating to the vegetable cutter and pestle and adds nothing to it. As regards the mercury on the two last mentioned utensils, 13th prosecution witness, the Monigar, no doubt, said that the cutter was found in the room occupied by second accused's mother; 12th prosecution witness, however, a brother of deceased, and 2nd accused did not corroborate this; whilst 8th prosecution witness said it was taken from the kitchen; and, in any case, in view of the close quarters, at which those concerned lived, it does not seem to me that anything in second accused's favour follows if 13th prosecution witness's statement is accepted. Ramesam, J., in his judgment has laid stress on the fact that analysis revealed the presence only of mercury, not *Viram*, or corrosive sublimate. But it is not clear that analysis was directed towards distinguishing or could have distinguished between the two and it is a fair inference from the use of a pestle, that the solid *Viram*, corresponding with corrosive sublimate, not the liquid mercury, was in question. There seems to me no reasonable doubt that corrosive sublimate was, shortly before deceased's death, in second accused's possession; and, as he has adduced nothing to explain this or transfer responsibility to any other member of his family the inference must so far be against him.

There remains, however, the question, on the answer to which the decision must really turn, whether there is evidence to corroborate

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the allegation in Exhibit D that second accused gave the *Viram*, of which he was possessed, to first accused; and the answer must on the best consideration I can give, be that there is not. There is no direct corroborative evidence on the point: and in the circumstances of the case an inference from the proved possession of *Viram* by two men in succession to the identity of the *Viram* in question and its transfer from the one to the other would exclude reasonable doubt, only if *Viram* were so rare a substance and its possession by any particular individual so extraordinary, as to exclude the possibility of other explanations. But this is not established. It is true that accused has not attempted to prove actual possession of *Viram* for any innocent purpose by any inmate of his house and has not suggested any explanation of first accused's possession other than the latter alleged. But it is clear that *Viram* is really procurable and although 7th prosecution witness denies any sale for the last two years except to third accused, he presumably is not the only vendor in the neighbourhood. That the drug is a common medicine is shown by the quotation in the judgment of Ramesam, J., from Maclean's Manual, III, 845; and it is further, I believe, a cosmetic. It is accordingly impossible to hold that any special explanation need be required for its possession by either first or second accused or that there is evidence from which the giving of it by the latter to the former can be inferred.

In these circumstances, Exhibit D is uncorroborated in a material respect and second accused cannot be convicted on it. The case is one of suspicion and it must fail for want of essential evidence. The appeal of second accused must, therefore, be allowed and he must be acquitted and released.

V. N. V.

Accused No. 2 acquitted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1022 OF 1922.

February 15, 1923.

Present.—Mr. Justice Buckland.

January 24, 1923.

Present.—Mr. Justice Newbould and
Mr. Justice Suhrawardy.

PRIYANATH GUPTA—PETITIONER

versus

LALJHI CHOWKIDAR—OPPOSITE PARTY.

Penal Code (Act XL V of 1860), s. 506 - Criminal Intimidation—Self-constituted Court—Notice to appear—Ex parte decree to be passed on failure to appear—Offence.

Accused issued a notice, signed by himself as President of a self-constituted Arbitration Court, to complainant calling on him to appear on a certain date and answer a claim brought against him, failing which an *ex parte* decree would be passed against him:

Held, that the statement in the notice that a decree would be passed in the event of the complainant failing to appear as directed amounted to a threat to harm his person, reputation or property, and amounted to criminal intimidation punishable under section 506 of the Criminal Procedure Code. [p. 512, col. 2.]

Revision.

Babus Narendra Kumar Bose and Bimal Chandar Das Gupta, for the Petitioner.

Mr. J. W. Orr, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

Newbould, J.—The petitioner Priya Nath Gupta was convicted by the Sub-Divisional Magistrate of Manikganj of an offence punishable under section 506, Indian Penal Code, and sentenced to pay a fine of Rs. 200, or in default to undergo six months' simple imprisonment. This conviction and sentence were confirmed on appeal by the Sessions Judge of Dacca. The petitioner has obtained a Rule calling on the District Magistrate to show cause why the conviction and sentence should not be set aside on the following two grounds only:—

1. For that the facts proved and found cannot legally constitute the offence of criminal intimidation.

2. For that the prosecution having neither alleged nor adduced any evidence to show that any decree passed by the Arbitration Court was ever sought to be enforced against the will of the person against whom the same was passed by any means whatsoever, the Courts below should have held that an *ex parte* decree of the said Arbitration Court against the opposite party

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would be perfectly innocuous and that as such the possibility of such a decree could not constitute a threat of injury within the meaning of section 503, Indian Penal Code.

These two grounds are really one and the same, the second ground setting out in detail the argument on which the first ground is based.

The following are the facts proved and found in this case. The petitioner is the President of what is known as the Arbitration Court of Gandhi Maharajke Court at Manikganj. A notice, Exhibit 1, partly printed and partly written, signed by the petitioner and issued under his authority as President of this Court was served on the complainant Laljhi, a village *chaukidar*. In this notice it is stated that one Gobin Bhar has filed a claim for Rs. 2,499 against Laljhi who is informed that he should appear before the Court and settle the claim. The notice concludes with the two following statements: "If the defendant do not answer the claim on the date fixed the claim will be decreed *ex parte* on the evidence of the plaintiff. No objections will be entertained after the passing of such an *ex parte* decree." Laljhi was frightened by this notice and consulted the *Panchayat* who reported the facts to the Magistrate.

Criminal intimidation, which is punishable under section 506, is defined in section 503, Indian Penal Code, as follows: "Whoever threatens another with any injury to his person, reputation or property with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat commits criminal intimidation."

The only question of any difficulty in this case is whether the concluding portion of Exhibit 1 was a threat of injury to the property of Laljhi. If it was such a threat, there can be no doubt that the criminal intent which is the other ingredient of the offence of criminal intimidation has been established. It is found as a fact that this notice did cause alarm to Laljhi. Such a result is a natural consequence of a threat which the person who threatened must be presumed to have intended. I

also hold that the inference has been rightly drawn that it was the intention of the petitioner to cause Laljhi to do an act which he was not legally bound to do, namely, to appear before the Arbitration Court, as the means of avoiding the execution of the threat (if it is held to be a threat) that an *ex parte* decree would be passed against him. On a full consideration I hold that the lower Courts were right in deciding that the statement that a claim for Rs. 2,499 would be decreed *ex parte* against Laljhi if he did not answer the claim on the date fixed, amounted to a threat of injury to his property. The learned Sessions Judge has compared the petitioner's action to that of a bully who threatens to shoot a person though he has no license to carry fire-arms. To my mind, a better comparison would be that of a person who holds an unloaded pistol at the head of another. The fact that the pistol was unloaded would be no defence to a charge of criminal intimidation if the person threatened was ignorant of this fact. The use of the word 'decree' in the notice implies that an order passed by the Arbitration Court would be enforced. Though the Court had no legal power to enforce its decree, a person in the position of Laljhi would naturally fear that it would be enforced by illegal methods. I can see no force in the contention based on the fact that no *ex parte* decree of the Arbitration Court has ever been enforced. Evidence was taken about two months after the issue of the notice. The omission to take any action to enforce *ex parte* decrees during that period may have been due to this prosecution or other causes. It has not been shown that at the time the notice was issued Laljhi had reason to believe that no steps would be taken to enforce a so-called decree against him.

I would, therefore, hold that the facts proved and found legally constitute the offence of criminal intimidation and would discharge this Rule.

I regret that I am unable to agree with my learned brother. The case will be submitted to the Chief Justice for the appointment of another Judge under section 429 read with section 439, Criminal Procedure Code.

Suhrawardy, J.—The accused has been convicted in this case under section 506.

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Indian Penal Code, and sentenced to pay a fine of Rs. 200, in default six months' simple imprisonment. The charge against him is that as President of a self-constituted Arbitration Court, styled in the notice referred to hereafter as Manikganj Arbitration Assembly, the accused caused a notice to be issued over his signature to the complainant and thereby committed an offence under section 506, Indian Penal Code. The notice complained of states that a certain person (name given) has laid a claim against the complainant for Rs. 2,499; here follow details of the claim—before the Arbitration Assembly and as recourse to Court would be ruinous to both sides, he is requested to be present on a given date and arrange for amicable settlement. These words are in point. Then follow the words in manuscript which are said to be the offending words constituting criminal intimidation. They are "Be it known that if the defendant (meaning the complainant in this case) does not give an answer (or file written statement) on that date the suit will be decreed on that date on plaintiff's (i.e., accused's) proof. Afterwards no objection will be accepted."

The accused has obtained this Rule on the ground that the facts proved and found do not legally constitute the offence of criminal intimidation. The Crown does not appear to support the conviction but the Trial Magistrate has submitted a full explanation.

It, therefore, remained to be considered if the words in writing quoted above make out the offence of which the accused has been convicted for it is evident that the printed portion of the notice is wholly innocuous.

The charge framed is in these words:—"That you... caused a written notice to be served on one Laljhi *Chaukidar*, of Gheor and thereby caused him alarm for his property intending thereby to cause him to appear before you on a certain date and place which you had no right to do and which he was not legally bound to obey and thereby committed an offence punishable under section 506, &c." I think this charge is bad. Section 503, Indian Penal Code, defines criminal intimidation thus:—(I quote so much of the section as is necessary for our present purpose).

"whoever threatens another with any injury to his property.....with intent to cause alarm to that person or to cause that person to do which he is not legally bound to do, as the means of avoiding such threat, commits criminal intimidation."

It is clear from this definition that the elements constituting the offence are, first, threat of injury to the property of the complainant and, secondly, the intention to cause alarm, etc.

As to the first element, it is said by the learned Additional Sessions Judge who heard the appeal that the expression that if the complainant did not appear on the day fixed an *ex parte* decree will be passed against him is threat to his property. I am unable to agree in this view. Injury is defined in section 44, Indian Penal Code, as 'denoting any harm whatever illegally caused to any person... in property'. Hence the threat must be of causing harm to property. I cannot persuade myself that the threat to pass an *ex parte* decree for a certain sum by an unauthorised person or body is threat to property. This apparently strained construction of the plain wording of the law is sought to be vindicated by suggesting that the accused or the body to which he belongs might thereafter proceed to touch the complainant's property on the strength of that decree. This is mere conjecture. Had there been any evidence that the accused even proceeded against another's property under colour of a so-called decree, it might be urged—I do not decide, rightly—that the threat involved subsequent injury to property. The evidence is just the other way for P. W. No. 3, Ch. Mohun Majumdar, says:—"I have never seen any decree of the Arbitration Court being executed." As I read section 503, Indian Penal Code, the threat must be a direct threat to cause harm to a person in property and not by way of insinuation of possibility or even probability of such harm.

As regards the second ingredient of the offence, the accused is not charged with having the intention to cause alarm to the complainant, nor is there any such finding. The learned Additional Sessions Judge finds that the complainant, a person of ordinary intelligence and education was in

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fact frightened. This is not enough. The mental condition of the complainant does not determine the offence. It is the mental attitude of the accused or *mens rea* that ordinarily makes an act criminal. It may be said that the accused intended to cause the complainant to do an act which he was not legally bound to do, viz., to file an answer, but the threat must be to cause injury to property in the event of non-compliance.

For all these reasons, I hold that the conviction is bad and must be set aside and the accused acquitted.

On account of this difference of opinion the case was referred to Buckland, J., who delivered the following judgment:—

Buckland, J.—The petitioner Priyanath Gupta who was convicted by the Sub-Divisional Magistrate, Manikganj, of the offence of criminal intimidation and sentenced to pay a fine of Rs. 200 or in default to undergo six months' simple imprisonment appealed to the Sessions Judge of Dacca by whom the conviction and sentence were confirmed and has now obtained a Rule from this Court to show cause why the conviction and sentence should not be set aside. The case has been laid before me under sections 429/439 of the Code of Criminal Procedure.

The complainant is one Laljhi Koeri, a *Chawkidar*. There was served on him by a peon a document in the following terms:—

Notice for decision of suit. Before the (body of) Arbitrators at Manikganj, District Dacca.

Rd. U. C. Roy CIVIL SUIT No. 595 OF 1,328-29.
P. U. B. Claim laid at Rs. 2,499.
22-5-22.

To,

5 Lalji Koeri, father's name not known of Gheor Bazar Defendant.

Whereas the plaintiff Gobin Bhar, son of the late Jhiguri Bhar, of Pechar Kandarhat, Thana Gheor, has brought a suit against you on the allegation that the defendants Nos. 2 to 6 have kept, confined the plaintiff's married wife, Parbati and the other defendants are in collusion with them, that the plaintiff at the time of his going to Benares had entrusted the defendants with the charge of his shop and

that the defendants have misappropriated many articles of the said shop and has prayed for the recovery of possession of those articles and of his wife under the decision of Salisi Nispatti Mandali (Body of Arbitrators) at Manikganj and whereas if a case be brought in Court in respect of the said matters there is likelihood of a heavy loss being suffered by both the parties, you are hereby informed that you will appear before me at 10 A. M. on Thursday the 11th Jaistha next and make arrangements for an amicable settlement thereof otherwise you will be put to loss for nothing.

Be it mentioned here, that if the defendants do not put in an answer on the aforesaid date the suit will be decreed on the evidence of the plaintiff and no objection will be allowed thereafter.

Manikganj	File	Priyanath Gupta,
Salisi Bichar	"	President,
Mandal	(Initials)	Salisi Nispatti,
Rastriya Samiti.	23.6.	Mandali.

On the back.
List of property.

		Rs.
1.	Har Magan Bhadai Cash ..	64
2.	Taken by Gabari	500
3.	On account of ornaments, ..	30
4.	Mangal Karmakar Ghatak, ..	1,000
5.	Gold Mohur ..	30
6.	Gobind Bhar on account of shop	425
7.	Guru Prosad on account of shop ..	450
Total Rs.		2,499

Portions of this document are in print, the remainder is in manuscript, in particular the last paragraph from the words "Be it mentioned," to "allowed thereafter." The petitioner whose signature it bears is the President of what is known as the Salisi Nispatti Bichar Mandali at Manikganj, and the charge is that by causing it to be served upon the complainant he committed the offence of which he was convicted.

Two points have been argued upon the hearing of the Rule. The first is, that there is no evidence to support the findings of the lower Courts that the

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last paragraph in manuscript was there when the petitioner signed the notice as to which I am not prepared to hold that there is no evidence to support the inference which the lower Courts have drawn in this respect.

The other point which is more substantial is that this notice cannot constitute the offence charged.

Excluding immaterial portions of the section criminal intimidation is defined as follows:—"Whoever threatens another with any injury to his person, reputation or property.....with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do....as the means of avoiding the execution of such threat commits criminal intimidation."

That the notice in question conforms in many respects to the forms used by Courts established by law does not admit of dispute. Expressions used are similar, the word "suit" is employed to specify the proceedings before this Tribunal which was self-constituted and had no legal sanction, and the complainant is required to put in an answer which he was not legally bound to do, as the means of avoiding that "the suit will be decreed on the evidence of the plaintiff" which fulfills the requirements of the section as regards intent.

The question then arises whether that which according to the notice the complainant could so avoid was injury threatened to his person, reputation or property. That a decree of a Civil Court harms an individual against whom it is made in his person, reputation or property is a proposition which was not controverted when I put the question to the learned Vakīl for the applicant in the course of argument and, in my opinion, he rightly accepted it as correct, though it might be more strictly accurate to say that the harm is caused by the probable legal consequences of a decree. Consequently, a threat of a decree is a threat of harm to an individual in his person, reputation or property.

But it is submitted that this notice cannot be construed as a threat of such harm as the tribunal was incompetent to execute its decree. That, in my judgment, is immaterial. The section says nothing about the capacity of the person making the threat

to carry it into execution. Were such capacity essential the threat implied in the presentation of an unloaded pistol at the head of another would not further the commission of the offence of criminal intimidation unless the act was accompanied by threatening words, which would reduce the section to an absurdity. Nor does the section say anything about the effect upon the person threatened, and whether or not the complainant knew that the notice was innocuous is equally immaterial.

Looking at the notice as a whole, the only inference to be drawn is that it was the intention of the petitioner to cause the complainant to think or believe that unless he did what the notice required him to do a decree as ordinarily understood would be passed against him and he would become liable to those penalties which are the sanctions for decrees made by Courts of justice duly constituted by law. No other intention can be attributed to the use of the forms of expression and words employed. The petitioner, therefore, threatened the complainant with harm in his person, reputation or property by threatening him with a decree. Under section 44 of the Indian Penal Code injury denotes harm illegally caused. By no legal process or means could this Tribunal make or give effect to such decree as it was the intention of the notice to cause the complainant to believe would be made if he failed to comply with it. Therefore, in that the petitioner threatened the complainant with such decree he threatened the complainant with harm to be caused illegally.

Upon the facts found by the lower Courts I hold that the petitioner committed the offence of criminal intimidation. The conviction and sentence are affirmed, and the Rule is discharged.

W. C. A.

Rule discharged.

INDER SINGH v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 421 OF 1922.

June 27, 1922.

Present.—Mr. Justice Abdul Qadir.

INDER SINGH AND OTHERS—

CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 34, 326—
Assault with deadly weapons—Offence—Common
intention.*

In a quarrel over a turn of water, four persons armed with *chhavis* made an assault upon another man in which injuries were caused to the latter resulting in his death. Out of all the injuries, there was only one that was fatal and it was uncertain by whom the same had been caused. The assailants were convicted under section 326 of the Penal Code read with section 34 of the Code and given equal punishment. On appeal:

Held, that considering the nature of the assault and the nature of the weapons used, it could not be said with regard to any one of the accused that he did not intend to cause serious injuries and that section 34 of the Penal Code had rightly been applied in the case.

Appeal from an order of the Additional Sessions Judge, Lahore, dated the 29th April 1922.

Pandit Sheo Narain, R. B., and Lala Narinjan Das, for the Appellants.

Mr. Zafrullah Khan, for the Respondent.

JUDGMENT.—Inder Singh, Tek Singh, Waryam Singh and Arjan Singh have been convicted under section 326, Indian Penal Code, read with section 34, Indian Penal Code, and have been sentenced to ten years' rigorous imprisonment each by the Additional Sessions Judge, Lahore. They have appealed against their convictions and sentences through Pandit Sheo Narain, whom I have heard, and I have also heard Mr. Zafrullah Khan for the Crown.

On the 29th October 1921 there was a quarrel, between the party of the appellants on the one hand and of Sudh Singh deceased on the other, over a turn of water. The turn of the appellants was to finish at 1 P.M. and that of Sudh Singh was to begin. Sudh Singh and his sons and some others went to take their turn and began to cut off the water that was flowing into the field of the appellants.

The latter resisted saying that one of their fields remained yet to be watered

and that they would allow the other party its turn after watering that field. Thereupon a quarrel ensued, in which injuries were caused to Sudh Singh, father of Kundan Singh, and, as a result of those injuries, Sudh Singh died in hospital on the 3rd November 1921. The six persons were then committed to the Sessions for trial under section 302, Indian Penal Code, read with section 149, Indian Penal Code. Two of them have been acquitted, because they were not said to have taken any part in the beating of Sudh Singh and had only beaten Kundan Singh, but there was no separate charge framed against them under section 323, Indian Penal Code. The charges of the remaining four persons were altered by the learned Sessions Judge to those under section 326-34, Indian Penal Code as he took the view that the case was not one of murder but was either one of culpable homicide or fell under section 326, Indian Penal Code, and as he thought the culprits could be punished as heavily under section 326, Indian Penal Code, as under section 304, part II, he thought it safer to convict them under the former section, because the evidence showed that it was uncertain who had struck the fatal blow.

According to the evidence of the Assistant Surgeon (P. W. No. 1), no less than eight injuries were found on the body of the deceased, of which four were caused by some sharp edged weapon, and others by a blunt weapon. The most dangerous injury of these was an incised gaping wound 1½ inches by ¾ inch about the middle of the head. The bone underneath it was cut and the membrane and the brain were lacerated. There was a compound fracture under this wound. Kundan Singh (P. W. No. 3), his brother Kehr Singh (P. W. No. 8) and Jaimal Singh (P. W. No. 9) give direct evidence as to the occurrence and name the four appellants as the persons who assaulted the deceased with *chhavis*. The main contentions of Pandit Sheo Narain on behalf of the defence are the following:—

(1) That the fight was probably due to a misunderstanding and being a sudden and unpremeditated fight a lenient view of the case should have been taken;

(2) The party of the appellants were entitled to resist the taking of water by

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the other side and have done nothing more than executing the right of self-defence.

(3) Arjan Singh, appellant should have been given the benefit of the doubt because of the material difference between the version in the first report and the version given by the deceased in the statement made by him on the 31st October 1921;

(4), All the appellants should not have been awarded the same amount of punishment because three of them who admittedly did not strike the deceased on the head did not deserve to receive the same punishment as those who were alleged to have struck him on the head.

I have considered all the above contentions along with the arguments addressed to me respecting them, but I think this appeal must fail. With regard to point No. 1 Pandit Sheo Narain says that admittedly the clock, which the parties used to consult for ascertaining time, was not available on the day in question, as the shop where the clock used to be was closed. He adds that probably what happened was that the party of the prosecution got to the spot earlier than the proper hour and wanted to take water before the time of the appellants' was up, or at least the appellants thought so. This, however, does not appear to be correct, because Kundan Singh deposes clearly that though the shop was shut, they sat outside the shop and started off for their fields only when they had heard the clock strike one. Therefore, while the quarrel appears to be a sudden and unpremeditated one, yet the fact of the shop in which the clock is placed, having been closed that day, cannot help the appellants in any way.

As regards point No. 2; in view of the opinion expressed by me above, it can hardly be argued that the appellants were within their rights in resisting the cutting off water by the party of Sudh Singh. There was no right of self defence and there is no question as to the exercise of that right or the exceeding of that right.

Point No. 3 is, however, arguable. It is stated in the first report that Arjan Singh gave the first blow on the head of the deceased and Inder Singh gave the second blow on the head and Waryam Singh and Tek Singh struck the deceased

when he fell down. According to the statement of the deceased, dated the 31st October 1921, which was made before Khan, Bahadur Sher Baz Khan, Honorary Magistrate, and which is duly proved by him, it was Inder Singh, who struck the first blow on the head, and Tek Singh who gave another blow on the head, and it was Kishen Singh, brother of Arjan Singh, who is mentioned along with Waryam Singh as joining the assault. Pandit Sheo Narain lays great stress on this discrepancy between the first information report and the dying declaration, and argues that Arjan Singh deserves an acquittal on the ground that the deceased does not mention him as his assailant. This point has been duly considered by the learned Sessions Judge and he has come to the conclusion that the first report is entitled to much greater weight than the statement of the deceased. The report was made by Kundan Singh who was himself present and injured. He, therefore, knew all about the affair. The parties were well known to one another as they are related collaterally, and it is not likely, in such circumstances, that Kundan Singh would mistake Arjan Singh for Kishen Singh, when describing an offence committed in broad daylight. On the other hand, a confusion can possibly arise as to which of the two brothers Kishen Singh or Arjan Singh took part in the fight, when the injured man began to give his version after having received a serious injury to his head and having been unconscious for some time. The Sessions Judge has come to the conclusion that the name of Kishen Singh is given by mistake by the deceased in his statement and it was probably Arjan Singh who was in the mind of the deceased when he mentioned Kishen Singh. I think this is a reasonable view of the case and as Kundan Singh is not the only man who names Arjan Singh, but is supported by the other eye-witnesses, I agree with the learned Sessions Judge in holding that Arjan Singh was the man present in the fight and not Kishen Singh, and that, in this respect, the first report is certainly more worthy of reliance than the statement of the deceased.

Coming to the last point, I think the decision of the Court below is correct, so far as the giving of equal punishment to

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all the four men is concerned. As has been seen from a comparison of the version as given in the first report and the version in the dying declaration, it is difficult to say who struck the fatal blow. It may have been Arjan Singh or it may have been Inder Singh and, if the dying declaration is to be accepted, even Tek Singh is mentioned as giving a blow on the head. There are only two blows on the head and it is only one of them which is serious. Under such circumstances, it is not possible to hold definitely about any one of these four individuals that he caused the particular blow. If it was possible to decide that definitely, there would be reasons for giving the man responsible for that blow a heavier sentence than that awarded to his companions; but the state of things that has been found here is, that all the four appellants are said to have been armed with sticks to which they fixed *chhavi* blades when they began this assault, and, no matter what part of the body any of them struck, they all seem to have joined the assault armed with their deadly weapons and, considering the nature of the assault and the nature of the weapons, I do not think it can be said with regard to any one of them that he did not mean to cause serious injuries. There is very little to differentiate between them, and section 34, Indian Penal Code, makes them equally responsible in such cases. I think each one of them has been rightly given the same sentence.

It is contended that the sentence is a severe one, but I do not agree with this argument and hold that the sentences though deterrent, appear to be fully justified by the circumstances of this case. I, therefore, dismiss the appeal of all the four appellants and maintain their convictions and sentences.

It may be added that Kunda Singh has filed an application for revision, praying that the sentences of the appellants should be enhanced and urging that the Court was not right in convicting them under section 326, Indian Penal Code, instead of convicting them under section 304, Indian Penal Code. I have explained above the reason why the Trial Court has pre-

ferred the use of section 326, Indian Penal Code, instead of section 304, Indian Penal Code, and I do not think any material difference is made to the case by the adoption of this course by the learned Sessions Judge. Taking all the circumstances into consideration, I do not see any sufficient reason for enhancing the sentences or for altering the section applied. The revision is, therefore, rejected.

Z. K.

*Appeal dismissed;
Revision rejected.*

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 1493 OF 1922.

January 8, 1923.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Ramesam.

CHOLANCHERI AYAMMAD AND OTHERS
—APPELLANTS—PRISONERS.

Evidence Act (I of 1872), s. 57. (7)—Signature of Chief Secretary to Government, judicial notice of—Criminal Procedure Code (Act V of 1898), s. 428—Appeal—Additional evidence.

Under section 57 (7) of the Evidence Act, a Court can take judicial notice of the signature of the Chief Secretary to Government just as of his accession to office, name, title and functions and the genuineness of his signature is not a matter which, unless the Court deems it necessary, need be proved. [p. 516, col. 2.]

Where there is no doubt as to the fact of a particular gentleman's appointment as Chief Secretary and its notification in the *Gazette*, the exhibition of a copy of the *Gazette* is not a necessary legal preliminary to the Court taking judicial notice of the genuineness of his signature.

It is open to an Appellate Court under section 428 of the Criminal Procedure Code to admit a document as additional evidence to cure a formal defect. [p. 516, col. 2.]

Observations of the Chief Justice in *Varadavajulu Naidu v. Emperor*, 51 Ind. Cas. 343; 42 M. 885; 20 Cr. L. J. 455; 37 M. L. J. 81; (1919) M. W. N. 669, followed.

Appeal against an order of the Court of the Special Judge, Malabar, in S. J. C. No. 151 of 1922.

Messrs. V. L. Ethiraj, and C. Shridharan for the Appellants.

The Public Prosecutor, Mr. J. C. Adam, for the Crown.

JUDGMENT.—The nine appellants in this case have been convicted of an offence under section 12, Indian Penal Code, and sentenced to transportation for life. They are said to have formed part of

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a body of some 3,000 Moplahs who marched on Tirurangadi Cutcherry on 20th August 1921. A small body of Police under two European Officers endeavoured to bring them to a stand and the two Officers with two Head Constables advanced to parley with the Moplahs. They were treacherously surrounded and murdered by the vanguard of the Moplahs consisting of about 1,000 armed men including the present appellants and the small Police force was driven to retreat. This was the encounter which inaugurated the Moplah Rebellion and there can be no doubt that if the evidence is accepted, all those who took part in the attack on the Police were guilty of an offence under section 121, Indian Penal Code (waging war against the King.)

A preliminary objection was taken by Mr. V. L. Ethiraj on behalf of the appellants that the sanction order (Exhibit A) required by section 196, Criminal Procedure Code, has not been properly proved. The order purports to be signed by Mr. R. A. Graham as Chief Secretary to Government and it is argued that the genuineness of his signature should be proved by evidence. It appears to have been the custom in cases of this nature to examine a witness to speak to the genuineness of the Chief Secretary's signature, but the learned Public Prosecutor points out (and in our opinion rightly) that under section 57 (7) of the Evidence Act, the Court can take judicial notice of this officer's signature just as of his accession to office, name, title and functions and the genuineness of his signature is not a matter which, unless the Court deems it necessary, need be proved.

To this Mr. Ethiraj replies with reference to the closing words of clause (7) that its applicability is contingent on the exhibition of a copy of the *Fort Saint George Gazette* containing a notification of Mr. Graham's appointment as Chief Secretary.

We do not think that this is the intention of the section. All that appears to be meant is to limit the application of the clause to what is known as "Gazetted Officers" that is, officers whose appointments are notified in the *Gazette of India* or *Local Government Gazette*. Of course, if there is any question or doubt as to whether the officer of whose signature, accession to office,

name, title or functions the Court is asked to take judicial notice falls in this category, it would be the duty of the Court to satisfy itself on the point by the best evidence available. But whereas in the present case, no doubt has ever been raised as to the fact of Mr. Graham's appointment and its notification in the *Fort Saint George Gazette*, we do not think that the exhibition of a copy of the latter was a necessary legal preliminary to the Court taking judicial notice of the genuineness of his signature.

We may add that our attention has been drawn in Court to a notification in the *Fort Saint George Gazette* of 25th April 1922; (nearly a month before the date of Exhibit A) appointing Mr. Graham as Chief Secretary to Government and that if we had held that the exhibition of the *Gazette* containing this notification, were necessary, we should have admitted it under section 428, Criminal Procedure Code, to cure the defect. As authority for such a course, we are content to rely on the observations of the learned Chief Justice in *Varadarajulu Naidu v. Emperor* (1).

Passing to the merits of the case, the only question is, whether we can rely on the evidence adduced to show that the appellants formed part of the band which fell upon and butchered these four servants of the Crown. We have the evidence of four eye-witnesses (P. Ws. Nos. 1, 2, 3 and 4) who all agree that the officers were murdered by a band of about 100 persons armed with knives, swords, and sticks and that the appellants were among those 100 persons although they cannot speak to any individual action. P. Ws. Nos. 1, 2, and 3 are constables forming part of the small force who saw what occurred from a distance of twenty or thirty yards. P. W. No. 4 is an ameen peon who witnessed it from a verandah only three or four yards away. The occurrence was at mid-day and the appellants are persons well-known to all these witnesses so that there is no reason why they should not have noticed and recognised them and been able to speak with certainty to their identity.

(1) 51 Ind. Cas. 343; 42 M. 88; 20 Cr. L. J. 455; 37 M. L. J. 81; (1919) M. W. N. 669.

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There is corroborative evidence of two other witnesses, P. Ws. Nos. 5 and 9, who did not witness the actual encounter but depose to the presence of the appellants in the mob which gathered at Kizhakepalli and was harangued by the notorious Moplah leader Ali Musaliar, before proceeding to Tirurangadi. A third witness, P. W. No. 6, who gives similar evidence has not been relied on by the Special Judge and although we should not ourselves reject his evidence as without value, it is inferior to that of the others, and we may leave it out of consideration.

If P. W. Nos. 5 and 9 are speaking the truth, the direct evidence of P. Ws. Nos. 1 to 4 as to the participation of appellants in the crime is very powerfully corroborated whether we look to the possibility of a mistake or deliberate false testimony on the part of the latter. For there can be no doubt that it was the same assembly which Ali Musaliar harangued at Kizhakepalli which attacked the Poicle at Tirurangadi.

Endeavours have been made to discredit the testimony of both sets of witnesses on the score of private enmity as a motive for false testimony. The Special Judge has carefully dealt with this in his judgment and has, in our opinion, come to a right conclusion. Such prior feeling as has been established in evidence is limited to P. W. No. 2 and P. W. No. 9 who may be in a position to influence P. W. No. 5. P. Ws. Nos. 1, 3 and 4 are unaffected by it. No cause of ill-feeling of a really serious nature is elicited in the case P. W. No. 9 and although the alleged enmity in the case of P. W. No. 2 has its origin in a murder case of 1917, in which the latter's father-in-law was one of the accused, we agree with the Judge in thinking that it is hardly a likely cause for the malicious implication of the accused in this case.

The suggestion that accused have been falsely implicated merely as being notorious rebels concerned in other incidents of the Rebellion is too flimsy for serious consideration.

In our opinion the evidence of the above witnesses may be safely accepted.

We confirm the convictions and sentences and dismiss the appeal.

Appeal dismissed

V. N. V.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 484 of 1922.

October 2, 1922.

Present.—Mr. Justice Scott-Smith.

ILAHIA AND OTHERS—CONVICTS—

APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 397—“Such offender”, meaning of—Grievous hurt caused by one of several offenders—Others, whether liable to enhanced punishment.

The words “such offender” in section 397 of the Penal Code, refer to the offender who uses a deadly weapon or causes grievous hurt to any person, and do not include those who jointly commit robbery or dacoity with him. [p. 518, col. 2.]

Queen-Empress v. Santok Singh, A. W.N. (1898) 186, relied upon.

Queen-Empress v. Mahabir Tiwari, 21 A. 263; A. W.N. (1899) 76; 9 Ind. Dec. (N. S.) 876 and Crown v. Mohra, 16 P. R. 1901 Cr. dissented from.

Criminal appeal from an order of the Sessions Judge, Rawalpindi, dated the 12th May 1922.

Mr. K. J. Rustomji, for the Appellants.

The Public Prosecutor, for the Respondent.

JUDGMENT.—On the night between the 29th and 30th January 1922 a dacoity was committed in the house of Zaman Ali in Dhok Bangial in the Rawalpindi District. In the course of this dacoity one of Zaman Ali's ribs was broken with a blow by one of the dacoits. In connection with this seven persons were committed to take their trial before the Sessions Judge of Rawalpindi. Out of these he convicted six, *viz.*, Sain Bak, Mardana, Ilahia, Karm Ilahi, Bak and Fattah Khan, under section 395 read with section 397, Indian Penal Code. The 7th accused Dina was acquitted. In the First Information Report the names of three accused persons, Ilahia, Mardana and Dina, were given by Zaman Ali as having

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been identified. He, his wife *Musammât* Baggo, and Niaz Ali, his step-son, gave evidence at the trial that they had identified them. The Sessions Judge, however, was of opinion for reasons fully given by him in his judgment that it would not be safe in this case to convict any of the accused persons upon the uncorroborated evidence of the eye-witnesses. In regard to all the accused, except Dira, articles of property stolen in the dacoity were either found in their possession or in the possession of persons to whom they had handed them over. All the accused produced such articles from various places or gave information which led to their recovery. No property was found in the possession of Dina nor did he give any information which led to the recovery of any. Sain Bak, Ilahia and Karam Ilahi have filed a joint appeal through Mr. Rustomji, Advocate, and Mardana, Bak and Fattah Khan have appealed through the Jail Authorities. Bak, in view of the fact that he had three previous convictions against him, was sentenced to ten years' rigorous imprisonment; the other five appellants were sentenced to seven years' rigorous imprisonment each. The learned Sessions Judge found that it was not proved which of the appellants had given Zaman Ali the blow which fractured his rib, but he was of opinion, having regard to the decision of the Chief Court reported as *Crown v. Mohra* (1), that he could not pass a sentence of less than seven years' rigorous imprisonment upon any of the accused.

The judgment of the learned Sessions Judge is a very careful and elaborate one and deals in full detail with the various articles of property traced to each of the appellants. Mr. Rustomji in arguing the case for his clients has shown no reason whatever why I should reject any of the evidence as to identification of the property which has been accepted by the learned Sessions Judge and by the Assessors. In regard to the evidence of Sukhdial and Sant Singh, goldsmiths, he says that it is very easy to produce such evidence, but he gives no reason why these two witnesses should be regarded as unreliable. The appellants produced either no defence evidence at all or produced evidence of a worthless character

and the learned Advocate for the three appellants has not asked me to accept any of the defence evidence. In my opinion the decision of the learned Sessions Judge as regards the six persons whom he has convicted is fully warranted by the evidence detailed in his judgment.

In *Crown v. Mohra* (1) it was certainly held that all persons taking part in a robbery or dacoity are liable to the minimum sentence laid down in section 397 if grievous hurt is caused by only one of them. In that case the Judges referred to *Queen-Empress v. Mahabir Tiwari* (2), but that ruling was specially dissented from in *Queen-Empress v. Santok Singh* (3) reported in Weekly Notes, N. W. P. of 1899 at page 186. The Madras High Court has taken a similar view. I am not aware of any reported cases of the Punjab Chief Court or of the High Court in which the view expressed in *Crown v. Mohra* (1) has been dissented from, but it is a fact that that view is not now-a-days followed in this Court and I do not agree with it. I fully concur in the reasoning of the Division Bench of the Allahabad High Court reported as *Queen-Empress v. Santok Singh* (3). In my opinion the words "such offender" in section 397 clearly refer to the offender who uses a deadly weapon or causes grievous hurt to any person and not to those who jointly commit robbery or dacoity with him. The learned Sessions Judge has expressed his opinion that the dacoity was not of a bad type and has stated that had he not been bound to convict under sections 395 and 397, Indian Penal Code, he would not have given the accused, other than Bak, such a severe sentence as seven years' rigorous imprisonment. As regards Bak, having regard to his previous record, I consider that the sentence of ten years' rigorous imprisonment is appropriate and I dismiss his appeal. As regards the other five appellants, I think the sentence of seven years' rigorous imprisonment is somewhat excessive. I agree with the learned Sessions Judge that the dacoity was not of a bad type. No great violence was used to the inmates of Zaman Ali's house and only one blow

(2) 21 A. 263; A. W. N. (1899) 76; 9 Ind. Dec. (N. S.) 876.

(3) A. W. N. (1898) 186.

(1) 16 P. R. 1901 Cr.

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was struck by one of the dacoits which fractured one of Zaman Ali's ribs. I, therefore, accept the appeals of Sain Bak, Mardana, Ilahia, Karam Ilahi and Fattah Khan and reduce their sentences to ones of five years' rigorous imprisonment in each case.

Z. K.

Sentences reduced.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 413 OF 1922.

July 31, 1922.

Present.—Mr. Justice Jwala Prasad and Mr. Justice Coutts.

JIWAN RAUT AND OTHERS—PETITIONERS
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898); s. 423—Appellate Court, duty of—Evidence, consideration of.

The Court of a Sessions Judge is the final Court on facts, and it is incumbent on a Sessions Judge in appeal to go into the evidence and to refer to it in such a manner as to show that he has applied his mind intelligently and carefully to the consideration of the evidence. [p. 519, col. 2.]

In a case of riot where a conflicting account of the occurrence is given by the prosecution and the defence and each party asserts that the opposite party was the aggressor, the Sessions Judge, in appeal, is bound to examine the evidence carefully so as to show that he is fully convinced on a consideration of the *pros* and *cons* of the case and the criticisms advanced on behalf of the defence that the account given by the prosecution is true and that the accused were the aggressors. [p. 519, col. 2.]

Messrs. S. P. Varma and P. C. Rai, for the Petitioners.

Assistant Government Advocate, for the Crown.

JUDGMENT.

Jwala Prasad, J.—We have carefully considered the judgments of the Courts below. The Appellate Court judgment does not afford much assistance in disposing of this application. Reading the judgment of the learned Sessions Judge one cannot

feel satisfied that he examined the evidence in the case. His was the final Court on facts and it was incumbent on his part to go into the evidence and to refer to it in such a manner as might strike us that he had applied his mind intelligently and carefully to the consideration of the evidence in the case. The case was not an ordinary riot case. An occurrence admittedly did take place. The question was—which account of the occurrence is true—that given by the prosecution or the one given by the defence. The Magistrate who tried the case had in his judgment given indications that in some of the material parts of the case of the prosecution the evidence was unsatisfactory and unreliable. He had held that the motive alleged on behalf of the prosecution for such a serious riot was not proved. He also held that the loot alleged by the prosecution of the crop stored in the *khalikan* also did not take place. He went further and held that the number of the rioters was greatly exaggerated. He had adversely criticised most of the witnesses on behalf of the prosecution. There were injuries on both sides four on the prosecution side and three on the defence side. There was a free fight. In these circumstances, the learned Sessions Judge was bound to examine the evidence carefully so as to show that he was fully convinced upon the consideration of the *pros* and *cons* of the case and the criticisms advanced on behalf of the defence, that the account given by the prosecution was true and that the accused were the aggressors. This he has not done, and on the whole we are satisfied that the case is one in which we should not affirm the conviction.

Now, the Trial Court's judgment is, to say the least of it, a most confused one. It did not consider the individual case of the accused. Under section 148, Indian Penal Code, an accused can only be convicted if he in committing the riot is armed with a deadly weapon. The point does not seem to have struck the Trial Court. It does not seem to appreciate the distinction between sections 148 and 149, Indian Penal Code. In the charge the Trial Court mentioned 148/149. This is an incongruous and impossible charge. Again, as

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observed above, the Trial Court did not find that the accused really committed the offence under section 148, Indian Penal Code, by being present in the mob armed with deadly weapons. Therefore, the learned Assistant Government Advocate is right in conceding that the charge as framed cannot stand and that the accused could, if at all, have been convicted under section 147, Indian Penal Code. The learned Sessions Judge also does not seem to have considered whether and how the charge under section 148, Indian Penal Code, was established.

Considering the facts and circumstances of the case, we set aside the conviction and the sentence passed upon the accused. The fine, if already paid, should be refunded.

Coutts, J.—I agree.

Z. K.

Rule made absolute.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 573 OF 1922.

October 5, 1922.

Present:—Mr. Justice Scott-Smith.

MUHAMMAD AKBAR—CONVICT—

APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 99, 100—Right of private defence, extent of.

Under section 100 of the Penal Code, the right of private defence of the body extends, subject to the restrictions contained in section 99 of the Code, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is such an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault. [p. 521, col. 1.]

Accused, with three companions, who were unarmed, was proceeding to a threshing floor in order to claim a share of certain produce to which he alleged, he was entitled. On the way they met the deceased who asked them to stop. They did so. The deceased rushed to his house and returning with a *dang* struck a blow on the head of the accused. The accused retaliated by striking a blow at the head of the deceased which killed him;

Held, that the accused had acted in the exercise of the right of private defence of the body and was

entitled to the benefit of section 100 of the Penal Code, and that it was immaterial that he intended to proceed to the threshing floor and enforce his right to a share of the produce. [p. 521, col. 2.]

Appeal from the order of the Sessions Judge, Mianwali, dated the 15th June 1922.

Mr. *Devi Dayal*, for the Appellant.

Public Prosecutor, for the Respondent.

JUDGMENT.—Muhammad Akbar has been convicted by the Sessions Judge of Mianwali of the culpable homicide not amounting to murder of Rohtas by striking him a single blow on the head with a *wahola*. Various discrepant accounts of what actually occurred have been given in the first information report and by the witnesses for the prosecution and these are set forth in detail by the learned Sessions Judge in his judgment. The Judge agreeing with the Assessors has accepted the version given by Nawaz Khan, P. W. No. 7. According to him there was a dispute between Muhammad Akbar and his relations on the one side and Rohtas and his relations on the other as to the produce of a certain piece of land, and it appears that on the day of the occurrence Muhammad Akbar, along with his father, uncle and cousin, was proceeding to the threshing floor of Khalil Khan in order to get the half share of the produce claimed by them. Muhammad Akbar had in his hand a *wahola* such as *zemindars*, according to Nawaz Khan, usually carry with them when they are winnowing their crops. The other three men with him had no weapons. Rohtas was having a bath in a *khola* and seeing them came out. He had only a loin cloth on him and told Muhammad Akbar to stop. He then went back to his house and Nawaz Khan, fearing that there would be a fight, told his mother to shut him inside the house. This she did, but in spite of it he came out with a *dang* and when Nawaz Khan tried to stop him he got past him and struck a blow on the head of Muhammad Akbar with the *dang*. Muhammad Akbar had a *chadar* tied on his head as protection against the sun and the blow glanced off his head and fell on his shoulder. That he did receive a blow of this sort is supported by the Medical evidence. Muhammad Akbar retaliated by striking Rohtas on the head with the *wahola* which he was carrying.

MAUNG TUN AUNG GYAW, in the matter of.

This blow fractured Rohtas' skull and resulted in his death.

The Sessions Judge is of opinion that the appellant could not plead that he was acting in the exercise of his right of private defence because he, accompanied by his relations, had gone to the threshing floor with the intention of enforcing his right to a share in the produce. At the same time, the Judge admits that nothing would have happened had not Rohtas been so excited and rushed out of his house and attacked Muhammad Akbar. Now, according to Nawaz Khan, the appellant and his relations were proceeding to the threshing floor when the witness told them not to do so and they stopped. It does not appear that their attitude was in any way aggressive when Rohtas rushed out and without being attacked or threatened in any way struck a blow on Muhammad Akbar's head with a *dang*. Rohtas was evidently in a violent rage at the time, and I cannot agree with the learned Sessions Judge that Muhammad Akbar was not entitled to defend himself against such an attack, simply because he and his companions had gone to get the share of the produce to which they thought they were entitled. The case would have been different had Muhammad Akbar's companions also been armed and had their attitude shown that they intended to take the share of produce by force if necessary. According to section 100, Indian Penal Code, the right of private defence of the body extends under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be such an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault. Now, having regard to the evidence of Nawaz Khan, I have no doubt at all that the assault committed by Rohtas was such as might reasonably cause to Muhammad Akbar the apprehension that death or grievous hurt would result to him if he did not strike Rohtas. He used the weapon which he had in his hand at the time and I see no reason to suppose that he took the *waholr* with him in order to use it as a weapon of offence. He only struck one blow which unfortunately

resulted in the death of Rohtas. In my opinion, he is clearly entitled to the benefit of section 100 and I, therefore, accept the appeal set aside the conviction and sentence and acquit him and order that he be released from custody.

Z. K.

Appeal accepted.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 5,
OF 1921.

May 12, 1921.

Present:—Mr. Justice Maung Kin and
Mr. Justice Duckworth.

In the matter of, MAUNG TUN AUNG
GYAW, THIRD GRADE PLEADER OF
NGATHAINGGYAUNG, BASSIEN DISTRICT—
APPLICANT.

Legal Practitioners Act (XVIII of 1879), s. 14—Misconduct—Inquiry—Jurisdiction—"Such Court," meaning of.

Under section 14 of the Legal Practitioners Act, any Court in which a Pleader practises is competent to enquire into a charge of misconduct made against him. [p. 523, col. 1.]

The expression "such Court" in that section means the Court in which the Pleader practises, and not necessarily the Court in which the Pleader commits the offence charged against him. [p. 523, col. 1.]

In the matter of Radha Churn Chuckerbutty, 10 C. W. N. 1059; 4 C. L. J. 229; 4 L. J. 160 dissented from.

In the matter of the petition of Ganga Dayal, 4 A. 375; A. W. N. (1882) 67; 2 Ind. Dec. (N. S.) 980 and *In the matter of Bahu Het Ram*, 188 P. L. R. 1901, referred to.

Mr. Surty, for the Applicant.

JUDGMENT.—Maung Tun Aung Gyaw is a Pleader of the third grade practising at Ngathainggyaung. He has been charged by this Court (1) with removing a record containing Police diaries, Police papers and the Station-House Officer's confidential instructions to the Court Prosecutor, and (2) with having taken copies of the Police record from his dictation without having previously obtained permission from the Presiding Officer of the Court in which the record was.

The Police sent up one Maung Sein Hmon to the Court of the Township Magistrate, Ngathainggyaung, to stand his trial under sec-

MAUNG TUN AUNG GYAW *in the matter of.*

tion 420, Indian Penal Code. The Magistrate transferred the case to the Court of the Additional Magistrate. That Magistrate thought he should not try the case as he was related to the accused and passed orders for the record to be sent to the Court of the Sub-Divisional Magistrate for orders on the point raised. The Clerk of the Court then got the record and the Police file stitched together to be sent under cover to the Sub-Divisional Magistrate. He had not put it under cover, when he had to go to the Additional Magistrate. In his absence the Pleader is alleged to have removed the record to some other table and there read out the contents of the Police record to Maung Sein Hmon who took down what was read to him.

A report was made to the Township Magistrate of Ngathainggyaung of the conduct of the Pleader. The Magistrate then made a preliminary enquiry examining all the witnesses named, with the result that charges were framed as aforesaid against the Pleader, and he was called upon to show cause why his conduct should not be reported to this Court. This order was passed on the 15th November 1920 and served on the Pleader on the same date. The date fixed on which the charges were to be taken into consideration was the 3rd of December 1920. On the 2nd of December the Pleader filed his explanation in writing, in which he said he had notes made by Maung Sein Hmon of the date of the First Information Report and as to who the witnesses were, but that he did not look at any confidential letter on the Police record and did not know whether there was such a document on it. He further stated that he did not take away the record from the clerk's table, and that the notes were made only at that table. On the day fixed for the consideration of the charges, he did not appear before the Court. It is perfectly clear that there were witnesses present ready to be examined, but, as the Pleader did not appear, the Magistrate considered that it was not necessary to record the evidence *ex parte* because the result would be a mere repetition of what had been done before, and he proceeded to write his report to this Court, recommending that the Pleader be dismissed. The District Magistrate also

recommends the same punishment, but the Sessions Judge recommends that the Pleader be suspended from practice for a period of two years.

The Pleader has now appeared before this Court to show cause. His Pleader, Mr. Surty, contends that the Township Magistrate was not competent to enquire into the charges because they were not committed in his Court but in that of the Additional Magistrate; secondly, that his client had not been given 15 days' notice of the hearing of the charges; and, thirdly, that the Township Magistrate did not, on the day fixed for the hearing, record any evidence in support of the charges. These contentions are made under section 14 of the Legal Practitioners Act and Mr. Surty submits that any one of them is sufficient to vitiate the Township Magistrate's proceedings.

In support of the first contention Mr. Surty cites the case of *In the matter of Radha Churn Chuckerbutty* (1) in which Mitra and Holmwood, JJ., held that the improper conduct, if any, of the Pleaders related to suits then pending in the Court of the Munsif, and that that Court was the proper Court to make an enquiry under section 14 of the Act. The Sub-Divisional Magistrate had made the enquiry and the Pleaders were Civil and Criminal Courts' *mukhtars* and were authorised by their certificates to practise in both classes of Courts. The learned Judges held that the Sub-Divisional Magistrate acted improperly and without jurisdiction in framing a charge for the purpose of holding an enquiry into the alleged misconduct of the petitioner. With great respect to the learned Judges I am unable to follow their ruling. The first paragraph of section 14 which has reference to the point under consideration is as follows:—
"If any such Pleader or *mukhtar* practising in any Subordinate Court, or in any Revenue Office, is charged in such Court or office with taking instructions except as aforesaid, or with any such misconduct as aforesaid, the Presiding Officer shall send him a copy of the charge, and also a notice that, on a day to be therein appointed,

(1) 10 C. W. N. 1059; 4 C. L. J. 229; 4 Cr. L. J. 160.

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such charge will be taken into consideration." The important words are "if any such Pleader or *mukhtar* practising in any subordinate Court is charged in such Court." "Such Court" must, in my opinion, be the Court in which the Pleader practises and not necessarily the Court in which the Pleader commits the offence charged against him. Section 32 which punishes persons illegally practising as Pleaders runs (leaving out what is immaterial for the present purpose) as follows:—"Any person who practises in any Court..shall be liable by order of such Court to a fine." *In the matter of the petition of Ganga Dyal* (2) the expression "such Court" was held to be the Court in which the Pleader proceeded against practices. Two Pleaders and a *mukhtar*, who were entitled to practise in the Courts of the Cawnpore District, appeared in a case in the Court of the Deputy Magistrate, Fatehgarh. For so doing they were convicted by the Magistrate of the latter District. They applied to the High Court to revise the order of the Magistrate on the ground, amongst others, that he was not competent to proceed against them under section 32 of the Act, XVIII of 1879, as they had not practised in his Court. Oldfield, J., held that the objection was valid and that section 32 only rendered a person practising in a Court liable by order of such Court to a fine. Therefore, the Court which might impose a penalty was the Court of the Deputy Magistrate and not that of the Magistrate of the District, who would have no jurisdiction under the terms of the sections. *In the matter of Babu Het Ram* (3), Reid and Robertson, JJ., of the Chief Court of the Punjab, held that the first clause of section 14 of the Legal Practitioners Act empowers any Court in which a Pleader practises to consider a charge of misconduct made against him in such Court, and that the section does not limit the consideration of the charge to the Court in which the misconduct is alleged to have been committed. So that it seems immaterial that the misconduct charged was committed in another Court. If the

charge is made in the Court in which the Pleader practises, that Court is competent to enquire into it. In my opinion the expression "such Court" in the first clause of section 14 cannot be construed to mean the Court in which the misconduct is alleged to have been committed. The section only means that any Court in which a Pleader practises is competent to enquire into a charge of misconduct, if the charge is brought in that Court.

* * * * *

W. C. A.

LAHORE HIGH COURT.

CRIMINAL REFERENCE NO. 153 OF 1922.

March 24, 1922.

Present.—Mr. Justice Abdul Raoof.

EMPEROR—PROSECUTOR

versus

Lala KHAN CHAND—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 197, application of—Canal Zilladar, prosecution of—Sanction, whether necessary.

A Canal Irrigation Department Zilladar appointed by the Local Government, before the right to appoint such Zilladars was given to the Chief Engineer of the Department, cannot be prosecuted without the previous sanction of the Local Government under section 197 of the Code of Criminal Procedure. [p. 524, col. 2.]

Criminal Reference made by the Sessions Judge, Shahpur at Sargodha, in Case No. 115G, dated the 20th January 1922.

FACTS.—Khan Chand, a Zilladar of the Canal Irrigation Department, is being prosecuted in 12 separate cases under section 161 for accepting illegal gratifications and under section 384 for extortion. The complaints have been instituted by the Colony Assistant under the orders of the Deputy Commissioner. An objection was taken by the accused person that as he was not removable from his office without the sanction of the Local Government the Court could not take cognizance of

(2) 4 A. 375; A. N. W. (1882) 67; 2 Ind. Dec. (N. S.) 980.

(3) 188 P. L. R. 1901.

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the offences without the previous sanction of the Local Government.

The accused's objection was overruled by *Rai Sahib Lala Murari Lal*, exercising the powers of a Magistrate of the First Class in the District, by order dated 21st November 1921.

GROUND.—The Magistrate held that the accused was removable from his office by the Chief Engineer and, therefore, the sanction of the Local Government under section 197 was not necessary.

Reliance was placed on certain rules contained in the Irrigation Manual and promulgated on the 4th January 1917 that the appointment, suspension and removal of *Zilladars* would in future rest with the Chief Engineer. The accused was admittedly appointed before 1917 when these powers vested in the Local Government alone and it was contended that, under paragraph 50 of the Public Works Department Code, 10th Edition, this power in the case of appointments made prior to 1917 still remained with the Local Government. The rule quoted runs as follows:—

“When no special rule is laid down the authority by which a person was appointed, and no inferior authority, is competent to dismiss him, to remove him from the Department or to accept his resignation.”

This rule certainly supports the contention of the petitioner and the learned Vakil, who appeared for the Crown, was unable to refer to this contention which receives further support from an endorsement by the Secretary to Government in the Public Works Department dated 15th December 1921, on the application of petitioner and which I have marked (A). *Prima facie* it does seem absurd that while entrants to the *Zilladar* line of the Canal Department after 4th January 1917, can be removed from office by the Chief Engineer, those appointed previously cannot be removed without the sanction of the Local Government. It would appear that the framers of the new rules failed to make provision for these previous appointments in accordance with rule 50 quoted above. To obviate a reference to the Hon'ble High Court I suggested to the District Magistrate that the complaints might be withdrawn and the sanction of Government obtained but he prefers a reference being made. I, there-

fore, submit the proceedings with the recommendation that the proceedings at present taken and pending against the petitioner in the Court of the Magistrate mentioned above be quashed as being without jurisdiction for the reasons given above.

Mr. *Bhagat Ram Puri*, for the Respondent.

The Government Advocate, for the Crown.

ORDER.—Proceedings were instituted for the prosecution of *Khan Chand, Zilladar*, under sections 384 and 161, Indian Penal Code. A preliminary objection was taken that the cases could not proceed against him without the sanction of the Local Government under section 197, Criminal Procedure Code. The Magistrate overruled the objection and held that as *Khan Chand* was liable to be removed by the Chief Engineer, section 197, Criminal Procedure Code, did not apply and ordered the case to proceed. The learned Sessions Judge of Shahpur, at Sargodha, has made a reference to this Court recommending that the proceedings at present taken and pending against the petitioner in the Court of the Magistrate be quashed as being without jurisdiction for the reasons given above. Notice was issued to the District Magistrate to show cause. The learned Government Advocate has appeared on behalf of the Crown and it has been admitted by him that, inasmuch as the accused was admittedly appointed before 1917 when the powers of the suspension and removal of a *Zilladar* were vested in the Local Government alone, the cases could not proceed without the necessary sanction under section 197, Criminal Procedure Code. It is admitted by him that the cases cannot proceed according to law.

In my opinion the course adopted by the learned Government Advocate is a right one. Having regard to the provisions of section 197, Criminal Procedure Code, no other view is possible. I, therefore, quash the proceedings at present pending in the Court of *Lala Murari Lal*, Magistrate First Class, at Sargodha, in the Shahpur District, against the petitioner *Khan Chand, Zilladar*. The papers will be returned.

N. H.

Reference accepted.

PARAVADA CHINA VENKU NAIDU.

MADRAS HIGH COURT:

CRIMINAL REVISION CASE NO. 397 OF 1922.
(CRIMINAL REVISION PETITION. No. 346
OF 1922).

December 13, 1922.

Present:—Mr. Justice Krishnan.

PARAVADA CHINA VENKU

NAIDU—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 346, 438—Case submitted by inferior Magistrate to superior Magistrate—Procedure—Discharge, order of, set aside—Notice to accused, whether necessary.

It is a general principle of the Code of Criminal Procedure that evidence taken by one Magistrate is not evidence in a trial before another Magistrate unless some provision of law expressly makes it so. The mere consent of the parties is not sufficient for the purpose. [p. 525, col. 2.]

In re Kottammal Kolathingal Ummar Hajee, 69 Ind. Cas. 636; 16 L. W. 697; (1922) M. W. N. 644; 43 M. L. J. 659; (1923) A. I. R. (M) 32; 23 Cr. L. J. 748, followed.

Jainab Bibi Saheba v. Hyderally Saheb, 56 Ind. Cas. 957; 43 M. 609; 12 L. W. 64; 38 M. L. J. 532; 28 M. L. T. 23; (1920) M. W. N. 360 (F. B.), distinguished.

Where a Second Class Magistrate, who was not competent to try a case, submitted it to a superior Magistrate under section 346 of the Criminal Procedure Code, and the latter Magistrate made an order of discharge merely after hearing arguments on the evidence already taken by the inferior Magistrate:

Held, that it could not be said that the superior Magistrate had tried the case himself within the meaning of section 346 clause (2) of the Criminal Procedure Code, and the order passed by him was, therefore, illegal. [p. 525, col. 2.]

Though as a general rule notice should go to an accused person before an order is made to his prejudice, where the question arising is one of law and the accused has not been prejudiced by want of notice, an order without notice which is otherwise correct will not be set aside. [p. 526, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise an order of the District Magistrate, Vizagapatam, in his proceedings in L. Dis. No. 437 of 1922, C-2, dated the 21st February 1922 against the judgment of the Court of the Sub-Divisional, First Class Magistrate, Narasapatam, in C. C. No. 28 of 1921.

Mr. S. Subramania Sastry, for the Petitioner.

The Public Prosecutor, Mr. J. C. Adam, for the Crown.

ORDER.—In this case the Sub-Divisional Magistrate, acting solely on the evidence taken by the Second Class Magistrate

who had sent up the case to him under section 346 of the Code of Criminal Procedure because he could not himself try the offence disclosed by the evidence, discharged the accused. The Prosecuting Inspector who was conducting the case for the Crown seems to have agreed to this course. The District Magistrate, however, set aside the order of discharge on the ground that the course pursued by the Magistrate was illegal and has ordered a fresh enquiry. It is argued before me that the view taken by the District Magistrate is wrong.

Now, it may be taken as a general principle of the Code of Criminal Procedure that evidence taken by one Magistrate is not evidence in a trial before another Magistrate unless some provision of law expressly makes it so. Mere consent of parties will not do. See *In re Kottammal Kolathingal Ummar Hajee* (1). No doubt that was a case where the Court's interference was sought on behalf of the accused. The same rule, it seems to me, should apply to the case of the prosecution also. The ruling in *Jainab Bibi Saheba v. Hyderally Saheb* (2) referred to was in a civil case and does not apply to a criminal case at all.

Section 346, Criminal Procedure Code, clause (2) says what the Magistrate to whom the case is submitted is to do. He may try the case himself or refer it to any Magistrate subordinate to him having jurisdiction or commit the accused for trial. In this case the Magistrate elected to adopt the first alternative; he was, therefore, bound to try the case himself. I do not think passing orders on evidence taken by another Magistrate who was not competent to try the case after merely hearing arguments, can be considered to be a "trying the case himself." When the Code intends that the Magistrate to whom a case is submitted may act on evidence already taken, it makes it quite clear as in section 349, Criminal Procedure Code.

(1) 69 Ind. Cas. 636; 16 L. W. 697; (1922) M. W. N. 644; 43 M. L. J. 659; (1923) A. I. R. (M) 32; 23 Cr. L. J. 748.

(2) 56 Ind. Cas. 957; 43 M. 609; 12 L. W. 64; 38 M. L. J. 532; 28 M. L. T. 23; (1920) M. W. N. 360 (F. B.).

LAKSHMINARAYANA CHETTIAR.

It was also objected that the accused had no notice before the order of discharge was set aside. Notice is not absolutely necessary in such cases and in this case the accused cannot be said to have been prejudiced by want of it as the question is one of law on which that order was set aside and the accused has been heard in full before me. The want of notice is thus not a ground in this case to set aside the order of the District Magistrate, though, as a general rule, notice should go to the accused before an order is made to his prejudice.

The petition fails and is dismissed.

V. N. V.

Petition dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 723 OF 1921.

CRIMINAL REVISION PETITION No. 592,
OF 1921.

March 9, 1922.

Present :—Mr. Justice Phillips.

LAKSHMINARAYANA CHETTIAR

—PETITIONER.

Penal Code (Act XLV of 1860), s. 379—Theft—Dishonest removal—Wrongful gain or loss.

In order to constitute theft there must be dishonesty. [p. 527, col. 1.]

Certain articles belonging to the accused were attached and secured in his own shop, but possession was transferred to the decree-holder under a bond in Form No. 15-A, Appendix E to O. XLI, r. 3, of the Civil Procedure Code. The accused preferred a claim to the articles which was allowed. The accused thereupon took forcible possession of the articles in the absence of the decree-holder;

Held, that the act of the accused did not amount to theft inasmuch as there was no intention to cause wrongful loss to the complainant or wrongful gain to the accused. [p. 527, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of West Tanjore Division, at Tanjore,

in Criminal Revision Petition No. 21 of 1921, preferred against the order of the Court of the Second Class Magistrate, Nannilam, in C. C. No. 119 of 1921.

The judgment of the Sessions Judge was as follows:—

“The complaint in this case was, that the three accused broke open the lock of a shop and committed theft of *maligai* articles worth Rs. 1,500 and odd. The articles had been attached in execution of a decree in Original Suit No. 397 of 1918 of the Principal District Munsif's Court of Tiruvalur and had been left in charge of the petitioner who had obtained an assignment of the decree and executed it under O. XXI, r. 43 (1), Civil Procedure Code, as amended by the Madras High Court Rules. This was sometime in March 1919. First accused put in a claim petition in respect of the articles, which was allowed. He did not, however, take delivery through Court but is alleged, along with the second and third accused, to have taken forcible possession during the petitioner's absence in Shiyali and Madras, in February 1920. Upon these facts, the Sub-Magistrate thought that the offence, if any, was one under section 206, Indian Penal Code; and that the sanction of the District Munsif was required, and discharged the accused for want of such sanction. It seems to me that this view is erroneous. The accused are not charged with fraudulent removal of goods with intention to prevent their being taken in execution of a decree. The property had already been taken in execution. The Sub-Magistrate says that this does not make it the petitioner's private property. What he has failed to observe is, that the property had been made over to petitioner's possession under a bond in Form No. 15 A Appendix E, to O. XX, r. 73 under which he was bound to pay a certain amount to the Court, if he shall not duly account for and produce when required before the Court the property that had been left in his charge. Clearly, therefore, the property was left in his possession and any taking of it out of his possession without his consent, if the act was done dishonestly, as it is alleged to have been done here, is theft.

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"I must, therefore, set aside the order of the lower Court and I hereby direct further inquiry under section 437, Criminal Procedure Code."

Mr. K. S. Jayarama Aiyar, for the Petitioner.

The Public Prosecutor, for the Government.

ORDER.—As the accused was only taking his own property which had been secured in his own shop, it is difficult to see how his act would be criminal. In order to constitute theft, there must be dishonesty, and it cannot be argued that accused intended to cause wrongful loss to complainant or wrongful gain to himself. Any loss that complainant might sustain owing to his inability to comply with the terms of his security-bond could be remedied by civil proceedings. The Sessions Judge's order is, therefore, set aside.

L. K.

Order set aside.

LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 575 OF 1922.

October 12, 1922.

Present:—Mr. Justice Scott-Smith.

NARAIN SINGH—CONVICT—APPELLANT
versus

EMPEROR—RESPONDENT.

Procedure—Joint and separate trials—Evidence recorded once only—Irregularity.

Where several cases were being tried separately but the evidence of those witnesses who were common to all the cases was recorded only once, it being merely read out in the other cases, with the consent of the Counsel for the accused:

Held, that the procedure adopted was irregular, but that in the absence of any prejudice having been caused to the accused, the irregularity did not affect the validity of the trial. [p. 528, col. 1.]

Nathu Sheikh v. Queen-Empress, 10 C. 405 8 Ind. Jur. 508; 5 Ind. Dec. (N. S.) 271; *Subrahmanya Ayyar v. King-Emperor*, 25 M. 61; 11 M. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.), referred to.

Appeal from an order of the Magistrate, First Class, with section 30 powers, Gurdaspur, dated the 13th June 1922.

Mr. Kanwar Narain, for Mr. D. N. Mehra, for the Appellant.

Mr. Des Raj Sawhny, for the Government Advocate, for the Respondent.

JUDGMENT.—Criminal Appeals Nos. 575, 576 and 596 are by three persons who have been convicted by a Magistrate with section 30 powers of illegal possession of *chhavis* and have been sentenced under section 20 of the Arms Act to 4½ years' rigorous imprisonment each.

The appellants were tried separately, but as a great deal of the evidence is the same in all the cases, the appeals may conveniently be disposed of by one judgment.

The appellants, who all got out of the same train at the Dhariwal Railway Station, were searched as suspicious characters by the Police in the presence of reliable witnesses. They were carrying *dangs*, and *chhavi* blades were found in the waistcoat pocket of one and in the loin cloths of the other two.

The first point raised in appeal is, that the appellants were not really tried separately at all, but that there was a joint trial, and that this was illegal being opposed to the procedure laid down in the Criminal Procedure Code. After an examination of the records of the three cases, it is clear to me that the trials were separate and not joint. The case of Thakar Singh was taken up first and at the conclusion of the statement of Sardar Sant Singh, Sub-Inspector, the Magistrate recorded the following note:—

"All three of the accused have been present during the course of the examination of this witness. Counsel for the three accused agree that the statement of the witness be read over in the connected cases as well. They agree that their clients will not be in any way prejudiced in this way and it will be a great saving of time."

The rest of the witnesses in Thakar Singh's case were then examined, and the cases

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against Makhan Singh and Narain Singh were subsequently taken up. The witnesses were again put into the witness-box and the statements made by them in Thakar Singh's case were read over to them. They admitted them to be correct and said that they had nothing to add. In Makhan Singh's case P.W. No. 5, Hafizulla Beg, was the Constable who had himself arrested him and conducted his search. He was not a witness in the case of Thakar Singh at all. Similarly, in the case of Narain Singh, Din Mohammad Constable, P. W. No. 5, was the witness who conducted the search of Narain Singh's person and was not a witness in the other two cases at all. It is, therefore, clear that the trials were separate. There is no doubt that the procedure adopted of reading out the statements of witnesses recorded in the first case was irregular, but it is quite clear that no prejudice has been caused to any of the appellants by this course which, according to the learned Sessions Judge, was suggested by appellants' Counsel. The only authority cited which has any bearing on the present case is that reported in *Nathu Sheikh v. Queen-Empress* (1). In that case four persons were accused of having given false evidence in the same proceeding and the Sessions Judge, while professing to try each case separately, heard the evidence of the witnesses only once. The High Court held that this was an error in the proceedings which would probably have proved fatal to the convictions, but these were set aside on the merits and the point was not, therefore, decided. Moreover, it is not clear from the judgment whether the facts were on all fours with the present case or not. I do not think that this is a case to which the well-known ruling of their Lordships of the Privy Council reported as *Subrahmaniam Ayyar v. King-Emperor* (2) is applicable.

On the merits, I am of opinion that the case against each of the appellants is clearly established. The evidence as to the search of their persons is quite conclusive and is

very reliable. The petty discrepancies pointed out by Counsel are quite immaterial, and do not at all shake the credibility of the witnesses. The convictions are, I consider, fully justified by the evidence. The learned Magistrate has given good reasons for awarding heavy sentences, and, having regard to the local circumstances of the District at the time, I do not consider the sentence to be too heavy. The question whether any particular case of illegal possession of arms comes under section 19 (f) or section 20 of the Arms Act must be decided on its own facts as was laid down in *Khem Singh v. Emperor* (3). I am not prepared to agree with all the remarks of the learned Judge who decided the case reported as *Ibrahim v. Emperor* (4), and the facts of that case are not on all fours with the present one. Here the appellants had removed the *chhavi* blades from their shafts and had concealed them about their persons with the obvious intention referred to in section 20 of the Act. The appeals are accordingly dismissed.

Appeals dismissed.

Z. K.

(3) 28 Ind. Cas. 796; 8 P. R. 1915 C1; 75 P. L. R. 1915; 16 Cr. L. J. 412.

(4) 18 Ind. Cas. 265; 9 P. R. 1912 Cr; 44 P. W. R. 1912; 14 Cr. L. J. 41; 128 P. L. R. 1913.

(1) 10 C. 405; 8 Ind. Jur. 508; 5 Ind. Dec. (N. S.) 271.

(2) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 856; 2 Weir 271; 8 Sar. P. C. J. 160; (P. C.)

VELLIAH KONE v. EMPEROR.

MADRAS HIGH COURT.

REFERRED TRIAL, No. 16 OF 1922

AND

CRIMINAL APPEAL, No. 133 OF 1922.

April 27, 1922.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Odgers.*In re VELLIAH KONE—*

PRISONER—APPELLANT

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), s. 288—Evidence Act (I of 1872), s. 157—"Testimony," meaning of—Deposition before Committing Magistrate—Corroboration by previous statement.

The object and effect of section 288 of the Criminal Procedure Code is to place the deposition in the committal inquiry on exactly the same footing as the deposition in the Sessions Court. Such a deposition is "testimony" within the meaning of section 157 of the Evidence Act, which a prior statement by the witness is admissible in evidence to corroborate. [p. 530, col. 1.]

Emperor v. Akbar Badu, 7 Ind. Cas. 933; 34 B. 599; 11 Cr. L. J. 542; 12 Bom. L. R. 663, dissented from.

Queen-Empress v. Dorasami Ayyar, 24 M. 414; 2 Weir 377, followed.

Emperor v. Dwarka Kurmi, 28 A. 683; 3 A. L. J. 852; A. W. N. (1906) 187; 4 Cr. L. J. 61, *Queen-Empress v. Dorasami Ayyar*, 24 M. 414; 2 Weir 377, *Reg. v. Arjun Megha*, 11 B. H. C. R. 281, referred to.

Trial referred by the Court of Sessions Judge, Tinnevely Division, for the confirmation of the sentence of death passed upon the said prisoner in Case No. 4 of the Calendar for 1922.

Appeal by the prisoner against the sentence.

Mr. C. Narasimhachariar, for the Prisoner.

The Public Prosecutor, for the Crown.

JUDGMENT.

Ayling, J.—Accused in this case has been convicted of the murder of an old woman named Pichai and sentenced to death.

The prosecution case is as follows:—Deceased was a relation of accused, and on her husband's death came to live in his house, bringing with her a sum of Rs. 200 which she lent him to pay off a mortgage. Subsequently, disputes arose and she wanted the money back and moved

into a small hut close to accused's where she lived by herself. So far there is no dispute.

According to the defence, the accused managed to pay off the debt to deceased by selling his wife's jewels. According to the prosecution, he did not; and the wrangling continued, culminating in a furious quarrel on the night of December 29th. Even after bed time, deceased continued to abuse accused from her hut and at last the man infuriated beyond endurance, went out and throttled her. He then tied her body in a sack with some heavy stones, and at about day-break carried it to a well about 150 yards away and threw it in. There the body was found 4 days later and accused was arrested.

The above facts are practically all contained in two statements recorded by the Sub-Magistrate from accused's wife, Subbammal, P. W. No. 2, the first, Exhibit D., under section 164, Criminal Procedure Code, on 4th January 1922, and the second, Exhibit C, in the course of the committal enquiry a week later. These statements, if accepted, leave no possible room for doubt as to the commission of the murder by the accused. Subbammal did not actually see the murder but she deposes to her husband going to deceased's hut, to hearing the latter's cries and the sound of blows, to her husband's returning and fetching a gunny bag and rope and threatening her to make her keep quiet. She subsequently fled to her mother's house and stayed there. In the Sessions Court, she resiled from the most important part of the above story and swore that her husband did not leave the house and that her earlier statements were enforced by Police ill-treatment. Her deposition before the Committing Magistrate, Exhibit C., was, therefore, treated as evidence under section 288, Criminal Procedure Code: and the case turns very largely on whether it can safely be accepted as true.

A preliminary point of some importance has been raised as to whether the first statement, Exhibit D, is relevant under section 157, Indian Evidence Act, to corroborate the deposition Exhibit C. It is not disputed that Exhibit D is a statement which would be admissible under the terms

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of the section to corroborate a statement to the same effect, if made in the witness-box in the Sessions Court; but it is argued for appellant that the deposition before the Committing Magistrate is not "testimony" within the meaning of section 157 and that the latter section will not apply to the present case.

The authority for this view is the judgment in *Emperor v. Akbar Badu* (1) in which the learned Judge certainly ruled that "previous statements may be used to corroborate or contradict statements made at the trial: not to corroborate statements made prior to the trial." In the latter category they included a statement made as in the present case in the course of the committal enquiry.

No reasons are given: and no other case has been quoted to us in which the same view has been taken.

With all respect, it seems to me to be wrong. I know of no reason why the word 'testimony' in section 157, Indian Evidence Act, should be given this artificial limitation; and the object and effect of section 288, Criminal Procedure Code, seems to me to be to place the deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions Court; of course, such a statement would be accepted with great caution like every statement of a person who has changed his story at different stages. But it is evidence in the case; and it is equally in the discretion of the Sessions Judge to believe it and act on it in preference to the deposition in his own Court, as it would be to believe and act on the latter in preference to a contradictory statement before the Committing Magistrate. *Vide* judgment of Aikman, J., in *Emperor v. Dwarka Kurmi* (2) and also *Queen-Emprass v. Dorasami Aiyar* (3). If this is so, then the credibility of the statement in the Committing Magistrate's Court must be considered and tested in exactly the same way as one made in the Sessions Court.

and it is of the utmost importance to know how it compares with statements made soon after the event or before a competent authority. No one will deny that, apart from any rule of law, comparison with a statement recorded in the circumstances in which Exhibit D was taken affords a very valuable test of the truth of any later statement.

My view is not unsupported by authority; *vide* a case reported as *In re Bayanna*, (4) in which Collins, C. J., and Benson, J., held that a statement of a witness made at the inquest could be used to corroborate her statement in the committal enquiry, although she entirely resiled from the latter in the Sessions Court.

I, therefore, hold that Exhibit D is admissible under section 157, Indian Evidence Act, to corroborate Exhibit C.

For this purpose it is not without importance. The two statements substantially agree, and a perusal of either leaves in my mind a strong impression of naturalness and truth. I should be prepared to accept Exhibit C without Exhibit D, but I am confirmed in this view by the fact that the young woman told the same story at the earliest opportunity. Exhibit D was, of course, taken on the day after the inquest, but she herself admits, and it is not disputed, that she gave the same story at the inquest itself.

She now seeks to explain that these statements were enforced and tutored. At one passage she says that the Police took her to the *choultry*, took off her clothes and ill-treated her. At another she says that they threatened to take off her cloth and disgrace her. I do not wish to emphasise this discrepancy; but there is nothing to support the idea that anything of the kind occurred, and it is impossible to believe that the very detailed and natural story which the witness told was obtained in this way. I may also refer to the evidence of one of the *panchayatdars*, P. W. No. 6, a respectable and disinterested man worth half a lakh of rupees.

I do not believe the story of ill-treatment; and, on the other hand, the action of the witness in resiling to save her husband is quite natural.

(4) 12 Weir 527.

(1) 7 Ind. Cas. 933; 34 B. 599; 11 Cr. L. J. 542; 12 Bom. L. R. 663.

(2) 28 A. 683; 3 A. L. J. 852; A. W. N. (1906) 187; 4 Cr. L. J. 61.

(3) 24 O. L. 141; 12 Weir 377.

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There is also the evidence of another woman, a neighbour, P. W. No. 3. Her earlier statements, Exhibits E and F, recorded at the same time as Exhibits C and D, fully corroborate the latter, but in the Sessions Court she also has resiled though not quite to the same extent as P. W. No. 2. She speaks to the quarrel and says, that on the night she heard cries, in what she took to be Pichai's (deceased's) voice; but she withdraws her earlier statement that she got up and saw accused entering or leaving deceased's hut and says they were made through fear of the Police. Here also I can find no foundation for the allegation against the Police; and, although the motive of affection is absent in the case of this woman, I think it quite probable that sympathy with her neighbours would induce her to keep in line with P. W. No. 2.

Lastly, there is the evidence of another neighbour, P. W. No. 4, who, besides deposing to the quarrel on Thursday evening, says that early next morning he saw accused going from his house in the direction of the well with a gunny bag, which the witness thought to contain Palmyra nuts. It is suggested that this contained the corpse. The witness says he felt no suspicion till the discovery of the corpse in the well when he gave information of what he had seen. He was examined at the inquest.

This witness appears to be quite disinterested; and I see no reason why he should not be believed. It is urged that it is most improbable that the accused would have postponed the disposal of the body till, as would appear from P. W. No. 4's evidence, it was getting light. The reason possibly lies in the fact that accused admittedly suffers from some kind of night blindness, and cannot see as well as most people at night. It may be suggested that this renders the perpetration of the murder by him improbable but even a blind man might without much difficulty grope his way across the few yards to deceased's hut and seize and murder her in the confined space. To carry a body 150 yards to a well is a very different matter.

The above evidence taken together appears to me to fully warrant the conviction. It is not suggested that any one else had a personal motive to murder deceased; and

in the circumstances the theory of robbery as a motive may be discarded. It would only be possible, if accused's tale of the re-payment of the money were believed; and no attempt has been made to prove this though, if true, it should be easy to adduce some evidence of it.

In his appeal petition accused has indulged in wild allegations that his wife is on intimate terms with P. W. No. 4, and with P. W. No. 6 actually committed the murder, and cooked up a case against him; allegations unsupported by anything, and which I can only reject as worthless and baseless.

I think the conviction must be confirmed; but I am inclined to reduce the sentence. If the wife's statement in Exhibits C and D are accepted, (and I believe them to be quite true), the murder was not committed with the deliberate object of making away with an inconvenient creditor, but in a fit of sudden fury provoked by the old woman's persistent stream of abuse.

I think in such circumstances, a sentence of transportation for life is sufficient, and I would commute the sentence accordingly.

Oggers, J.—I have had the advantage of perusing the judgment just now delivered in which the facts are fully set out. There is no doubt to my mind that the conviction of the accused is right if the statements of Subbammal, (the wife of the accused) and Chinnammal, in the Magistrate's Court, can be accepted in preference to their statements before the Sessions Judge. This is the only point with which I propose to deal. Subbammal in Exhibits C and C-1 before the Sub-Magistrate clearly speaks to the abuse of her husband by Pichai and to the fact that he went inside her house, dealt her two blows and she cried out, "He has caught hold of the throat and is killing," and she also speaks to the fact of the gunny bag in which the corpse was tied as belonging to her house. Subbammal said exactly the same thing in Exhibit D before the Investigating Officer. She also adds that her husband actually went towards the west carrying a gunny bag on his head which is corroborated by a witness, P. W. No. 4, against whom nothing has been suggested. The statements of Chinnammal are not quite so consistent.

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In her statement before the Investigating Officer she says that the deceased went inside the house of Pichai whom she heard crying out at midnight: "He is pressing my throat and killing me." Before the Committing Magistrate she repeats the statement, but there seems to be some doubt as to whether she was in or outside the house when she heard the cry. The question is: Can the statement before the Committing Magistrate be accepted in preference to those before the Sessions Judge from the fact that the former are corroborated by the statements made before the Investigating Officer. Section 288 of the Criminal Procedure Code clearly says that the evidence taken before the Committing Magistrate may, in the discretion of the Judge, be treated as evidence in the case if such witness is examined and there is abundant authority, it seems to me, for holding that this evidence once admitted at the discretion of the Judge stands on exactly the same footing as any other evidence in the case. See *Reg. v. Arjun Megha* (5), *Emperor v. Dwarka Kurmi* (2) and *Queen-Empress v. Dorasami Ayyar* (3). It was not argued before us that the Sessions Judge has exercised his discretion wrongly, or that he should not have admitted in evidence the statements made before the Committing Magistrate. Further, the Police were examined to disprove any allegation of pressure by them.

Section 157 of the Evidence Act says that, "in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved." There is an authority in *Emperor v. Akbar Badu* (1) to the effect that only the statements of the witnesses made to the Trying Court can be corroborated in the manner contemplated by section 157; previous statements may be used to corroborate or contradict the statements made at the trial, not to corroborate statements made prior to the trial. With all respect, it seems to me that under section 288, Criminal Procedure Code and the authorities quoted above to the effect that once admitted, evi-

dence before the Committing Magistrate stands exactly on the same level as any other evidence in the case, it cannot be said that any previous statement taken before the competent investigating authority cannot be used to corroborate the statements made before the Committing Magistrate which is made by section 288 part of the evidence at the trial. No authority is quoted for the proposition laid down by the Bombay High Court: and in view of the fact that the object of enacting section 157 of the Evidence Act proceeded upon the principle that consistency is a ground for belief in the witness's veracity, contrary to the English rule, this state of the law cannot be supported. The view I venture to take finds support in a case reported as *In re Bayanna* (4) of our own Court. Where Collins, C. J., and Benson, J., held that a statement made at the inquest could only be used to corroborate or to contradict a subsequent statement of the witnesses admissible as evidence. They go on: "The only use the prosecution could make of her statement at the inquest would be to partially corroborate her statement to the Magistrate, but when that statement is itself unworthy of credit, it cannot be materially strengthened by showing that the witness had previously made a statement partly in agreement and partly in direct and material disagreement with it." The learned Judges would, therefore, appear to be clearly of opinion that the statement made at the inquest might be used to corroborate the subsequent statement of the witness admissible as evidence that is such as a deposition before a Committing Magistrate which is admissible as evidence under the circumstances detailed in section 288, Criminal Procedure Code. I, therefore, think that the statements Exhibits C and C-1 and F, corroborated as they are by their previous statements before the Investigating Officer are to be preferred to the evidence given by these witnesses before the Sessions Court, especially when we reflect that one of the witnesses is the accused's own wife. As to the other consideration arising on the facts of this case, I have had the advantage of considering the judgment just pronounced and I agree with the conclusions arrived at

(5) 11 B. H. C. R. 281.

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and with the reduction of the sentence.
Sentence reduced.

V. N. V.

LAHORE HIGH COURT.

CRIMINAL APPEAL, No. 428 OF 1922.

October 11, 1922.

Present:—Mr. Justice Scott-Smith.

BHAJAN DAS AND OTHERS—

CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 304, 323, 325, 366—Abducting woman to compel marriage—Ingredients of offence—Culpable homicide—Death caused owing to enlarged spleen—Simple hurt.

In order to fall under section 366 of the Penal Code an abduction must be accompanied by the intention or knowledge specified in the section. [p. 535, col. 1.]

Where a woman was abducted by a man whom she had not married but with whom she had lived willingly for a couple of months as his wife before the abduction and whom she probably intended to marry:

Held, that an offence under section 366 of the Penal Code had not been established. [p. 535, cols. 1 & 2.]

Where a person dies as the result of simple injuries owing to the fact that his spleen is diseased and it is not shown that the accused had knowledge of this fact, he can only be convicted of causing simple hurt. [p. 535, col. 2.]

Appeal from an order of the Sessions Judge, Hoshiarpur, dated the 6th April 1922, convicting the appellants.

Lala Mul Chand, R. S., for Mr. Abdul Aziz, for the Appellants.

The Public Prosecutor, for the Respondent.

JUDGMENT.—This is a joint appeal by six persons Bhajan Das, Haku, Ganga Jat, Fakiria, Ganga Barber and Arjan, who have been convicted by the Sessions Judge of Hoshiarpur of offences under sections 366-149, 325-149 and 148, Indian Penal Code, and have been sentenced to various terms of imprisonment for each offence.

The facts are briefly as follows:—

Musammat Ishri, daughter of Musammat Kirpo, is the widow of Bhagat Ram

of Ram Nangli. She has three sisters married in the village of Jandoli where Fakiria and Haku live. Fakiria is married to one of those sisters and Haku is the uncle of Fakiria. Musammat Kirpo and subsequently Musammat Ishri herself brought complaints against one Khushia charging him with having fraudulently got Musammat Ishri's thumb-mark affixed to an entry in the Marriage Register making out that she had been married to him. For some time whilst these cases were pending Musammat Ishri was living with Haku, appellant, in Jandoli village. Before the date of the occurrence, the 8th December 1921, Musammat Kirpo had taken her daughter away to live with her. On the 8th December there was a hearing of the complaint against Khushia in a Magistrate's Court at Hoshiarpur. Fakiria and Haku, knowing that Musammat Kirpo and Musammat Ishri would be at Hoshiarpur on the 8th of December, met Musammat Kirpo in the *Kutchery* compound and asked her to send Musammat Ishri back to Jandoli with them, Musammat Kirpo refused to do so. After the hearing of the case was over Musammat Kirpo and Musammat Ishri, accompanied by Santu, deceased, were going along the road in Hoshiarpur where the six appellants are said to have overtaken them and to have forcibly carried off Musammat Ishri and to have beaten Santu who tried to prevent them. Santu was knocked down and died on the spot shortly afterwards and the medical evidence shows that his death was due to rupture of the spleen which was enlarged owing to disease. In addition to the rupture of the spleen, Santu received two or three other simple injuries one being on the head; but it is quite clear that the beating received by him was in no sense a severe one. The Police after receiving the First Information Report recorded a charge under section 304, Indian Penal Code, and eventually *chalaned* the six appellants under that section. They did not *chalan* them under section 366 at all apparently considering that no offence had been committed under that section. After the abduction, Musammat Ishri was taken to Jandoli village where, on the morning after the occurrence, she was found in the house of her sister, the wife

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of Fakiria. Haku and Fakiria admit that they took away *Musammat* Ishri from her mother. They also admit that they had a fight with Santu to whom they gave some blows. Their main defence is (1) that *Musammat* Ishri had been married to Haku by *chadar andazi* and (2) that she went with them voluntarily though she made a show of resistance. The learned Sessions Judge in an exhaustive judgment has held that the alleged *chadar andazi* marriage with Haku has not been proved, that *Musammat* Ishri did not go voluntarily with Haku and Fakiria, that all the appellants took part in the assault, that they constituted an unlawful assembly and that though they had no knowledge that they were likely to cause the death of Santu, yet as they struck him blows upon a vital part of the body they must be held to have intended or known that they were likely to cause grievous hurt. He accordingly convicted them under the sections aforesaid.

Mr. Mul Chand has taken me through the evidence on the record. His contentions are: (1) that *Musammat* Ishri was the married wife of Haku, (2) that she went voluntarily with the appellants or some of them, (3) that even if she was not the married wife of Haku, still the ingredients necessary to constitute an offence under section 366 have not been established, and (4) that it cannot be said that the appellants intended to cause or knew that they were likely to cause grievous hurt to Santu. After a perusal of the evidence I agree with the learned Sessions Judge that the occurrence took place substantially in the way deposed to by *Musammat* Kirpo and the prosecution witnesses. The story told by them is in accordance with that put forward by *Musammat* Kirpo in the First Information Report with the exception that she tried to exonerate her son-in-law Fakiria. It was natural on her part, but having regard to the evidence I have no doubt that he took part in the occurrence as he himself admits.

The next point is, whether *Musammat* Ishri was the wife of Haku or not. In the First Information Report *Musammat* Kirpo said that *Musammat* Ishri had been settled in the house of Haku without her (*Musammat* Kirpo's) permission.

The words used in the report were *bithla diya tha*. For the defence it is urged that this meant that *Musammat* Ishri had become the *karewa* wife of Haku, and having regard to their actions at least it was probable that this was what they understood also. The learned Sessions Judge says that the expression possibly conveys the idea of treatment as wife but without any formal ceremony having taken place. He also admits that formal ceremony of *chadar andazi* is, as alleged, not necessary but goes on to say that "although marriage is sometimes presumed from long connection as man and wife, I do not think such a connection for a couple of months could be held to establish a valid marriage under any circumstances." Evidence has been produced of an actual *chadar andazi* ceremony having taken place, but having regard to the facts that no entry is made in the Marriage Register and that the question whether *Musammat* Ishri was the wife of Khushia or not was at that time *sub judice*, I agree with the learned Sessions Judge in thinking that it is not likely that any *chadar andazi* ceremony took place, but that Haku and Fakiria intended that if Khushia's marriage was not established, a regular ceremony would be performed.

I also agree with the learned Sessions Judge that *Musammat* Ishri was not taken away with her consent. Certainly, at first, she was unwilling to go with the appellants but she very soon gave up resistance and went along with them more or less willingly. This, I think, may be gathered from the evidence of Mr. Manual, P. W. No. 8, and from that of P. Ws. Nos. 11 and 12, which shows that the abductors took *Musammat* Ishri past the Police lines and actually halted there to get her a drink of water. It is hardly likely that they would have done this, had the girl been still unwilling to go with them. At the same time, I have no difficulty in holding that the appellants constituted an unlawful assembly, their object being by criminal force to enforce their right or supposed right to the possession of *Musammat* Ishri.

Now, the learned Sessions Judge after holding that *Musammat* Ishri was not the wife of Haku and was taken away by force appears to hold that these findings

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alone are sufficient to constitute an offence made punishable under section 366. The section, however, also requires that such abduction must be (a) with the intent that the woman may be compelled or knowing it to be likely that she will be compelled, to marry any person against her will, or (b) in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse. Now, having regard to the facts that *Musammam* Ishri had already lived apparently quite willingly with Haku for some two months as his wife, that two of her sisters were already married in Haku's village, and that on the morning following the abduction she was found living in the house of her sister, the wife of Fakiria, I do not see how it can be held that the abduction was with the intent and knowledge necessary to constitute an offence under section 366. So far as I can judge the intention of the appellants was to get *Musammam* Ishri again to live in Jandoli until the case against Khushia should be decided. If the case was decided against Khushia they probably intended that she should be married to Haku but I see no reason to suppose that such a marriage would have been against her will, she having already lived with him for two months as his wife. Even in the First Information Report it was not said that she had been made to live with Haku against her will. *Musammam* Kirpo's complaint was that she had been settled in the house of Haku without asking *Musammam* Kirpo's permission. It is also noteworthy as appears from Mr. Manual's evidence, that when he met the abductors, Fakiria was saying to *Musammam* Kirpo that she had already received money once for *Musammam* Ishri and wanted to sell her again. This is not like the case of a young unmarried girl who is abducted for the first time from the house of her parents or guardian and made to marry a stranger or seduced or forced to illicit intercourse. The case is one of a widow who has been settled in a man's house and has lived with him as his wife for some time apparently with her own consent. In these circumstances, I do not think it can be held that the appellants had the intention or knowledge required as one of the ingredients to make

up an offence made punishable under section 366.

The next point to consider is, whether they can be considered guilty of causing grievous hurt to Santu. A good many cases where death has been due to a diseased spleen are referred to by Mr. Rattan Lal in his Law of Crimes, 9th Edition, pages 615 and 616. In most of these cases it was held that where it was shown that the accused person had no knowledge that the deceased's spleen was diseased, he could only be convicted of causing simple hurt. No doubt one injury was caused to Santu's head but it was quite a trivial one. There were only four injuries altogether on Santu's body and, as already stated, he was not given a severe beating. From the injuries caused to him I am of opinion that it cannot be held that those who attacked him intended or knew that they were likely to cause grievous hurt. They can, however, be convicted of simple hurt under section 323, read with section 149, Indian Penal Code.

In my opinion the learned Sessions Judge has taken much too serious a view of the occurrence. It is an unfortunate circumstance that Santu had a diseased spleen, if he had not, he would not have died as the result of the beating received by him, and the probability is that the Police would not have taken cognizance of the case at all. The case was rendered serious in the opinion of the Police by the fact that Santu died as the result of the beating received by him. His death, however, was an unfortunate accident seeing that his spleen was enlarged.

I accept the appeal and set aside the convictions and the sentences under the sections specified and convict them instead of causing hurt under sections 323-149, Indian Penal Code. It is not clear exactly what sort of weapons they were carrying and, therefore, I do not think that they can be convicted under section 148. They have already suffered more than six months rigorous imprisonment and I think that they have been sufficiently punished. I accordingly sentence them to the term of imprisonment already undergone and direct that they be released from custody.

Z. K.

Appeal accepted.

NATARAJA PILLAI v. RANGASAMI PILLAI.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION

No. 459 OF 1922.

January 17, 1923.

Present :—Justice Sir William Ayling, Kt.,
and Mr. Justice Ramesam.

NATARAJA PILLAI—PETITIONER

versus

RANGASAMI PILLAI AND OTHERS

—COUNTER-PETITIONERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 144, 195 (1) (a), (6), (7)—Order under s. 144 whether by public servant or Court—Sanction by Sub-Divisional Magistrate for prosecution for disobedience of order under s. 144—Revocation by Sessions Judge, legality of.

A Magistrate passing an order under section 144, Criminal Procedure Code, does so only as a 'public servant' and not as a 'Court' and sub-section (7) of section 195 is, therefore, inapplicable to a case where the Magistrate making the order sanctions the prosecution of persons disobeying it. [p. 537, col. 2]

Arunachalam Pillai v. Ponnuswami Pillai, 48 Ind. Cas. 878; 35 M. L. J. 454; (1918) M. W. N. 824; 8 L. W. 422; 24 M. L. T. 396; 20 Cr. L. J. 78; 42 M. 64, dissented from.

Sundaram Chelli v. Queen, 6 M. 203; 2 Weir 77; 2 Ind. Dec. (N. S.) 420 and *Abbas Ali Chowdhry v. Illim Meah*, 14 W. R. Cr. 46, referred to.

Where a Sub-Magistrate passed an order under section 144, Criminal Procedure Code, prohibiting certain persons from interfering with the performance of a certain religious ceremony, and the Magistrate later on sanctioned their prosecution for an offence under section 188 of the Penal Code for having disobeyed the order and the Sessions Judge purporting to act under sub-section (6) of section 195 of the Code revoked the sanction:

Held, that the case fell under clause (a) of sub-section (1) of section 195 and the power of revocation lay with the District Magistrate and not with the Sessions Judge, and that, therefore, the order of the Sessions Judge revoking the sanction was without jurisdiction. [p. 538, cols. 1 & 2.]

Section 144 of the Criminal Procedure Code merely empowers certain Magistrates to pass temporary orders in urgent cases. These orders need not be based on any record outside the Magistrate's own knowledge or observation, and it is not even necessary that the party against whom any such order is directed should first be given a chance of being heard. [p. 537, col. 2.]

Petition praying that, in the circumstances stated therein, the High Court will be pleased to set aside the order of the Court of Session of the West Tanjore Division, in Criminal Miscellaneous Petition No. 11 of 1922 setting aside the order of the Sub-Divisional Magistrate, Tanjore, in his proceedings dated the 8th December 1921 according sanction to prosecute the res-

pondents herein for an offence under section 188, Indian Penal Code.

Mr. K. S. Jayarama Aiyar, for the Petitioner:—This is an application to revise the order of the Sessions Judge revoking the sanction granted by the Sub-Divisional Magistrate for the prosecution of the respondent for disobedience of an order issued under section 144, Criminal Procedure Code. The ground, I take, is one of jurisdiction. The Sub-Divisional Magistrate is not "subordinate to the Sessions Judge under section 195 clauses (6) and (7) Criminal Procedure Code. The order passed by the Sub-Divisional Magistrate is an executive one and not judicial. Section 144 (4) says that the order is only liable to be revised by the District Magistrate, and not by the Sessions Judge. Though ordinarily appeals against judicial orders would lie to the Sessions Judge, in this case it is different. It is not as a "Court" that the Magistrate passes the order under section 133. Section 195 (6) mentions the word 'authority' and not 'Court'; whereas section 195 (7) refers to "Court". Section 195 (7) is not applicable to this case.

Only section 144 (4) is applicable and the District Magistrate alone has jurisdiction. It is submitted *Arunachalam Pillai v. Ponnuswami Pillai* (1) was wrongly decided. The Magistrate issuing an order under section 144 does so in his executive capacity as a "public servant," to avoid a breach of the peace. The decision in *Sundaram Chelli v. Queen* (2) shows that proceedings under section 144 are not to be regarded as judicial proceedings. See also *Abbas Ali Chowdhry v. Illim Meah* (3).

The order of the Sessions Judge revoking sanction is clearly without jurisdiction.

The Public Prosecutor, for the Crown:—For the purposes of proceedings taken under section 195, the Sub-Divisional Magistrate is a "Court," though the order itself is passed by him in his executive capacity.

Section 195 refers to judicial proceedings only. A Court is one where evidence is or may be taken on oath (Evidence Act,

(1) 48 Ind. Cas. 878; 35 M. L. J. 454; (1918) M. W. N. 824; 8 L. W. 422; 24 M. L. T. 396; 20 Cr. L. J. 78; 42 M. 64.

(2) 6 M. 203; 2 Weir 77; 2 Ind. Dec. (N. S.) 420 (F.B.)

(3) 14 W. R. Cr. 46.

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section 3). In proceedings under section 195, a Court may take evidence and so the proceeding where sanction was accorded is a judicial proceeding and hence the Sessions Judge had jurisdiction. "Public servant" is defined in section 20 of the Indian Penal Code as including Judges and Magistrates. The decision in *Arunachalam Pillai v. Ponnuswami Pillai* (1) is correct.

Mr. S. Subramania Aiyar, for the Respondent.

ORDER.—The Sub-Divisional Magistrate, Tanjore, passed an order under section 144, Criminal Procedure Code, prohibiting certain persons (respondents before us) from interference in the performance of a certain religious ceremony. Respondents are said to have disobeyed this order and the Sub-Divisional Magistrate thereupon sanctioned their prosecution for an offence under section 188, Penal Code. The Sessions Judge, purporting to act under sub-section (6) of section 195, revoked the sanction.

We are now asked to revise his order; and the first ground taken is that, as the case falls under clause (a) of sub-section (1) of section 195, the power of revocation lay with the District Magistrate and not with the Sessions Judge and that the latter's order was without jurisdiction.

The question has to be decided with reference to the provisions of sub-sections (6) and (7) of section 195. There is no doubt that, if the general principle of sub-section (6) is applied, the proper authority to revoke the sanction is the District Magistrate: *Vide* section 17 (1) and (5), Criminal Procedure Code. But it is contended that the Sub-Divisional Magistrate must be regarded as a "Court" when issuing an order under section 144 and (consequently) when sanctioning prosecution for breach of the same, and that it follows that the special test laid down in sub-section (7) for determining the subordination of "Courts" in this connection applies. If so, the proper authority to revoke is undeniably the Sessions Judge.

It is, we think, reasonable to hold that if the order under section 144 is passed by a person acting as a Court that person

must also be treated as a Court when he sanctions prosecution for disobedience of the same. It is also possible that the "public servant" referred to in sections 172 to 188, Indian Penal Code, might, in certain circumstances, be a "Court," whether in the latter event sub-section (7) should apply or whether the application of that sub-section is confined to cases falling under clauses (b) and (c) of sub-section (1) seems to us doubtful. But we are inclined to hold that a Magistrate passing an order under section 144, Criminal Procedure Code, does so only as a "public servant" and not as a "Court." We are aware that an opposite view has been taken by a Bench of this Court in *Arunachalam Pillai v. Ponnuswami Pillai* (1). We have carefully considered the judgment in that case which appears to proceed on the footing that an order under section 144 is an order of a Court. Napier, J., says such orders have always been treated as judicial orders which the learned Judge appears to treat as identical with orders of a Court. With all respect, we do not think this view is correct. A Full Bench of this Court in *Sundaram Chetti v. Queen* (2), a leading case on orders under this section, has specifically laid down that, "it should always be borne in mind that orders under section 518 of the Code of Criminal Procedure of 1872" corresponding to section 144 of the present Code are not judicial proceedings," and the same view has been taken by a Full Bench of the Calcutta High Court in *Abbas Ali Chowdhry v. Illim Meah* (3) of section 62 of the Code of 1861. That section has been elaborated and its operation in some ways restricted in the corresponding sections of subsequent Codes. But we find nothing in the changes which would render less applicable the considered opinions of the learned Judges in that case.

This view seems to be supported by a consideration of section 144. This section merely empowers certain Magistrates to pass temporary orders in urgent cases. These orders need not be based on any record outside the Magistrate's own knowledge or observation, and it is not even necessary that the party against whom it is directed should first be given a chance of being heard. To take a simple instance,

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a Magistrate observing with his own eyes (without complaint or report) that certain property was in a condition imminently dangerous to human life, might immediately and without waiting to hear what any human being had to say, issue an order under this section and provided his order was in writing, set out the material facts and was properly served, it would be a valid order, disobedience to which would be an offence under section 188, Indian Penal Code. The remedy of a party injuriously affected is to get it set aside under sub-section (4). Can such an order be treated as an order of a Court, or, to use another phrase, a "judicial order?" If not, is its nature altered because the Magistrate may hold an enquiry and record and consider evidence before issuing it?

Orders under section 145, Criminal Procedure Code, which must be preceded by an enquiry in the presence of parties who are entitled to adduce evidence, stand on a different footing though orders under both sections are withdrawn from the ordinary revisional jurisdiction of this Court (*vide* section 435 (3), Criminal Procedure Code).

In our opinion a Magistrate passing an order under section 144, Criminal Procedure Code, is not acting as a "Court" and sub-section (7) of section 195 is inapplicable to such a case.

In considering the intention of the Legislature it may not be out of place to refer to the improbability that, while securing orders under section 144 from interference except by the successor of the Magistrate passing them or by some superior Magistrate (*vide* clause 4 quoted above), the Sessions Judge should have been given the power to render the order practically nugatory by declining to allow a prosecution for disobedience to it.

We would also refer to the judgment of a Bench of this Court reported as *Sankaram Aiyar v. Sakkarappa Mudaliar* (4) in which the learned Judges took a more extreme view than that we have expressed above, and held, in effect, that all sanction orders passed under clause

(a) of sub-section (1) must be taken to be passed by a "public servant" who was not acting as a Court.

In our opinion the order of the Sessions Judge must be held to be without jurisdiction and is accordingly set aside.

V. N. V.

Z. K.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 1326 OF 1922.

December 4, 1922.

Present:—Mr. Justice Krishnan.

RAMUDU AIYAR—ACCUSED No. 1.

—APPELLANT

versus.

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 411—Evidence Act (I of 1872), s. 114—Receiving stolen goods—Guilty knowledge—Proof—Presumption—Co-accused—Statement, admissibility of—Practice—Criminal trial—Weakness of defence—Conviction, whether justified.

It is of the essence of an offence under section 411 of the Penal Code to show that the person who is in possession of the stolen property knew or had reason to believe it was stolen property. [p. 539, col. 1.]

Where stolen property is traced to the accused's possession nearly two months after the theft, the presumption of guilt under section 114 of the Evidence Act can hardly be applied. [p. 539, col. 1.]

A statement made by one of two co-accused should not be used against the other, where later on their cases are tried separately. If such a statement is to be relied on as evidence the accused person who made it must be examined as a witness in the other case. [p. 539, col. 2.]

It is the duty of the prosecution to establish by its own evidence that the accused is guilty. The weakness of the defence evidence is no ground for finding the accused guilty. [p. 540, col. 2.]

Appeal against the judgment of the Chief Presidency Magistrate, Madras, in C. C. No. 10116 of 1922.

Mr. Nugent Grant, Counsel, for Messrs. K. V. Shama Rao and Chinnaswami, for the Appellant.

The Crown Prosecutor, on behalf of the Crown.

JUDGMENT.—This is an appeal against the conviction by the Chief Presidency Magistrate of the accused under section 411, Indian Penal Code. The accused was sentenced to one year's rigorous imprisonment.

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ment. The stolen property is said to be a particular kind of gold thread which has never been sold before in the Madras market and which is easily identifiable. It would seem that about Rs. 40,000 worth of gold thread including this special kind of thread was stolen from the Port Trust premises some time in April 1922 from certain boxes which had been imported from Europe and kept there. The theft was discovered in April but the stolen property was not traced till the beginning of June. On some clues which the Police obtained they found that this particular kind of gold thread, which is the subject-matter of this case, was purchased by certain Salem merchants from the accused's brother and his *gumashdah*, and in consequence the accused was arrested and charged with receiving stolen property with reference to this gold thread.

Mr. Grant appearing for the accused does not dispute that the gold thread in question was really stolen property. The only question which is argued is, whether the accused received this stolen property "knowing or having reason to believe the same to be" stolen property. It is of the essence of any offence under section 411, Indian Penal Code, to show that the person who was in possession of the stolen property knew or had reason to believe that it was stolen property. The stolen property was traced to the accused's possession nearly two months at least after the theft so that the presumption under section 114 of the Evidence Act can hardly be applied in this case. Then, the question is whether there is evidence in this case sufficient to bring home to the accused the fact that he knew or had reason to believe the property to be stolen property. After hearing the evidence discussed before me, I have come to the conclusion that that evidence is not sufficient to establish the guilty knowledge of the accused, though it throws a very great deal of suspicion upon him. The accused says that he obtained the gold thread which he had from one Guruvappa Chetty and no attempt has been made to prove that this is false. Guruvappa Chetty was a co-accused in this case to start with, but subsequently his case was treated as a separate one and the accused was tried only along with his brother who had been discharged. The

Magistrate uses the statement made by Guruvappa Chetty as third accused when he was co-accused with the present accused for saying that Guruvappa Chetty never gave these goods to the first accused. I do not think that this was a proper use of his statement at all. As he was taken out of the dock he should have been examined as a witness if the Magistrate intended to rely upon his statement as evidence against the first accused. Even if that had been done, it would be very difficult to say that his evidence would have carried much weight, being himself accused of having been the thief. However, on the record there is no evidence whatever to show that the accused's statement that he bought the goods from Guruvappa Chetty and that he paid Rs. 4,980 for 83 marks of this gold-thread is not true. We cannot assume without evidence that the accused's statement is false. Therefore, it is the duty of the prosecution to prove that it is false if they propose to rely on its falsehood as against the accused. It is true that the accused's attempt to prove that he did actually give Rs. 4,980 by producing his account-book has not been very successful. I am not prepared to rely upon what appears in his account in his favour. The entry in his book is, as the Magistrate observes, very suspicious for the reasons he has stated. But it is one thing to find the entry suspicious and to refuse to act upon it and another thing to find the falsehood of what is sought to be proved. Assuming that it has not been proved that his statement that he got the goods from Guruvappa Chetty and that he paid Rs. 4,980 for the goods is not true, the question is whether there is evidence to show that he had reason to believe that Guruvappa Chetty could not have come by the goods honestly or that he should have suspected the *bona fides* of Guruvappa Chetty in being in possession of these goods and selling them to him. Now the price he has paid, the Crown Prosecutor contends, is such a low price that an adverse inference can be drawn against the accused from that fact alone. I am quite unable to agree with that argument because the price works out at Rs. 60 a mark and the evidence of the prosecution second witness seems to show that that was not at all an unfair price for the goods.

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in the market. No doubt he says that at the time the goods were imported the price including the duty for importation to British India was Rs. 71 but he admits that subsequently the price fell. Apparently at the time of the purchase by the accused it was not more than Rs. 45 without the duty and including the duty which is 30 per cent., it was somewhere about Rs. 60. No adverse inference, therefore, can be drawn from the amount of the purchase-money said to have been paid. It is also argued by the Crown Prosecutor that the two circumstances, namely, that the accused himself was not a dealer in gold thread and that he purchased this gold thread from a person who was not a dealer in gold thread, are very strong evidence against the accused. I certainly agree that those circumstances are grounds of great suspicion against the accused; but I am not prepared to hold, on these circumstances alone, that the accused had any suspicion or guilty knowledge of the goods being stolen property. Many people in Madras do sometimes speculate in goods in which they do not trade, and to take that as evidence of guilty knowledge would be quite unreasonable. There is no proof in this case that the accused knew that Guruvappa Chetty himself was, as the Crown Prosecutor contends, a fire-wood seller. He seems to have been a fire-wood seller long prior to this transaction and latterly according to the evidence he had become a seller of gems, and it is not impossible that such a man may on an occasion trade in gold lace. However, the circumstances though no doubt they carry great suspicion with them, are not, in my opinion, sufficient to convict the accused.

Another point made is that the gold lace was sold in Salem. Each side contends the fact to be in its favour. Mr. Grant says that the fact that it was sold in Salem in open market hawking it from shop to shop is a circumstance in his client's favour showing that he did not know the goods to be stolen as otherwise he would not have attempted to sell the goods in such an open manner. On the other hand, the Crown Prosecutor contends that the fact that the accused did not sell the gold lace in Madras but sent it up-country to Salem to have it sold is an indication that he knew

there was something wrong with the purchase of the goods. I do not think that either inference can reasonably be drawn. Any merchant in Madras may send goods honestly to Salem and possibly also if a man has stolen goods he might take it away up-country to some station to have them sold there rather than sell them in Madras. I think the circumstance is insufficient to draw a definite inference from. The Crown Prosecutor also contended that because the defence evidence is all untrue I must take it that the accused is a dishonest person and I should import this dishonesty into his conduct into purchasing gold thread. I am quite unable to do this. It is the duty of the prosecution to establish by its own evidence that the accused is guilty. The weakness of the defence evidence is no ground for finding the accused guilty.

On the whole of the evidence I have come to the conclusion that the prosecution has failed to establish satisfactorily that the accused when he bought this gold thread knew or had reason to believe the same to be stolen property. The newspapers and hand-bills produced are of no value whatever in this case for it is not shown that any of them got anywhere near the accused. The conviction and sentence of the accused will be set aside and his bail bond cancelled.

V. N. V.

Conviction set aside.

PALANI GOUNDAN v. KULANDAVELU GOUNDAN.

MADRAS HIGH COURT.CRIMINAL REVISION CASE NO. 137 OF 1922.
(CRIMINAL REVISION PETITION NO. 127 OF 1922.)

March 28, 1922.

Present.—Mr. Justice Venkatasubba Rao.

PALANI GOUNDAN—PETITIONER

versus

KULANDAVELU GOUNDAN AND OTHERS

—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 439—Proceedings under s 145—Magistrate, duty of—Refusal to proceed—Revision—Possession, delivery of, on written statement of party—Magistrate, jurisdiction of.

A Magistrate, who has initiated proceedings by a preliminary order under section 145 of the Criminal Procedure Code, can pursue one of three courses; he can cancel the preliminary order under sub-section (5) if he is satisfied that no dispute of the nature mentioned in the section exists or he can find who is in possession and issue an order under sub-section (6) or he can attach the property under section 146 of the Code. [p. 541, col. 2; p. 542, col. 1.]

Where a Magistrate starts proceedings under section 145 of the Criminal Procedure Code he cannot refuse to proceed with the enquiry on the ground that proceedings had already been taken by another Court in which the question of possession had been incidentally decided. The High Court has jurisdiction to set aside such an order in revision. [p. 543, col. 1.]

Sreeman Kumara Tirumalraja Bahadur, Rajah of Karvetnagar v. Sowcar Lodd Govind Doss Krishna Doss, 29 M. 561; 16 M. L. J. 419; 1 M. L. T. 405; 5 Cr. L. J. 91. *Velayudha Kone v. Narayana Kone*, 31 Ind. Cas. 645; 2 L. W. 1208; 16 Cr. L. J. 789. *In re Dyawappa Basgunda Patil*, 29 Ind. Cas. 66; 17 Bom. L. R. 382; 16 Cr. L. J. 434 and *Juthan Singh v. Ram Narain Singh*, 22 Ind. Cas. 986; 18 C. W. N. 700; 19 C. L. J. 356; 15 Cr. L. J. 202, relied upon.

Manindra Chandra Nandi v. Barada Kanta Chowdhury, 30 C. 112; 6 C. W. N. 417. *Kamulammal Avargal v. Vavu Rowthar*, 33 Ind. Cas. 314; 17 Cr. L. J. 138; 4 L. W. 57, distinguished.

In a proceeding under section 145 of the Criminal Procedure Code, the Magistrate has no jurisdiction to hand over the possession of the property in dispute to one of the parties to the proceeding merely on the basis of his written statement without taking evidence. [p. 543, col. 1.]

Chenga Reddi v. Ramasamy Gounden, 27 Ind. Cas. 152; 1 L. W. 1032; 16 Cr. L. J. 104. *Karimuddi Fakir v. Narmuddi Kaviraj*, 3 C. L. J. 573; 3 Cr. L. J. 466, relied upon.

Petition, under section 107 of the Government of India Act, 1915, praying the High Court to revise an order of the Court of the Joint Magistrate, Dindigul, dated the 1st February 1922, in Miscellaneous Case No. 1 of 1922 on its file.

Mr. F. C. Vaz, for the Petitioner.

Messrs. T. Richmond and K. B. Ranganatha Iyer, for the Respondents.

ORDER.—At the instance of the petitioner the Joint Magistrate of Dindigul passed a preliminary order under section 145, Criminal Procedure Code, on the 10th January 1922. This was preceded by an order of attachment under sub-section (4) dated the 5th January. The parties were directed to file written statements which were filed on the 1st February 1922 and the Magistrate on the same date made an order refusing to proceed with the enquiry under section 145 on the ground that some proceedings had already been taken under section 144. The Magistrate says: "It is true that the order passed under section 144, Criminal Procedure Code, by the Sub-Magistrate has now ceased to be in force and that the Sub-Magistrate had no jurisdiction under that section to give a decision as to who on a given date was in possession of the land. But on further consideration of the circumstances, which were not all before me when I passed my first order *ex parte*, I do not think that it is necessary now to take action as prayed for. I, therefore, dismiss the petition asking for action under section 145, Criminal Procedure Code. The finding of the Sub-Magistrate was upheld on appeal by this Court and I see no reason to take it up again." He again observes, "the claims of the parties should be settled by a Civil Court and I do not consider that it is necessary to enter into the question of possession here." What apparently happened was this. On the 25th July 1921 the Sub-Magistrate of Palni made an order which purported to be an order under section 144 which is said to be favourable to the counter-petitioners. That order was upheld on appeal by the Sub-Divisional Magistrate on the 10th September 1921. The Joint Magistrate thinks that, in view of these orders, it would be unnecessary to take any further proceedings.

It has been contended on behalf of the petitioner that the Magistrate had no jurisdiction to make the order in question. Having initiated the proceedings it was open to the Magistrate to make an order under sub-section (5); that is to say, if he was satisfied that no dispute of the nature

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mentioned in the section existed, he could cancel the preliminary order made on the 10th January 1922. It was also open to the Magistrate to find who was in possession of the subject-matter and issue an order under sub-section 145. A third course was still open to him, namely, to attach the property under section 146. It is obvious that the Magistrate has pursued none of these three courses, and the order that he passed is not justified by the directions contained either in section 145 or in section 146.

Mr. Richmond who supports the order has argued that it contains in effect, a finding that there was no apprehension of a breach of the peace. I have carefully read the order and I am unable to accept this contention. The Magistrate merely states that as proceedings were previously taken under section 144 and incidentally in the course of those proceedings it was found that the counter-petitioners were in possession of the property, it is not desirable to proceed with the enquiry under section 145. The order of the Magistrate clearly contravenes the provisions of the Criminal Procedure Code.

The next question that arises is:—Can the High Court in the exercise of its revisional powers interfere with an order of this nature? There seems to be ample authority for the proposition that it can. In *Sreeman Kumara Tirumalraja Bahadur, Rajah of Karvetnagar v. Sowcar Lodd Govind Doss Krishna Doss* (1) Davies and Moore, J.J., held that the Magistrate's refusal to receive evidence gave the Court no option but to declare that the order under section 145 was passed without jurisdiction, and on that ground they set aside the order. I may observe that in the present case no evidence was taken and no enquiry was held before the so-called final order was made by the Magistrate. In *Velayuda Kone v. Narayana Kone* (2) the High Court interfered on the ground that the Magistrate refused to hold an enquiry and gave it as his reason for the refusal,

that a prior application was dropped by another Magistrate. In *In re Dyawappa Basgunda Patil* (3) the Magistrate merely made an order that the applicant was not to obstruct and one of the learned Judges observes: "Where, as here, all the most essential things that go to the making of the order were absent, I can only say that I regard the order made as not a final order under the section." As regards the duty of the Magistrate the following observations were made: "The position, therefore, stands thus: if there is still a danger of a breach of the peace, the Magistrate must complete the proceedings as required by section 145 and make proper order either under that section or under section 146. If, however, there is no longer any danger of a breach of peace, the proceedings may be dropped. The next case that has been cited by Mr. Vaz for the petitioner is *Juthan Singh v. Ram Narain Singh* (4). In a proceeding under section 145, Criminal Procedure Code, no witness was examined on either side but the Magistrate decided the case on the documents filed before him, the latest of those documents dating back to about ten years before the date of the proceedings. It was held that the order made by the Magistrate was without jurisdiction. The learned Judge set aside the order and directed that, if necessary, fresh proceedings should be taken according to law.

The cases cited by Mr. Richmond on behalf of the counter-petitioners do not lay down different rule. In *Mapindra Chandra Nandi v. Barada Kanta Chowdhury* (5) it was held that a Magistrate has jurisdiction to cancel an order passed under sub-section (1) of section 145, and to stay proceedings if he becomes satisfied, whatever the source of his information may be, that the state of things does not exist, which alone would give jurisdiction to proceed with the enquiry. I may observe that the Magistrate in that case gave a finding that there was no apprehension of a breach of the peace. It was

(1) 29 M. 561; 16 M. L. J. 419; 1 M. L. T. 405; 5 Cr. L. J. 91.

(2) 31 Ind. Cas. 645; 2 L. W. 1208; 16 Cr. L. J. 789.

(3) 29 Ind. Cas. 66; 17 Bom. L. R. 382; 16 Cr. L. J. 434.

(4) 22 Ind. Cas. 986; 18 C. W. N. 700; 19 C. L. J. 356; 15 Cr. L. J. 202.

(5) 30 C. 112; 6 C. W. N. 417.

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argued that it was not open to the Magistrate to cancel an order made under subsection (1), unless one of the parties or some other person interested had shown that the supposed dispute did not exist or had not existed. The learned Judges refused to recognize any such limitation on the power of the Magistrate to stay his hand. In regard to the power of the High Court to interfere with orders under section 145, the learned Judges accept the correctness of the proposition that if an order was challenged to be without jurisdiction, that is to say, if it be outside the section, the mere fact of its purporting to be so passed would not bring it within the section so as to debar the exercise of the revisional powers of the High Court to set it aside. This case, therefore, does not assist the counter-petitioner.

Kamulammal Avargal v. Vavu Rowthar (6) only decides that a Magistrate could decline to proceed with the enquiry on being satisfied that there was no apprehension of a breach of the peace although statements had been put in and the enquiry had commenced. This again has no bearing upon the question under consideration.

I am satisfied that the High Court can in the exercise of its revisional powers set aside the order in question, as I have found that the Magistrate had no jurisdiction to pass it. The order of the 5th January directing attachment and the preliminary order of the 10th January have not been attacked and it is also conceded that in the filing and the receiving of the written statements no irregularity was committed. In the circumstances I set aside the order of the 1st February and direct the Magistrate to proceed with the enquiry and deal with the petition in one of the modes he is authorized to deal with it under sections 145 and 146.

A further objection taken relates to the portion of the order which directs the release of the property from attachment and the handing over of it to the respondents. The Magistrate refused to go into the question of the possession of the property

but the order he made is tantamount to an adjudication that counter-petitioners were in possession of the property. The cases relied on by the petitioner *Chenga Reddi v. Ramasamy Gounden* (7) and *Karimuddi Fakir v. Naimuddi Kavi-raj* (8) are in point. As a matter of fact, no evidence was taken, no statements were made before the Magistrate and he made the order in question merely on account of an allegation in the written statements of the counter-petitioners to the effect that the property had been taken from them by the Village Munsif in pursuance of the order of attachment. This order is clearly wrong. I, therefore, set aside the order of the Magistrate relating to the disposal of the property and its release from attachment. I have been asked to give directions to the Magistrate as regards the order he should make in the matter of the disposal of the property. I do not think that it is either proper or desirable to follow this course and I merely direct him to make such order as is in accordance with law.

As regards costs I direct that each party shall bear his own costs of this revision case.

V. N. V.

Z. K.

Order set aside.

(7) 27 Ind. Cas. 152; 1 L. W. 1032; 15 Cr. L. J. 104.

(8) 3 C. L. J. 573; 3 Cr. L. J. 466.

(5) 33 Ind. Cas. 314; 17 Cr. L. J. 132; 4 L. W. 57.

LAKHPAT GOPE v. EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION No. 82 OF 1923.

March 14, 1923.

Present:—Mr. Justice Kulwant Sahay.

LAKHPAT GOPE AND OTHERS—

FIRST PARTY—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 439—Failure to consider evidence—Revision.

A general remark in an order under section 145 of the Criminal Procedure Code that the documentary evidence is not relevant and that the oral evidence is not satisfactory, without referring to the evidence and without giving reasons, is not a disposal of the evidence upon the record. It amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision.

Kailashbehari Lal v. Jai Narain Lal, 57 Ind. Cas. 169; (1920) Pat. 288; 1 P. L. T. 291; 21 Cr. L. J. 601 and *Lachmi Ojha v. Birja Misser*, 63 Ind. Cas. 152; (1921) Pat. 110; 2 P. L. T. 168; 22 Cr. L. J. 616, followed.

Application.

Mr. P. C. Rai, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application on behalf of the first party in a proceeding under section 145, Criminal Procedure Code. The subject of dispute comprises two fields measuring 4 acres and 39 decimals, being Survey Plots Nos. 316 and 324. The first party claimed this land as their *kasht* land while the second party claimed this as their *khudkasht* land. The Record of Rights which was finally published in the year 1911 is in favour of the first party. The learned Magistrate in this judgment says "the parties have introduced into the case a mass of irrelevant matters fit for cognizance by a competent Court in a regular suit for adjudication of title and restoration of possession with recovery of mesne profits. They have also filed certified copies of documents and of judgments or orders of Courts, most of which tend to throw little light on the case." Then as regards the oral evidence all that he says is, "Both the parties have produced oral evidence which is not quite satisfactory." Then he ends his judgment by saying: "I have perused the statements filed by the parties, heard their Pleaders and considered the effect of the

evidence adduced by them and in the circumstances of the case. I decide that the second party was in actual possession of the plots under dispute on the date of the initiation of the proceedings."

In my opinion this judgment cannot stand. The learned Magistrate does not consider the evidence produced by the parties. The Record of Rights is in favour of the first party. He does not say how this Record of Rights has been rebutted and what is the evidence adduced by the other side. It is stated before me that a large number of documents had been produced by the second party which rebut the presumption raised by the Record of Rights, but the learned Magistrate does not refer to a single one of those documents and it does not appear that he considered those documents inasmuch as he says that most of the documents were irrelevant, and throw little light on the case. As was laid down in the case of *Lachmi Ojha v. Birja Misser* (1), the general remark in an order under section 146, Criminal Procedure Code, that the oral evidence is not reliable, without referring to it and without giving any reason, is not a disposal of the evidence upon the record. It amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision. The same view was taken in the case of *Kailashbehari Lal v. Jai Narain Lal* (2). In my opinion this order cannot be upheld. One can form no idea as to what the evidence on the record is and whether the learned Magistrate considered the evidence adduced by the parties.

This order must be set aside and the case remanded to the Court below for trial according to law.

Case remanded.

Z. K.

(1) 63 Ind. Cas. 152; (1921) Pat. 110; 2 P. L. T. 168; 22 Cr. L. J. 616.

(2) 57 Ind. Cas. 169; (1920) Pat. 288; 1 P. L. T. 291; 21 Cr. L. J. 601.

RAGHAVACHARIAR v. MURUGESA MUDALI.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 83 OF 1921.

January 26, 1923.

Present:—Sir Walter Schwabe, Kt.,
Chief Justice, and Mr. Justice Wallace.P. V. RAGHAVACHARIAR, BY HIS
AUTHORISED AGENT, P. R. SRINIVASAN
—PLAINTIFF—APPELLANT

versus

MURUGESA MUDALI AND OTHERS—
DEFENDANTS—RESPONDENTS.*Civil Procedure Code (Act V of 1908), s. 151,
O. XXI, r. 92—Execution-sale—Suppression of
material facts—Inherent power to set aside sale.*

A Court has an inherent power to refuse to confirm a sale made at Court-auction, if it is satisfied that it has been misled either in giving leave to bid or in fixing the reserve price. This is only an instance of the inherent power possessed by all Courts to prevent an abuse of the process of the Court, but the Court will not use that inherent power unless it has had all the facts fully before it and is satisfied that it has been misled. [p. 545, col. 2.]

In order to prove that it has been misled, it is necessary to show either actual mis-statements to the Court or non-disclosure to the Court of relevant facts unknown to the Court and which there was a duty to bring before the Court, and if a person professes to give information on any particular subject with a view to guide its discretion and obtain its approval, he is bound to lay before the Court all the material information he possesses on that particular subject. [p. 545, col. 2 & p. 546, col. 1.]

Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalur, 23 M. 227; 2 Bom. L. R. 640; 4 C. W. N. 228; 27 I. A. 17; 10 M. L. J. 1; 7 Sar. P. C. J. 661; 8 Ind. Dec. (N. S.) 561 (P. C.), *Coaks v. Boswell*, (1886) 11 App. Cas. 232; 55 L. Ch. J. 761; 55 L. T. 32, followed.

Birj Mohun Thakur v. Rai Uma Nath Chowdhry, 20 C. 8 (P. C.); 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6, referred to.

Where on an application to fix the reserve price, the decree-holder suppressed the fact that on a previous occasion the Court itself had fixed a very high price as the reserve price and had refused to accept a high bid:

Held, that there had been a suppression of a material fact and that the Court was entitled to refuse to confirm the Court sale when the fact was subsequently brought to its knowledge. The fact that notice is served on all the parties at the time of the application does not relieve the decree-holder from his obligation to set out the relevant facts nor reduce the liability on him when he does state the facts, to lay before the Court all the material information he possesses about these facts. [p. 546, col. 1.]

Per *Wallace, J.*—Order XXI, r. 92 of the Civil Procedure Code is no bar to the Court interfering to cancel an auction-sale, even though no party has applied for cancellation, when the Court dis-

covers, in the course of the proceedings, that the decree-holder auction-purchaser deliberately misled it, and profited thereby to the disadvantage of the judgment-debtor or the judgment-debtor's creditors. [p. 547, col. 2.]

Appeal from an order of Mr. Justice Kumaraswami Sastri, dated the 2nd May 1921, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 196 of 1920.

Mr. T. Narasimha Iyengar, for the Appellant.

Messrs. V. S. Govindachari and C. Narasimha Chariar, for the Respondents.

JUDGMENT.

Schwabe, C. J.—This is an appeal from an order of Kumaraswami Sastri, J., refusing to confirm a sale made at Court-auction. He has refused to confirm the sale on the ground that all the facts were not placed before him when the reserve price was fixed and when the plaintiff obtained leave to bid. There is a misapprehension on the part of the learned Judge, in that the application for leave to bid was to him, but the application to fix the reserve price was to the Registrar and not to him. I do not think it is enough to say, in order to refuse to confirm a sale, that all the facts were not put before the Court on the two occasions referred to. But, in my judgment, the Court has an inherent power to refuse to allow the sale to be carried out if it is satisfied that the Court has been misled either in giving leave to bid or in fixing the reserve price. This is only an instance of the inherent power possessed by all Courts to prevent an abuse of the process of the Court, but, of course, the Court will not use that inherent power unless it has had all the facts fully before it and is satisfied that it has been misled. I think the principle is that, in order to show that the Court has been misled, it is necessary to show either actual mis-statements to the Court or non-disclosure to the Court, of relevant facts unknown to the Court and which there was a duty to bring before the Court. How far that duty goes, in applications for leave to bid and in applications to fix the reserve price may, I think, be found in the judgment of the Privy Council in *Mahomed Mira Ravuthar v.*

RAGHAVACHARIAR v. MURUGESA MUDALI.

Savvasi Vijaya Raghunadha Gopalar (1) quoting passages from the judgments of Lord Selborne and Lord Fitzgerald in *Coaks v. Boswell* (2), and they come at last to this, that if a party professes to give the Court information on any particular subject with a view to guide its discretion and obtain its approval, he is bound to lay before the Court all the material information he possesses on that particular subject.

There were two stages in which the present plaintiff gave information to the Court. The first was to the Judge himself on his application for leave to bid and I am not prepared to say that there were materials relevant to the consideration as to whether he should be allowed to bid or not known to him which he did not disclose. I think he did give a very meagre statement of facts on that occasion, but I am not convinced that full statement of facts was relevant for the consideration of the Court in deciding whether he should bid or not, because on that application, certainly, the main question for the Court to consider is whether it is to the advantage of everyone concerned in order to obtain the highest price that the plaintiff should be allowed to bid or not. The second stage in which he gave information was on his second application which was to the Registrar, and that was under rule 205 of the Original Side Rules, by which the applicant for sale has to put in an affidavit stating what, in his opinion, is the best time and place of sale and method of advertising the same, the lots, if any, into which the property should be divided, and the market value of, and the reserve price to be fixed for, the property. Then under rule 206 the Registrar is to determine the various matters and in the event of any objection being raised to the lots, the market value or reserved price mentioned in the affidavit, the question is to be determined by a Judge in Chambers. Now, an affidavit was put in of which the tenor was that it was very doubtful whether the judgment-debtors had any interest in the

property at all which was proposed to be sold, that they had claims to it which were subject to litigation and the outcome of that litigation, like most litigations, was uncertain and that it was impossible, therefore, to give any idea of the market value. The Registrar not being satisfied that that was a proper compliance with the rule, a further paragraph was added by the plaintiff that, under the circumstances stated in the rest of the affidavit, the market value of lot No. 1, which is the lot in question, might be fixed at Rs. 3,000; and so the reserve price was fixed. The matter did not go before the Judge because no one seems to have taken any objection to the reservation of that price. It is true that on these proceedings one of the judgment-debtors was represented and the other had been served with a notice, but that fact does not, in my judgment, in any way relieve the plaintiff from the obligation to set out the relevant facts in his affidavit, nor reduce the liability on him, when he does state facts, to lay before the Court all the material information he possesses about those facts. In this case I am quite satisfied that he did not comply with that obligation. There was a fact well-known to him, namely, that the property in respect of which the judgment-debtors claimed and have since been held by the Court to have a two-thirds interest, had been put up for sale by the Court before and that the Court had fixed Rs. 45,000 as the reserve price and a bid of Rs. 36,000 had been refused on the ground that it was not great enough. It might have been a question for argument before the Registrar that, notwithstanding that fact, a very low price with no reserve price should be fixed in this case because of the doubt as to the judgment-debtor's title, but the Registrar was not given the opportunity of making up his mind upon that or receiving any such argument because the fact was entirely suppressed from his knowledge. I am convinced that, whatever the result might be, any Tribunal that had to make up its mind as to what the reserve price should be, would, in fact, be greatly influenced by such information as was in this case suppressed, namely, that the Court itself for the property in dispute had on a previous occasion fixed a very high price as the reserve price and refused the

(1) 23 M. 227; 2 Bom. L. R. 640; 4 C. W. N. 228; 27 I. A. 17; 10 M. L. J. 1; 7 Sar. P. C. J. 661; 8 Ind. Dec. (N. S.) 561 (P. C.).

(2) (1886) 11 App. Cas. 232; 55 L. J. Ch. 761; 55 L. T. 32.

HIRASA V. SHEOKUWAR.

bid of an amount such as was accepted in this case. I think, therefore, that there were all the elements necessary for the Court to act on its inherent powers. The plaintiff had taken upon himself to give the Court information as to the value.

He had told the Court certain facts and not told the Court other facts relevant for the Court's consideration and unknown to the Court. I am satisfied that the learned Judge's order was right. It seems to me that it is not, as I have pointed out, correct to say that he was deceived in respect of the price, and I doubt if he was right in the view he took that in respect of allowing the plaintiff to bid he ought to have had the information before him. I am satisfied on the other application, namely, the application before the Registrar, that there was a suppression of a material fact, and, therefore, the sale cannot be confirmed.

This appeal must be dismissed with costs.

Wallace, J.—I am of the same opinion: I am not satisfied that knowledge of the facts of the previous auction, in which the property was valued at Rs. 45,000 and as being the joint family property of the plaintiff's two judgment-debtors and another, would have led the Executing Court to refuse the plaintiff permission to bid, but I am satisfied that that knowledge would, in the case of this second sale, in which the property was again advertised as the joint family property of the plaintiff's two judgment-debtors and another, in all probability, have restrained the officer of this Court, whose duty it was to fix the upset price, from fixing an upset price at any figure so low as Rs. 3,000 and would therefore, have resulted in preventing the selling officer from knocking down the property for Rs. 36,000. The suppression of this fact by the plaintiff was, therefore, a suppression of a material fact. Further, it was clearly his duty, when the Court had to fix this upset price, and he elected to put before it such facts as he knew relevant to that point, to put forward all material facts within his knowledge on that point, to enable the Court to fix the value for the purpose of setting that price. In fact, it was his duty to put before the Court those facts which he chose to put forward at length in his subsequent affidavit of the 5th of March, which he chose to put for-

ward only when the question of confirming his sale arose. In his affidavit of the 3rd of November, 1920, which does discuss the difficulties in fixing the value, the plaintiff withheld—deliberately, I am satisfied—the very material fact of the prior auction, and did not fairly and openly state to the Court the factors in the problem which he put to himself and of which he himself was aware and the Court was not. That the Court Officer was not aware of it seems to me obvious. The judgment-debtors had added nothing to what the plaintiff stated in his affidavit, and I find nothing in the plaintiff's affidavit to put the Court on notice of this previous auction. Thus, the ingredients necessary to prove misrepresentation necessary to justify the setting aside of the sale are present. O. XXI, r. 92; and the Privy Council ruling in *Birj Mohun Thakur v. Rai Uma Nath Chowdhry* (3) are, in my view, no bar to the Court interfering to cancel the sale, even though no party has applied for cancellation, when the Court discovers, in the course of the proceedings, that the decree-holder (auction-purchaser) deliberately misled it, and profited thereby to the disadvantage of the judgment-debtor or the judgment-debtor's creditors.

V. N. V.

Appeal dismissed.

(3) 20 C. 8 (P. C.); 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 46 OF 1922.

February 10, 1923.

Present:—Mr. Hallifax, A. J. C.

HIRASA AND OTHERS—DEFENDANTS

—APPLICANTS

versus

SHEOKUWAR—PLAINTIFF—

NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 141, O. IX, r. 2—Suit dismissed in default—Application for restoration dismissed for default in payment of process-f:—Appeal, whether lies.

VENCATACHELLA PILLAI v. ARUNTHAVATHATCHI.

P's suit was dismissed in default of prosecution. He applied to set aside the order of dismissal, but on his failure to pay the process-fees in time, the application was dismissed for default:

Held, that the dismissal of the application was under O. IX, r. 2 of the Civil Procedure Code, and that against such dismissal an appeal did not lie, irrespective of whether or not section 141 of the Civil Procedure Code applied to the proceedings on the application for restoration.

Revision of the order of the Additional District Judge, Bilaspur, dated the 16th December 1921, in Civil Appeal No. 14 of 1921.

Mr. M. R. Bobde, for the Applicant.

Mr. G. R. Deo, for the Non-Applicant.

JUDGMENT.—The non-applicant, *Musammal* Sheokuwar, filed a suit against the applicants, Hirasai and others, in the Court of the Subordinate Judge of Bilaspur. Certain preliminary issues were framed and the parties were told to appear on the 12th of July, 1921, to argue them. The defendants were present but the plaintiff was not and the suit was accordingly dismissed. On the 23rd of July, 1921, Sheokuwar made an application for setting aside the order of dismissal. She appeared on the 3rd of September, 1921, but notices on the opposite party had not then been served. The case was adjourned to 8th October, 1921, and the order passed on that date was as follows:—
“Applicant *Musammal* Sheokuwar in person. Non-applicants absent. The previous notices were returned unserved. Notices for this hearing could not be served for want of time as process-fee was paid on 3rd October, 1921. I do not find any justification for paying process-fees so late. I, therefore, dismiss the application for default of the applicant.”

2. Against this dismissal of her application for restoration of her suit the plaintiff appealed and the judgment of the learned Additional District Judge is as follows: “Parties say that the suit was for a house valued at nearly Rs. 300. The suit was dismissed in default and then the restoration petition was dismissed as the process-fees were paid late. This was correct, but as property is involved which may be the all in all to the plaintiff, I direct that the applicant do in ten days deposit Rs. 15 for payment as restoration costs to the other side, and then the petition be restored

and heard on the merits. Failing such deposit, the petition shall stand finally dismissed. No costs of the appeal to either party.”

3. The defendants in the suit have applied to this Court for revision of the appellate order that the application for restoration of the suit shall be restored. If section 141 of the Civil Procedure Code does not apply to the proceedings on the application for restoration, then it is clear that there can be no appeal against the order dismissing it. If, however, that section does apply, it is equally clear that the dismissal of the application was a dismissal under r. 2 and not under r. 9 of O. IX of the Civil Procedure Code. Against such dismissal no appeal lies. It is not, therefore, necessary to discuss the somewhat fantastic grounds on which the order of dismissal of the application has been set aside in appeal, as that appellate order is passed without jurisdiction. It will accordingly be set aside and the order of the First Court will be restored. The costs incurred by the non-applicant as well as those of the applicants in this Court and in appeal will be paid by the plaintiff-non-applicant. The Pleader's fee in this Court will be Rs. 15.

W. C. A.

Order set aside.

MADRAS HIGH COURT.

CIVIL APPEAL No. 305 OF 1921.

October 6, 1922.

Present:—Mr. Justice Krishnan and Mr. Justice Ramesam.

VENCATACHELLA PILLAI—PLAINTIFF

—APPELLANT

versus

ARUNTHAVATHATCHI—DEFENDANT

RESPONDENT.

Estoppel—False representation—Knowledge of true facts—Estoppel, if arises—Construction of document—Hindu joint family—Deed of union with stranger—Co-parcenary; severance of.

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A person who knows the truth cannot be allowed to rely upon an estoppel arising from a false representation and no estoppel can arise where the truth is known to the party who claims the estoppel. [p. 552, col. 1.]

Mohori Bibee v. Dharmodas Ghose, 30 I. A. 114; 30 C. 539; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374, (P. C.), followed.

By a "deed of union" two brothers forming a joint Hindu family entered into an agreement with another brother who had been adopted away into another family by which the properties of the joint family and those of the adopted brother were put together and it was agreed that when a division took place in the future, the properties were to be divided into three shares equally and that if any uterine brothers were born they were also to take jointly with them and that three brothers were to treat themselves as members of a joint family. It was urged that the legal effect of the deed was to sever the co-parcenary on the ground that the two members of the joint family could not constitute themselves into a unit and take in a stranger without themselves being treated as united:

Held, that the intention of the deed was clearly not to divide but to unite and if it had failed to do that it had failed of its purpose, but that its legal effect was not to result in a severance of the co-parcenary interest between the two brothers of the joint family. [p. 552, col. 2.]

Balkishen Das v. Ram Narain Sahu; 30 C. 738; 30 I. A. 139; 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar. P. C. J. 489, distinguished.

Appeal against a decree of the Subordinate Judge, Cuddalore, in Original Suit No. 65 of 1919.

Mr. A. Krishnaswami Iyer (with him Mr. Padhmanata Iyengar), for the Appellant:—This is a suit by a widow to recover certain properties belonging to her husband. Her case that her husband's brother had been adopted away, so that she was entitled to the whole properties as her husband's heir has been negatived. The alternate claim for a moiety has been decreed on the ground that the plaintiff's husband was divided from his brother. The finding on this question is clearly wrong. The evidence as to partition is very faint. The undoubted presumption in a Hindu family is one of jointness. (The evidence in the case was referred to show it was insufficient to prove a division of status). If partition is found against plaintiff's suit must fail in its entirety.

Mr. T. Rangachariar (with him Messrs. K. Bhashyam Iyengar and K. Narasimha Iyer), for the Respondent:—The finding of the Judge as to the adoption of Venkatachella

is clearly wrong. His adoption to his brother who had himself been adopted away to Subbaroya's family is amply borne out by the uniform course of conduct of Venkatachella as to his adoption; his various assertions during a long period, and by the conduct of parties all of which would be consistent only with a case of adoption.

Apart however from the actual fact of adoption, the defendant having always set up and asserted an adoption is now estopped from proving a case of no adoption. But for this representation of the defendant, the plaintiff's husband might have separated himself from the joint family and secured the property to his separate heirs, viz., wife and daughters.

Where parties had been acting on the footing of a valid and subsisting adoption for a long time and where it will be impossible or inequitable to restore the adopted son to his natural family, the *factum* of the adoption cannot be questioned by any of the parties.

Kannammal v. Virasami (1); *Gopalayyan v. Raghupaliayyan* (2); *Parvatibayamma v. Ramakrishna Rau* (3); *Muniswami Chetty v. Maruthammal* (4); *Vaithilinga Mudali v. Munigan* (5); *Dharam Kunwar v. Balwant Singh* (6); *Kanhai Lal v. Brij Lal* (7).

The estoppel is founded on the fact of a long and general recognition of adoption by the natural family the adoptive family and the adopted son himself.

In any case even if there was no adoption the finding as to division of status is correct. Exhibit A, the deed of agreement between

(1) 15 M. 486; 2 M. L. J. 114; 5 Ind. Dec. (N. S.) 690.

(2) 7 M. H. C. R. 250 at pp. 256, 257.

(3) 18 M. 145; 5 M. L. J. 44; 6 Ind. Dec. (N. S.) 450.

(4) 7 Ind. Cas. 176; 34 M. 211; (1910) M. W. N. 233; 8 M. L. T. 124; 20 M. L. J. 687.

(5) 15 Ind. Cas. 299; 37 M. 529; 23 M. L. J. 189; (1912) M. W. N. 1127.

(6) 15 Ind. Cas. 673; 34 A. 398; 16 C. W. N. 675; 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 23 M. L. J. 200; 39 I. A. 142 (P. C.).

(7) 47 Ind. Cas. 207; 40 A. 487 at p. 496; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 23; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.).

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the two natural brothers and the adopted brother itself, creates a division of status between the two brothers *inter se*. The members of a joint family cannot except by a division *inter se* agree with a stranger to live jointly. The agreement fixes the shares as being one-third for each and is conclusive on the question of division. See *Balkishen Das v. Ram Narain Sahu* (8). A division of status is a necessary corollary to the arrangement in the case. The document creates an interest *in present* and negatives any idea of survivorship. See also *Jogeswar Narain Deo v. Ram Chandra Dutt* (9).

There is also independent evidence to prove division (reference was then made to the evidence in the case).

Mr. A. Krishnaswami Iyer, for the Appellant in reply:—There is no question of estoppel at all in this case. If the adoption was false, it was false to the knowledge of the defendant and still more so of the plaintiff's husband and it is clear law that where the truth is known there can be no estoppel.

Mohori Bibee v. Dharmodass Ghose (10); *Ramachari v. Saraswati Ammal* (11).

To constitute estoppel, there must have been a contest between the alleged adopted son and the other member who relies on estoppel.

Vaithilinga Mudali v. Munigan (5); *Ramachari v. Saraswati Ammal* (11).

There is further no evidence that plaintiff's husband was influenced by the assertions of the defendant.

Secondly, the document A is a deed of union and not of division. The mere use of the word "shares" is clearly insufficient. There is no authority for the position that a joint family as an entity without separation *inter se* cannot unite with a stranger even as a matter of contract. The cases referred to do not bear on the present suit. *Jogeswar Narain Deo v. Ram Chandra Dutt* (9) merely

lays down that co-tenancy is the rule and joint tenancy the exception.

There is further overwhelming evidence in the case to show there was no partition. The finding of the Judge is, therefore, wrong.

JUDGMENT.—This is an appeal by the defendant from the decree of the Subordinate Judge of Cuddalore in Original Suit No. 65 of 1919.

The plaintiff is the widow of one Ananta narayana Pillai and the defendant Venkatchella Pillai, is her husband's brother.

She claims the properties in various ways: firstly, the whole of the properties in schedules II and III on a certain footing; secondly, half of those properties on a certain other footing; and thirdly, one-third of the property in schedules II and IV and the whole of schedule III properties on still another footing. The facts of the case are fully set out by the learned Subordinate Judge in his judgment and need not again be referred to in detail.

Anantanarayana, Ramachandra and Venkatchella (the defendant herein) were brothers, being the sons of one Muthusami Pillai. Muthusami Pillai had two brothers himself, but they died 20 or 25 years ago leaving no male issue, and all their property passed to Muthusami Pillai. Schedule II of the plaint gives the property which Muthusami had and which would have passed to his three sons as the ancestral estate. Schedule III gives the properties which the plaintiff's husband and his brothers got from their maternal grandfather, and schedule IV consists of certain properties which had once belonged to one Subbaroya Pillai and which passed to Venkatchella Pillai. The plaintiff states that as her husband was the sole surviving member of the joint family at the time of his death, he is entitled to whole of the properties described in schedules II and III; in the alternative she says that if the defendant is held to be entitled to the properties as co-owner to himself and to plaintiff's husband, she would be entitled to half of the properties in all the three schedules. She denies that defendant continued as co-parcener of her husband at the time of his death.

It is the defendant's case that he was such a co-parcener and, therefore, the whole of the properties in the three schedules

(8) 30 C. 738; 30 I. A. 139; 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar. P. C. J. 489. (P. C.)
 (9) 23 C. 670; 23 I. A. 37; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445. (P. C.)
 (10) 30 I. A. 114; 30 C. 539; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374. (P. C.)
 (11) 60 Ind. Cas. 246; 12 L. W. 544; (1920) M. W. N. 721.

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in the plaint passed to him and that the plaintiff got only a right of maintenance.

Of the three brothers Anantanarayana Pillai, Ramachandra Pillai and Vencatachella Pillai, Ramachandra Pillai, the second brother, was admittedly adopted away from the family by one Pannapattu Subbaroya Pillai, and he seems to have succeeded to the properties of Subbaroya Pillai and enjoyed them. Just before his death, a document the effect of which has been discussed before us at some length and which we have to consider, Exhibit A was executed by the plaintiff's husband, this Ramachandra Pillai and their father Muthusami Pillai as representing the defendant who was then a minor. It is the plaintiff's case that, sometime thereafter, the defendant was himself adopted by Ramachandra Pillai into the new family to which Ramachandra Pillai had passed and he contends that having been so adopted away, he has no more rights in the original family, and it is in that eventuality, she says, she is entitled to the plaint properties in schedules II and III. Schedule IV properties which came from Subbaroya Pillai, she would admit would then belong to the defendant solely, so that, one important question in this case has been whether the adoption of the defendant by Ramachandra Pillai has been proved. The Subordinate Judge found on the evidence that it must be taken that the adoption has not been proved and that, in fact, it was a false assertion, made by the defendant and his brother, the plaintiff's husband. There is a good deal of evidence to show that this adoption was not true in fact, for very soon after Ramachandra Pillai died, the properties of Ramachandra Pillai were claimed by his widow, Valliammal. She got a transfer of *patta* of the property in her name to start with. There is nothing to show that Vencatachella Pillai objected to that course being adopted. Nextly, we have a suit brought by a stranger, a Nattukottai Chetti for a debt alleged to be due by Ramachandra Pillai against Valliammal as his legal representative. The suit was decreed and a considerable bulk of the properties of Ramachandra Pillai was sold and purchased by the Chetti himself. The defendant subsequently brought a suit to have the sale set aside, but he did not continue that suit and obtain-

ed no relief. Subsequently, we find some reversioners of Ramachandra Pillai bringing a suit against this Chetti in which Vencatachella Pillai and Valliammal were both made parties. In that suit Vencatachella's alleged adoption was disputed and there was a finding arrived at that the adoption was not true. The main evidence which was put forward in that suit to support the adoption was a Will supposed to have been executed by Ramachandra Pillai. That Will was also found to be not genuine. It was decided that the plaintiffs in that suit were the reversioners, which meant that the truth of the adoption was negated. No appeal was filed by Vencatachella Pillai against this decision, although there was an appeal by the other parties. Again a subsequent suit, *vide* Exhibit H, which the defendant and his brother, Anantanarayana, brought, the latter as an assignee of the mortgage in favour of Ramachandra Pillai and the former as adopted son, was dismissed. The finding there also was against the adoption, but no further steps were taken in that litigation either to establish the adoption. We find, therefore, that immediately on the death of Ramachandra Pillai the defendant's supposed adoption was disputed, and every time it went before the Court, the decision was against the truth of the adoption.

Further we find certain transactions which also go against the truth of this adoption. As has been already stated, the bulk of the properties of Ramachandra Pillai was sold and purchased by Nattu Kottai Chetti: but there were some properties still left and they were conveyed by Valliammal to a relation of hers, one Muthu Velaguden. Of course, she could not validly have done this if the adoption was true, and yet no steps were taken by the defendant to dispute the validity of that sale.

These and other circumstances referred to by the Subordinate Judge in his judgment show very clearly that it is not possible to find that the adoption was in fact proved. No doubt, on the other hand, it is pointed out to us that in spite of all these adverse decisions, Vencatachella, the defendant, went on asserting that he was the adopted son of Ramachandra Pillai in the numerous documents which he executed till about May 1916. Why he did so it is difficult

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to say for certain, but the Subordinate Judge has given what he considers to be the possible reason for it, and it is not unlikely that that may be the motive that made him continue to assert that he was the adopted son of Ramachandra Pillai. Anyhow the fact of the adoption, we must take it, has not been proved, and we agree with the Subordinate Judge on that point.

It was then suggested that, because the defendant went on asserting that he was the adopted son of Ramachandra Pillai, he must now be estopped from saying that he is a member of the same family as Anantanarayana Pillai for, it is contended that, if he had not done so, Anantanarayana Pillai might himself have formally divided himself off from Vencatachella Pillai and secured his share for his wife and daughters, and as by the latter's conduct, Anantanarayana was misled into not doing that, an estoppel arises against the defendant. We are not able to accept this argument for, in the first place, it is not denied that if the adoption is false, Anantanarayana knew the whole truth about it, perhaps to a greater degree than the defendant himself. A person who knows the truth can hardly be allowed to rely upon an estoppel arising from a false representation. No estoppel can arise where the truth is known to the party who claims the estoppel. *Vide Mohcri Bibee v. Dharmodas Ghose* (10). In the second place, there is absolutely nothing to show that Anantanarayana Pillai ever intended to divide from Vencatachella Pillai who was asserting that he was the adopted son of Ramachandra Pillai. There is thus no basis for the estoppel pleaded.

Then it is said that by the document, Exhibit A, there was a severance of co-parcenary between Vencatachella Pillai and Anantanarayana Pillai. On this point the Subordinate Judge has held against the plaintiff and in favour of the defendant. The document is a curious one. It calls itself "a deed of union" and it is in fact an attempt by the two brothers Anantanarayana and Vencatachella to unite with the third brother, Ramachandra Pillai, who had been adopted away into another family. It purports to be an agreement by which the properties of all the three brothers were put together with a statement that

they should be, when a division takes place in the future, divided into three shares equally, that, if any uterine brothers are born, they are also to take jointly with them, and in fact, that the three brothers are to treat themselves as members of joint family. It is contended for the respondent that this deed, as a matter of legal consequence whatever the parties might have intended, resulted in the severance of co-parcenary between the plaintiff's husband and Vencatachella Pillai, for it is said that two members of a joint family could not constitute themselves into a unit and take in a stranger, without themselves being treated as divided. In our opinion the intention of the deed is clearly not to divide but to combine, and if the deed has failed to do that, it has failed of its purpose. It may be valid, as a matter of contract, between the stranger, Ramachandra Pillai, and the two brothers members of the joint family but it does not sever the latter's co-parcenary. In fact it expressly says that no party to the deed is to assert that any portion of the property belongs to him separately or exclusively. It provides for future born children, to be made sharers. It no doubt also provides that the eldest man was to manage all the properties and keep the accounts. It was suggested that this and the fixing of the share as one-third to each of the parties are indications that a division was intended; and the case in *Balkishen Das v. Ram Narain Sahu* (8) was cited as an authority for the partition that a definition of shares will result in the family being treated as divided. But that case is very different because there was a present allotment of the different shares with a statement in the deed that any person who wanted to separate may take his share and leave the joint family and the others may continue in joint enjoyment. Here there is no such provision. Exhibit A does not contemplate a division but it expressly says that in case the defendant who was then a minor becomes of age, the properties are to be divided in future into three shares. That amounts to nothing more than a mere statement as to what each person would be entitled to in case of a division if no brothers are born. We cannot accept that as indicating that Anantanarayana Pillai and the defend-

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ant intended to divide themselves off from each other *in presenti* by that deed.

It was next argued that certain dealings between the parties and the conduct of Anantanarayana Pillai and the defendant showed that they had treated themselves as divided in status and that they were really so divided. It is this part of the case that the Subordinate Judge has found in favour of the plaintiff and given her a decree for half of the properties in schedules II, III, and IV. We are unable, however, to follow the Subordinate Judge in the view that he has taken on this part of the case. He says that the commonality between Vencatachella and Anantanarayana came to an end about a year before the latter died, meaning that they were living separately. Then he refused to certain lease-deeds of the lands taken in the name of the defendant alone, and to certain debt bonds being taken exclusively in Anantanarayana's name. He then refers to two documents, Exhibits C and C 1, which were two pro-notes assigned over by endorsement by the defendant to Anantanarayana. Pausing here for a moment we do not think that any of these circumstances are of any value in showing that Anantanarayana Pillai and Vencatachella became divided. It is not the plaintiff's case that there was any division just before the death of Anantanarayana. Her case is that from very long ago, since the date of Exhibit A and certainly after the date of the alleged adoption, the two were not members of joint family but were divided. The endorsement that the Subordinate Judge refers to leads to no conclusion whatever without knowing more about the nature of the debt for which these pro-notes were executed. We only know that was a transfer by endorsement by one member of a family to another of two notes; this is of no evidentiary value in considering the question whether they were divided or not. The transactions may have taken place even if they were undivided if for example they were dealing with self-acquired properties.

Then the Subordinate Judge refers to an instalment of *kist* being paid in Anantanarayana's name, though previously all along it had been paid in the defendant's name. He refers to Exhibits E and X and XI series in support of this. How this

indicates that Vencatachella divided off from Anantanarayana it is difficult to imagine. No reliance has been placed by the learned Vakil for the respondent before us on this circumstance. We are unable to attach any significance as the Subordinate Judge seems to have done to the assignments of the pro-notes or to the payments of *kists*. We think they are all circumstances quite consistent with the parties remaining in the same state as they were before.

Then the Subordinate Judge says, "the following facts strongly militate against the supposition that it was the intention of Anantanarayana and defendant in cultivating and enjoying the lands jointly, to do so as members of a co-parcenary and he refers to the defendant, Vencatachella masquerading to all the world in the disguise of Ramachandra Pillai's adopted son. We have already referred to this circumstance and, whatever the reason for his having done so may be, it certainly does not indicate any intention on his part to divide himself off from his brother. In fact apparently these men were of opinion that, even after the adoption into another family, they could remain as members of the original family or bring themselves back into it as they have attempted to do in Exhibit A in the case of Ramachandra Pillai and continue as members of the original joint family.

Another circumstance has also been referred to, *viz.*, that Vencatachella Pillai adopted the Saivite faith of Ramachandra and performed funeral ceremonies to him. This may be some evidence on the question of the truth of the adoption, but we have already held that the evidence on that point is strongly the other way. It has little or no bearing upon the question of division. In fact it is not urged by the learned Vakil for the respondent that it is any basis for any inference that there was any division between the brothers. Anantanarayana and Vencatachella were originally members of a joint family and, unless the plaintiff is able to show some act on their part which amounted to a division of status, at any rate between them such as any unambiguous declarations of one party to the other, that he was thereafter to be considered as divided in status from the other, we must hold that the original joint family status has not been affected and they continued a

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joint family till the death of Anantanarayana Pillai. In these circumstances it would follow that Vencatachella as the undivided brother of Anantanarayana Pillai is entitled to all the plaint properties and that the plaintiff's suit should have been dismissed altogether. Accordingly we allow the appeal and dismiss the plaintiff's suit.

As the litigation was in part at any rate brought by the way in which Vencatachella Pillai himself behaved by asserting that he was the adopted son of Ramachandra Pillai, we think that in this case the costs should not follow the event. Each party will bear their costs in the lower Court and in the appeal, but in the memorandum of objections we direct the plaintiff will pay the costs of the defendant. The memorandum of objections is dismissed with costs.

Appeal accepted ;
Memorandum of objections dismissed.

V. N. V.
N. H.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 2676 OF 1920.

December 12, 1922.

Present :—Justice Sir N. R. Chatterjee,
KT., and Mr. Justice Cuming.
JOGENDRA NATH BANERJEE—
PLAINTIFF—APPELLANT

versus

KHODA BUKSHA BISWAS AND OTHERS

—DEFENDANTS—RESPONDENTS.

Estoppel—Order of Court—Acceptance of benefit under order—Appeal, if rendered incompetent—Principles applicable.

Where a person accepts a benefit under an order of a Court, which he would not have obtained otherwise than under that order, he is precluded subsequently from challenging the validity of that order. But this principle is not applicable where the benefit accepted would in any case be his whether the appeal succeeded or failed. [p. 556, col. 1.]

Banku Chandra Bose v. Marium Begum, 37 Ind. Cas. 804; 21 C. W. N. 232 and *Mani Lal Guzzati v. Harendra Lal Roy*, 8 Ind. Cas. 791; 12 C. L. J. 556, distinguished.

Where in a suit on a money-bond payable with compound interest, the Court awards simple interest only, an appeal against the decree is not rendered incompetent, where subsequent to the filing of the appeal, the decree-holder accepts costs deposited by the judgment-debtor on the basis of simple interest. [p. 556, col. 1.]

Appeal against a decree of the District Judge, Nadia, dated the 15th of July, 1920, affirming that of the Munsif, Second Court at Krishnagar, dated the 24th of April 1919.

Babu Peary Mohan Chatterjee, for the Appellant :—The plaintiff is the appellant. The appeal arises out of a suit for money on the basis of a registered-bond. The interest payable was at 18 per cent. compound. First Court gave a decree for simple interest at 18 per cent. and allowed the defendant to pay off in three instalments with costs of the suit. I preferred an appeal which has been dismissed upon erroneous misconception of facts of the case. The Court holds that there was a subsequent agreement not to charge compound interest. I submit such evidence is totally inadmissible to vary the original registered contract. Then the Court holds that inasmuch as I accepted one of the instalments according to decree, therefore, I would not be entitled to appeal as regards the rate of interest. He has relied upon certain cases which are absolutely not applicable to the present case. I submit the mere fact of my accepting the first instalment would not take away my right of appeal as to the rate of interest claimed by me and disallowed by the First Court.

Babu Upendra Nath Bagchi, for the Respondent :—I submit the appellant would be bound by his agreement not to accept compound interest. As regards the other point, I submit the cases in *Banku Chandra Bose v. Marium Begum* (1) and *Mani Lal*

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Guzrati v. Harendra Lal Roy (2), and the English cases referred to there cover the present point.

Babu Peary Mohan Chatterjea replied in brief.

JUDGMENT.—This appeal arises out of a suit upon a registered bond for a money debt bearing compound interest at 18 per cent. per annum.

The Court of first instance was of opinion that the stipulation as to the payment of compound interest was a hard and unconscionable bargain, though not penal. It allowed simple interest at 18 per cent and directed the decretal amount to be paid in three instalments with costs of the suit (costs to be paid by *Jaista* 1326, and the principal and interest in two equal instalments in *Aswin* and *Chait* 1326.

On appeal by the plaintiff, the learned District Judge held that there was no plea of undue influence or fraud, and that the plaintiff would, under ordinary circumstances, have been entitled to get the stipulated rates of compound interest, having regard to the decisions of the Judicial Committee in certain cases referred to in the judgment, but he disallowed the compound interest on the grounds that the plaintiff had subsequently agreed not to charge compound interest and that he had accepted Rs. 65-10 as one of the instalments, after the decree. He accordingly upheld the decree of the Court of first instance and dismissed the appeal.

The plaintiff has appealed to this Court.

The first ground upon which the learned Judge proceeds is erroneous for two reasons. In the first place, there was no defence taken that the plaintiff had agreed not to charge compound interest. In the next place, evidence of subsequent oral agreement not to charge compound interest was inadmissible to vary the original contract which was a registered one.

The next ground upon which the Court below proceeded was that the plaintiff accepted Rs. 65-10 in payment of one of the instalments (the instalment for costs) after the decree; but we do not think that the plaintiff was precluded, by reason of that, from maintaining his appeal with

regard to the compound interest. Our attention has been drawn to the cases of *Mani Lal Guzrati v. Harendra Lal Roy* (2) and *Banku Chandra Bose v. Marium Begum* (1).

In the first case the learned Judges referred to the cases of *Tinkler v. Hilder* (3) *Kennard v. Harris* (4), *King v. Simmonds* (5) and *Pearce v. Chaplin* (6), and observed that the principle is that a party who has adopted an order of the Court and acted under it, cannot, after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another. We do not think, however, that that principle applies to the present case.

In *Tinkler v. Hilder* (3) it was held that where a party accepts costs under a Judge's order, *which, but for the order would not at that time be payable*, he cannot afterwards object that the order was made without jurisdiction.

In *Kennard v. Harris* (4), it was observed that "the plaintiff, after accepting the costs of the reference and award, is precluded from moving to set it aside. If no award had been made, no costs would have been due; by accepting the costs of the award he admits the award to be valid, and cannot now say that it is bad". In *King v. Simmonds* (5) the plaintiff was allowed to amend the record on payment of the costs, occasioned by the amendment, to the defendant, and it was held that the defendant cannot after taxing and receiving such costs apply to set aside the order for amendment as made without jurisdiction.

In *Pearce v. Chaplin* (6), on motion to set aside judgment and execution for irregularity, the Court made an order setting them aside without costs, but not embodying any decision as to the irregularity and adding a direction that the defendant should bring no action. The defendant, while protesting against the direction, availed himself of the order, and it was held that he could not apply to the Court to rescind that part of it which forbade bringing an action.

(3) (1849) 4 Ex. 187; 7 D. & L. 61; 18 L. J. Ex. 429; 13 Jur. 684; 154 E. R. 1176.

(4) (1824) 2 B. & C. 801; 4 D. & R. 272; 107 E. R. 580.

(5) (1845) 7 Q. B. 289; 14 L. J. Q. B. 248; 9 Jur. 791; 115 E. R. 498.

(6) (1845) 9 Q. B. 802; 16 L. J. Q. B. 49; 115 E. R. 1483.

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In the case of *Mani Lal Guzrati v. Harendra Lal Roy* (2), an order for amendment of a plaint was made on payment of costs to the defendants; the costs were received under protest. The learned Judges held that the principle of the English decisions did not apply, as the costs had been accepted by the defendants under protest and the defendants had no choice in the matter having regard to the form of the order of the Court. The principle referred to in the above case was followed in *Banku Chandra Bose v. Marium Begum* (1). In that case, a suit which was dismissed for non-prosecution was restored on an application on behalf of the plaintiff, and the Court made certain orders in respect of the payment of defendant's costs incidental to the application, and the defendants got their costs taxed, and obtained an allocatur. It was held that having taken this benefit under the order the defendants were precluded from appealing against it.

It will appear that in the English cases as also in the case in *Banku Chandra Bose v. Marium Begum* (1) cited above, the opposite party having accepted the benefit which he would not have obtained otherwise than under such order, was held to be precluded from challenging the validity of the order.

In the case before us, there was no such thing. The plaintiff appealed against the decree in so far as it disallowed compound interest. After the appeal had been filed, against that part of the decree which disallowed compound interest he accepted the costs (deposited by the respondent) and which was decreed by the lower Court on the basis of simple interest as to which there was no dispute and which the plaintiff would have got in any event whether the appeal succeeded or failed. In these circumstances, the principle of the cases referred to above does not apply to the present case.

The appeal must accordingly be allowed. The plaintiff will get a decree for interest at the rate stipulated in the bond and with costs in all Courts.

N. H.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 101 OF 1922.

January 23, 1923.

Present :—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
HANMANT alias VENKATESH ANANT
HASABNIS—PLAINTIFF—
APPELLANT.

versus

SHIDU SAMBHU GATADA
AND OTHERS—DEFENDANTS—
RESPONDENTS.

Mortgage—Redemption suit—Decree for Possession on payment of specified amount—Payment to be made in particular month in any year—Relation of mortgagor and mortgagee, if determined—Application for execution beyond time—Application, whether may be treated as redemption suit—Civil Procedure Code (Act V of 1908), s. 47—Limitation Act (IX of 1908), Sch. I, Art. 148.

In 1886, a consent-decree was passed in a redemption suit to the following effect:—"The plaintiff do pay to the defendants Rs. 55 in respect of the debt on mortgage in the month of *Chaitra* of any year and the plaintiff do obtain possession of the lands in suit, considering the same to have been redeemed from the mortgage. It should be understood that the plaintiff is not entitled to take possession of the lands in dispute in any other month except the month of *Chaitra*." In 1919 the plaintiff sought to execute the decree and was met by the contention that execution was barred by limitation.

Held, (1) that the effect of the decree was not to put an end to the mortgage, but only to settle the mortgage amount, and to direct that if that amount be paid in any following year the defendant should give back possession;

(2) that as the relationship of mortgagor and mortgagee continued after the decree was passed, there was nothing in it which barred the plaintiff's right to redeem;

(3) that it was open to the Court under section 47, Civil Procedure Code, to treat the application for execution as a suit for redemption, for which the period of limitation was sixty years under Art. 148, Schedule I to the Limitation Act.

Maruti v. Krishna, 23 B. 592; 1 Bom. L. R. 31; 12 Ind. Dec. (N. S.) 395, disapproved.

Ramji Bapuji Patil v. Pandharinath Raoji, 49 Ind. Gas. 894; 21 Bom. L. R. 56; 43 B. 334; at p. 477 (F. B.), followed.

Second appeal against the decision of the District Judge, Satara, in Appeal No. 212 of 1920.

Mr. A. G. Desai, for the Appellant.

Mr. H. K. Kulkarni, for the Respondents.

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JUDGMENT.—A decree was passed in August 1886 in a suit between the respective predecessors of the parties in which a consent-decree was taken in the following words:—"The plaintiff do pay to the defendants Nos. 2 and 3 Rs. 55 (fifty five rupees) in respect of the debt on mortgage in the month of *Chaitra* of any year and the plaintiff do obtain possession of the lands in suit considering the same to have been redeemed from the mortgage. It should be understood that the plaintiff is not entitled to take possession of the lands in dispute in any other month except the month of *Chaitra*."

The plaintiff is now seeking to execute that decree and was met by the contention that execution was barred by limitation. The Trial Court, relying upon the decision in *Maruti v. Krishna* (1), held that the application was time-barred, and disallowed the plaintiff's application to treat the *Darkhast* as a suit under section 47, Civil Procedure Code, as the relationship of mortgagor and mortgagee no longer existed.

This decision was confirmed in appeal by the District Judge. It seems that the decision of the Full Bench in *Ramji Bapuji Patil v. Pandharinath Ravji*, (2) was not considered. I do not think that the effect of the decree of 1886 was to put an end to the mortgage, and that is the real test. The relationship of mortgagor and mortgagee still continued to exist between the parties, only the mortgage amount which had previously been in dispute was settled, and it was directed that if the plaintiff paid that amount in *Chaitra* of any following year, the defendants should give back possession. If the plaintiff did not choose to pay the mortgage amount, then he had no right to apply for possession. It was really a preliminary decree. It is quite true that in *Maruti v. Krishna* (1) the Court considered that "when the words of the decree were vague and indefinite, and were to be considered as

really mentioning no time for payment, the decree should be taken as operating from its date, and to be enforceable only within three years from that time, unless kept alive by application for execution made according to law within the prescribed period."

With all respect I cannot agree with that decision under Art. 181 three years are prescribed as the period of limitation for applications for which no period of limitation is provided elsewhere in the Schedule, or by section 48 of the Code of Civil Procedure of 1908, and time begins to run from the time when the time to apply accrued. The plaintiff could apply for the assistance of the Court after he had offered to pay Rs. 55 and the defendants refused to give him possession of the land. Until he paid the money he was not entitled to possession, and until possession was asked for and refused he had no right to apply to the Court. If he had not tendered the money, he could make no application to the Court for assistance, and it is difficult to see what sort of application the plaintiff could have made to the Court from time to time. If as a matter of fact he was not prepared to pay the amount mentioned in the decree, he could only say to the Court: "I am not ready to pay the amount, I want the time extended." The Court would reply, "There is no time mentioned for the payment of the amount, therefore, there is no necessity for you to make an application to extend time which has not expired." But in any event as the relationship of mortgagor and mortgagee continued after the decree of 1886 was passed, it cannot be said there was anything in that decree which could be considered as barring the plaintiff's right to redeem. He would then come under Art. 148 which prescribes 60 years as the period of limitation for the redemption of a mortgage, and if his right of redemption is not barred, then under the decision in *Ramji Bapuji Patil v. Pandharinath Ravji* (2) he can bring another suit for redemption. Therefore, even supposing we are prepared to hold that the *Darkhast* is barred under section 48 of the Civil Procedure Code, then it is still open to the Court under section 47, Civil Procedure Code, to treat the *Darkhast* (application) as a suit for redemption. That seems to us a perfectly right course to take.

(1) 23 Bom., 592; 1 Bom. L. R. 3; 12 Ind. Dec. (N. S.) 395.

(2) 49 Ind. Cas. 894; 21 Bom. L. R. 56; 43 B. 434 at p. 477 (F. B.).

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On that ground, we think, the appeal must be allowed, and the plaintiff-appellant must be allowed to redeem the mortgaged property. The plaintiff to pay costs in the Trial Court. He will get his costs in this Court and in the lower Appellate Court.

W. C. A.

*Appeal allowed.***MADRAS HIGH COURT.**

SECOND CIVIL APPEAL NO. 1624 OF 1920.

January 18, 1923.

Présent :—Sir Walter Schwabe, Kt.,
Chief Justice, and Mr. Justice Wallace.

SUBBEIR—PLAINTIFF—APPELLANT
versus

MOIDEEN PITCHAI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XXI, r. 63—Attachment of debt—Objection of garnishee dismissed—Suit by auction-purchaser to enforce payment of debt—Objection whether res judicata.

A *garnishee*, whose objection to the attachment of the debt on the ground that no debt is due by him to the judgment-debtor is disallowed, is bound to bring a suit within a year to set aside the order. If he fails to do so the order becomes final and conclusive and the *garnishee* is barred by the rule of *res judicata* from raising the same objection in answer to a suit to enforce payment of the debt by the auction-purchaser. [p. 559, col. 1.]

Appeal against a decree of the Court of the
Additional Subordinate Judge, Tinnevely,

in Appeal Suit No. 48 of 1920, preferred against the decree of the Court of the Temporary Additional District Munsif, Tinnevely, in Original Suit No. 260 of 1917.

Mr. Salem Ramasami Aiyar, for the Appellant.

Mr. K. V. Luke, for the Respondents.

JUDGMENT.

Schwabe, C. J.—In this case the facts are that a decree-holder in a Small Cause Suit applied for attachment of a debt alleged to be due by one Khader Moideen to the judgment-debtor. Notice of that application was served upon Khader Moideen as *garnishee* and also upon the widow of the judgment-debtor as representing his estate. She did not appear but the *garnishee* appeared and put in a counter-statement in which he alleged three things, first, that the debt had never been due to the judgment-debtor, second, that it had been assigned and he had promised to pay the assignee; and thirdly, that the amount of the debt was not Rs. 350 as claimed by the decree-holder but Rs. 300. That application came before the District Munsif the *garnishee* appearing, and the District Munsif passed an order in these words: "Attachment is confirmed." In due course, the debt which had been attached was brought to sale as the property of the judgment-debtor in the Small Cause Suit and was purchased by the present plaintiff, who was himself the decree-holder. The present plaintiff then sued to recover the debt.

It has been held by the District Munsif and on appeal by the Subordinate Judge that there never was any debt due by the *garnishee* to the judgment-debtor, and in fact that the debt which had been supposed to be due to the judgment-debtor was due not to him but to his widow, and consequently the suit was dismissed.

The question for our determination is whether it was open to those Courts to go into this question at all, and, in my judgment, it was not. By section 11 of the Civil Procedure Code, no Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties. Now the whole matter decided was directly in issue in the execution and *garnishee* proceedings in

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1913. It is true that the order made in 1913 was not at once final, because, under O. XXI, r. 63 where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute but subject to the result of such suit, if any, the order shall be conclusive. Now the *garnishee* did not choose within the time limited by the Indian Limitation Act, namely, a year, to bring in any such suit, and so the matter became conclusive. It having been decided by the Court in 1913 that the debt was a debt for Rs. 350 due by the *garnishee* to the judgment-debtor, as long as that order stands, it cannot be re-agitated as between the parties to those proceedings.

We are told that after service upon him of the notice calling upon him to show cause why this debt should not be attached the *garnishee* acted upon a notice he had received of an assignment of the debt to a third party and paid the full amount to the third party. I should very much doubt the truth of that statement, because it is exceedingly unlikely, having got notice from the Court that someone was claiming, that he should have paid this alleged assignee pending the hearing of the application. If he did so, and the result of this judgment is that, he will now have to pay over again to some one else, he has no one to blame but himself for not taking the steps which were provided for him by the Code, namely, of suing to establish his right under O. XXI, r. 63, within a year. I suspect the reason why he did not do so was that he knew at that time he would not succeed.

The decrees of the lower Courts must, therefore, be set aside and the plaintiff will get a decree, in the usual mortgage-decree form, against the defendants Nos. 1 to 5 for Rs. 350 and interest thereon at six per cent. per annum from the date from which interest was due on the mortgage *i. e.*, May 2, 1912, to the date of payment with costs both here and in the Courts below. Time for payment six months.

Wallace, J.—I agree.

V. N. V.

Z. K.

Decrees set aside.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 70 OF 1921.

January 17, 1923.

Present:—Sir Walter Schwabe, Kt.,
Chief Justice, and Mr. Justice Wallace.

S. PARTHASARATHY AIYAR—

APPELLANT

versus

M. SUBBAROYA GRAMONY AND ANOTHER
—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 3—Succession Act (X of 1865), s. 187—Owner under voidable title, whether can pass good title—Bona fide purchaser for value—Person in possession of property, rights of, notice of—Constructive notice, doctrine of, limits of—Will—Probate not taken—Executor, whether can pass possessory title.

A person who has acquired property under a voidable title can himself give a good title to that property to a *bona fide* purchaser or mortgagee from him who deals for value and has no notice of the defects in the title. [p. 561, col. 1.]

Constructive notice of all the rights of a person in possession will be imputed to a purchaser or mortgagee who makes no inquiry of the person in occupation, on the principle that where another is in exclusive possession of property and such possession is *prima facie* inconsistent with the full right of the vendor or mortgagor and the purchaser does not choose to ask what that possession is, he must be taken to have got the information that he would have obtained if he had asked. [p. 561, col. 2.]

It is not, however, the duty of a proposed purchaser or mortgagee to inquire of every person who may be on the premises or any part thereof, nor does the unknown occupation of a part of the premises put him on inquiry as to the possible rights of the occupier of that portion over the remainder of the premises. [p. 561, col. 2.]

Hunt v. Luck, (1901) 1 Ch. 45; 70 L. J. Ch. 30; 83 L. T. 479; 49 W. R. 155; 17 T. L. R. 3. *Kunt v. Luck*, (1902) 1 Ch. 428; 71 L. J. Ch. 239; 86 L. T. 68; 50 W. R. 291, 18 T. L. R. 265. *Hunter v. Walters*, (1872) 7 Ch. App. 75 at p. 83; 41 L. J. Ch. 175; 25 L. T. 765; 20 W. R. 218 and *Manji Karimbhai v. Hoorbai*, 8 Ind. Cas. 752; 35 B. 342; 12 Bom. L. R. 1044, followed.

In the case of tenement houses, there may be on the premises the actual sub-tenants, their wives, families, friends, guests and so forth. To suggest that it is the duty of the proposed mortgagee or purchaser to attend on these premises and examine narrowly every one of these persons would be to him an intolerable burden and to hold that he was affected by constructive notice of all these persons possible equitable rights over any part of the premises would be an extension of the doctrine of constructive notice, which must be kept within the limits which have already been fixed. [p. 562, col. 1.]

Under section 187 of the Succession Act a person who in Court has to prove title deduced from a Will, whether he is plaintiff or defendant, cannot do so, without producing Probate. [p. 562, col. 2.]

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Cavlapatti Chinna Cunniah v. Cota Wamma-ivariah, 3 Ind. Cas. 475; 33 M. 91, dissented from.

But a Will of which Probate has not been granted cannot be treated as non-existent nor can the property pass by intestacy. The Will is a perfectly valid document and the executor under it can deal with the property and give a perfectly good title though it may be that to complete that title it requires Probate to be taken out at a later date. [p. 562, col. 2.]

Section 187 of the Succession Act is no bar to a transferee from an executor who has not taken out Probate but who was in possession and who has given a possessory title-deed, suing on that title-deed to eject a trespasser and the lack of Probate is insufficient to bar the ejectment of such a trespasser. [p. 564, col. 1.]

Asher v. Whillock, (1866) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W.R. 26 and *Perry v. Clissold*, (1907) A. C. 73; 76 L. J. P. C. 19; 95 L. T. 890; 23 T. L. R. 232, followed.

Appeal from the judgment of Mr. Justice Kumaraswamy Sastri, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in O. S. No. 288 of 1919.

Mr. M. S. Varadachariar for Mr. T. R. Venkatarama Sastri, for the Appellant.

Messrs. T. Ethiraja Mudaliar and M. S. Rangasami Iyengar, for the Respondent.

JUDGMENT.

Schwabe, C. J.—One Jambulinga owned two adjoining houses in Mylapore. He purported to mortgage them to one Subbusami who was the brother of the husband of Meenakshi, Jambulinga's daughter. He then died and left a Will appointing his widow Mylathammal executrix and giving her power to sell his property for the purpose of paying debts and to enjoy what was left during her life and bequeathing after her death what was left to Meenakshi. Probate has never been taken out of the Will. Some years later, the widow purported to sell the property to Rajagopal, her brother for Rs. 1,000. The documents of title were handed over to him; the sale-deed was registered and in the presence of the Registrar a thousand rupees were handed over by Rajagopal to the widow. Subbusami joined in that sale by acknowledging the discharge of his mortgage which was for a larger amount, the sale-deed providing that the sale was for the purpose of discharging that mortgage. Many years afterwards, Rajagopal purported to sell the property to Subbaroya Gramony for Rs. 4,000, and he with the assistance of Rajagopal, mortgaged

the premises to the plaintiff or Rs. 2,000, it being stated that Rs. 2,000 was required for the purpose of providing part of the purchase-money. This suit has been brought by this mortgagee to obtain possession of the premises. Meenakshi who has been for sometime in occupation of part of one of the two houses resists the claim for ejectment alleging that the property is hers.

The learned Judge, who tried the case, has held that defendant Meenakshi has made out her case. He holds that all the transactions relating to this property from the time of the mortgage to Subbusami down to the sale to Subbaroya Gramony and including that sale, were *benami* transactions and mere shams. He holds, too, that the plaintiff is in no better position than Rajagopal or Subbaroya Gramony, because he is not a *bona fide* mortgagee for value without notice.

I agree with the findings of fact of the learned Judge except on two material points. I agree that the original mortgage to Subbusami by Jambulinga himself was not a real transaction. I agree that the sale by Rajagopal to Subbaroya Gramony was not a real transaction. I am prepared also to accept his view of the character and credibility of Rajagopal that he was an impecunious and unscrupulous person. But I do not agree with the inference that he has drawn from the facts put before him in relation to the sale by Mylathammal, the widow. Nor do I agree that on the facts as found by him, the plaintiff is not a *bona fide* mortgagee for value. No rational explanation has been offered to the Court as to why Mylathammal should have gone through the form of selling the property to her brother Rajagopal. It is suggested that she did so either so that Rajagopal might be trustee for Meenakshi, her daughter, and after her death, protect the property for the benefit of the daughter against her husband, or as an alternative, that she went through a form of real sale in order to frighten her son-in-law and make him more careful in the future in his conduct towards her and her daughter. The first of these alternatives seems to me to be incredible, for one cannot believe that her mother would hand over her property to her

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brother in trust after her death for her daughter in the form of an absolute conveyance without informing her daughter of the fact; and it is admitted that the daughter was never told anything about it. In doing so she would leave her daughter at the mercy of her uncle and, if the uncle died, she would leave her without evidence to attempt to recover her inheritance from the uncle's heirs. The other alternative seems to me to be equally incredible. Because, in order to have the desired salutary effect upon the conduct of the son-in-law, he would have to be told of the sale, that there was a real sale, and one would have thought that he would ascertain at once that it was not a real sale because his brother Subbusami, who was a party to the transaction, would tell him not to be alarmed, as the whole thing was *benami* and could be disregarded. And, again, if he knew about it, how is it possible that his wife Meenakshi did not know about it? I cannot accept either alternative as a possible motive for this curious transaction. It is not the case of a person buying the property and putting the name of somebody else as *benami*. It is suggested to be the case of a person who has a life-interest and whose daughter has a reversionary right to her property, voluntarily parting with the property in the sense of transferring it to somebody else. It is a much more likely view, in my judgment, that Rajagopal being of the character attributed to him, in some way defrauded or tricked his sister into selling the property to him at an under-value and probably, also, knowing full well that under the terms of the Will she was exceeding her authority in effecting the sale, because at that time there were no debts of the testator which required to be paid. I find on the facts that the sale to Rajagopal was a real sale though induced by fraud and voidable, therefore, on discovery of fraud by Mylathammal and consequently also by Meenakshi. But a person who has acquired property under a voidable title can himself give a good title to that property to a *bona fide* purchaser or mortgagee from him who deals for value and has no notice of the defects in the title. In this case the plaintiff admittedly dealt for value. He had in fact no notice at all of anything being wrong from the beginning to the end

of these transactions. He had before him the original mortgage, the Will, title-deeds to the property, the conveyance to Rajagopal and the endorsement by the original mortgagee. He knew nothing of Meenakshi or that she had ever resided on the premises. But it is argued that he had constructive notice of all Meenakshi's claims by reason of the fact that, unknown to him, she was at the date of sale in possession of a part of the premises. Now, the doctrine of constructive notice is one that applies here as well as in England, and here the requisites for it are stated in section 3 of the Transfer of Property Act which runs thus:—"A person is said to have notice of a fact when he actually knows that fact or when, but for wilful abstention from an enquiry or search, which he ought to have made, or gross negligence, he would have known it, ... In England, as here, it has been held that constructive notice of all the rights of a person in possession of property sold or mortgaged is to be imputed to purchasers or mortgagees who made no enquiry of the persons in occupation. But the rule depends upon the principle that where another is in exclusive possession of the property and such possession would be *prima facie* inconsistent with the full rights of ownership of the vendor or mortgagor and the purchaser does not choose to ask what that possession is, he must be taken to have got the information that he would have obtained if he had asked. It has, however, frequently been laid down that that doctrine has gone to its full length and must not be extended, and it has never been held that it is the duty of the proposed purchaser or mortgagee to enquire of every person who may be on the premises or any part of those premises. Nor has it been suggested that the unknown occupation of a part of the premises would put him on enquiry as to the possible rights of the occupier of that portion over the remainder of the premises. There is indeed strong authority to the contrary. That Master of Equity, Mr. Justice Farwell, as he then was, in *Hunt v. Luck* (1) with whose judgment the Court of Appeal in *Hunt v. Luck* (2)

(1) (1901) 1 Ch. 45; 70 L. J. Ch. 30; 83 L. T. 479; 49 W.R. 155; 17 T. L. R. 3.

(2) (1902) 1 Ch. 428; 71 L. J. Ch. 239; 86 L. T. 68; 50 W. R. 291; 18 T. L. R. 265.

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agreed, said thus: "If a vendor or mortgagor offers property stated to be subject to tenancies, there is nothing in the fact that the tenants are in occupation to give rise to any suspicion, ..." In *Hunter v. Wallers* (3), it was held that if further enquiry as to title of a small part of the estate would have been a defect in title as the whole estate, the purchaser was not to be held to have constructive notice of that defect. In *Mangi Karimbhai v. Hoorbai* (4) it was held that the fact that a person was in occupation of a small part of a house did not put a purchaser on constructive notice of that person's rights as to the whole house. But, apart from authority, one has to see here whether there has been wilful abstention from enquiry or gross negligence and I fail to see how there can be wilful abstention or gross negligence in a failure to enquire from every body on the premises what their title might be. In the case of tenement houses, there may be on the premises the actual sub-tenants, their wives, families, friends, guests, and so forth. To suggest that it is the duty of the proposed mortgagee or purchaser to attend on these premises and examine narrowly everyone of these persons would be to him an intolerable burden and to hold that he was affected by constructive notice of all these persons' possible equitable rights over any part of the premises would be an extension of the doctrine of constructive notice which, as I have pointed out, has long been held, must be kept within the limits which have been fixed. I find nothing in the case to put the plaintiff upon any inquiry to Meenakshi's rights and I hold that he is a mortgagee for value without notice.

An attempt was made before us to contend that the defendant had a prescriptive title as against plaintiff, that she and her mother had been in adverse possession of this property over 12 years. No such defence was set up in the Court below and no such issue was before that Court. In my judgment it is much too late to raise such a point now when it is obvious all the materials

which would be required to decide that question properly are not before the Court.

On my finding that the plaintiff is a mortgagee for value, it follows that he is entitled to succeed in the action unless there is some infirmity in his own title, and this brings me to a point which has been fully argued before us under section 187 of the Succession Act which applies to the will of Jambulinga in this case. By that section no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction shall have granted probate of the will under which the right is claimed or shall have granted letters of administration. Now the position in this case is rather curious. The defendant Meenakshi has no right to this property at all unless she takes under the will from Jambulinga. It is not right, as has been suggested in some cases, to treat a Will of which Probate has not been granted as non-existent and the property passing by intestacy. On the contrary, the Will is a perfectly valid document. The executor under it can deal with the property and give a perfectly good title, though it may be that to complete that title it requires Probate to be taken out at a later date. The defendant then having no title under the Will which she can prove and seeing, too, that her right as reversioner might be affected when Probate has been granted, she says that she is prepared, as far as this case is concerned, to be treated as a mere trespasser in possession of the premises. She says "you, the plaintiff, cannot turn me out, because you cannot prove your title without proving that Will and you cannot prove that Will without producing the Probate of it." Now the law as stated in section 187, in my judgment, is the same as the Law of England on the subject. And I think that it is, that a person who in Court has to prove title and has to deduce that title from a Will, whether that person is plaintiff or defendant cannot do so without producing Probate, and I do not agree with the cases which have suggested to the contrary such as *Carlapatti Chinna Cunniah v. Cota Wammalivaraiah* (5) which seems to have decided that a defendant can claim as a legatee under an unproved

(3) (1872) 7 Ch. App. 75 at p.83; 41 L. J. Ch. 175; 25 L. T. 765; 20 W. R. 218.

(4) 8 Ind. Cas. 752; 35 B. 342; 12 Bqm. L.R. 1044.

(5) 3 Ind. Cas. 475; 33 M. 91.

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Will. This would not prevent a defendant resisting a claim by an heir-at-law by producing and proving a Will of which Probate had not been granted. But the difficulty which would have been put in the plaintiff's way, if the view which I have just expressed is correct, is in this case removed; because, Mylathammal who sold and conveyed to Rajagopal, she being executrix of the Will, was herself in possession of the property, and she had a right to that possession and she could give that possessory right to Rajagopal and that right to possession would be included in the conveyance by her of the property absolutely. The plaintiff in this case stands in the shoes of Rajagopal as far as title is concerned. He, too, has that possessory title which can be used by him to eject a trespasser. (See *Asher v. Whitlock* (6) approved by the Privy Council in *Perry v. Clissold* (7). If, on the other hand, the defendant Meenakshi was entitled to rely upon the Will, it would follow that the plaintiff could equally rely upon it and then he would be able to say that he innocently took the property from a purchaser from an executrix who had a right given by the Will of selling the property and that he is not concerned with the fact that the executrix exceeded the authority which she in fact had, and there would also arise in that eventuality an interesting question how far the daughter claiming as a lagatee is estopped by reason of the acts of her mother, the executrix, as well as of her father, the testator.

For these reasons, in my judgment, the plaintiff is entitled to succeed, for his mortgage is a good mortgage as against the defendant Meenakshi. Her rights to redeem on payment of principal, interest and costs must depend on the terms of the mortgage which she, no doubt, can get Rajagopal to enforce. The mortgage being a usufructuary mortgage, the plaintiff is entitled to possession. This appeal must be allowed with costs here and below. Judgment must be entered for the plaintiff for possession and for enquiry of mesne profits.

Wallace, J.—I agree.

The plaintiff is suing to eject the second defendant from certain property. He holds the title-deeds for that as from the original owner Jambulinga, and is *prima facie* entitled to be put in possession under his usufructuary mortgage and to eject second defendant on the strength of his documents, coupled with his payment of good consideration for his mortgage, until it is otherwise shown that he has not obtained a good title to eject.

As against plaintiff's case, the second defendant has put her case, as I take it, on four grounds. Firstly, that Exhibit D, in particular the really important document in this case, is *benami*; secondly, that if Exhibit D is not *benami* she is entitled to ignore her father's Will, remain on the property as the heir to her father; thirdly, that if Exhibit D is not *benami* and the Will accepted, she is entitled to remain on the property on the ground that her mother had no right to sell it, and, fourthly, that assuming that Exhibit D is not *benami* and she gets no title even under the Will, she can maintain her possession as a trespasser against the plaintiff unless he is able to prove a better title.

Grounds Nos. 2 and 4 may be shortly disposed of. It is quite clear that 2nd defendant cannot ignore the Will. The property was the self-acquired property of her father and he left a Will. There was no intestacy. The Will, Exhibit M, is registered, has been attested by witnesses on both sides in this case and although denied by the second defendant has been accepted as genuine by the Trying Court and it does not matter whether before the suit the second defendant was aware of it or not. I should have been inclined to hold further that, until the second defendant had taken out Probate, she cannot plead in defence any right as legatee under the Will, had not a Bench of this Court apparently held in a case reported as *Carlapatti Chinna Cunniah v. Cota Wammalivariah* (5) in which however, the facts are not very clear, that section 187 of the Indian Succession Act did not preclude her from doing so. At any rate, it is quite clear that the 2nd defendant cannot ignore the Will since if she does so she has otherwise no right to the property. Therefore, ground No. 2 fails.

(6) (1866) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N. S.) 925; 13 L. T. 254; 14 W.R. 26.

(7) (1907) A. C. 73; 76 L. J. P. C. 19; 95 L.T. 890; 23 T. L. R. 232.

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As to ground No. 4, I agree with the learned Chief Justice that section 187 is no bar to a transferee from an executrix who has not taken out Probate but who was in possession and who has given possessory title-deed suing on that title-deed to eject a trespasser. It cannot be said that the transferee in such a case has not a better title to possession than the trespasser and the lack of Probate is insufficient, under the authorities quoted, to bar the ejectment of such a trespasser.

The next point is ground No. 1. It relates to the question whether Exhibit D is a genuine sale. That Exhibit D was a *benami* document under which no transfer of the property was at all intended, as the Trying Court has held, I find very difficult to believe. There is really no evidence to prove it and the onus lies on those who assert it. The hearsay statement of the widow reported by Vinayaka Mudali is not evidence that the statement was true and is partly countered by the fact that the sale-deed was handed over to the transferee. The only attester examined, D. W. No. 2, who speaks to its *benami* nature is on the second defendant's own admission the real contesting defendant in this case. The reason alleged for *benami* document, namely, to frighten the second defendant's husband, is unintelligible if it is true as contended that it was kept from his knowledge altogether. Further, it seems incredible that the widow of Rajagopal or D. W. No. 2 or 2nd defendant's husband, if he knew of it, would not at some time have told second defendant about the real nature of the transaction which, on the face of it, robbed her of her rights and made sure that the title-deeds were handed to her. In my view, the second defendant has no reasonable explanation why the documents Exhibits E, M and D were not with her. I cannot believe that she did not know that they were in possession of Rajagopal (*sic.*) should have been left in possession of these title-deeds ever since 1906 or why it was necessary to keep up the *benami* farce after the death of second defendant's husband in 1910. It is further difficult to believe that second defendant would not have heard that Rajagopal himself was mortgaging the property in 1908 her husband's brother having attested that mortgage. It is quite clear to me that she knew of

Rajagopal's title and, for reasons known to herself, refrained from challenging it. Against these considerations are set the alleged low price and the fact that Exhibit D was executed ostensibly to discharge Exhibit E. I am not so clear as the Trying Court that Exhibit E was *benami* but accepting it to be so there is nothing to show that the widow knew that it was so, and at this distance of time I am not prepared to assume in the absence of evidence that she did know. If Rajagopal was, as contended by second defendant, villain enough to cheat her by Exhibit D, he would not scruple by using Exhibit E to cheat her mother also. The theory that the ostensible mortgagee Subbusami and Rajagopal colluded to cheat the widow might easily account for the low figure in Exhibit D. It is also not as clear as the Trying Court found that Rajagopal could not have raised Rs. 1,000 on loan then, as he was able to do in 1905 under Exhibit Q, which if he was an insolvent as suggested it is unlikely that the widow would choose him as *benamidar*. Her refusal of Vinayaka Mudali's offer of Rs. 2,000 was not very reasonable as by selling to Rajagopal she was at least keeping the property within the family, and probably securing herself in continued occupation thereof. As to the tenants paying rent to the widow, such occupation with Rajagopal's permission may be the very simple explanation for that, and there is no evidence free from grave suspicion that for any length of time they paid rent to second defendant or to any one on her behalf and not on behalf of Rajagopal. I find it difficult to believe that if Ayyathambi was collecting rent for second defendant he never informed her of the sale-deed which he attested by her mother to Rajagopal. The fact that she pleaded she did not know of the sale is enough to dispose of the idea that the attester to Exhibit D was collecting rent for her. The execution of rental agreements by Rajagopal, and first defendant may be due merely to the fact that they had a suspicion that the tenants were then preparing to side with second defendant. There is thus no convincing evidence that Exhibit D must have been *benami* and I, therefore, agree with the learned Chief Justice that Exhibit D must be held to have been a genuine sale transferring all the vendor's rights in the

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property to Rajagopal. Therefore, the second defendant cannot resist the plaintiff's suit on the plea that Exhibit D was *benami*.

Ground No. 3 remains. The question is whether or not second defendant's mother had a right to sell under Exhibit D so as to bind second defendant by the sale. It seems unlikely that the mother would wish to defraud the daughter. No reason why she should do so is suggested. It, therefore, seems probable that she must have at least believed that the debt under Exhibit D was a genuine debt. On this point again I would call in aid the Will. I have said that the second defendant cannot reprobate it, and if she now approbates, it is to claim rights to herself, she cannot be heard to reprobate it so as to destroy the mother's right and authority under it. That is, she cannot be heard to deny that the mother had the authority of the testator to sell the property to discharge his debts and that she herself is entitled only to the residue of the property after such sale. As to whether there was necessity for the sale, *i.e.*, whether there was a genuine debt under Exhibit E, it is clear to me that Jambulinga when he died left Exhibit E, and his Will among other documents, to his widow, and thus, in my view, represented to his widow as to others that the debt under Exhibit E was genuine and one which fell to be discharged under the Will, and the widow, as I find, believed that it was a genuine debt. Second defendant, who claims under the Will of the testator who was guilty of this representation which resulted in a genuine sale under Exhibit D, cannot in my view be heard to say that this was not a *bona fide* sale by the widow, *i.e.*, *bona fide* so far as she was concerned and that it was not validated by the authority given under the Will. For this conclusion reference may be made to the Privy Council case in *Luchmun Chunder Geer Gossain v. Kalli Churn Singh* (8). It appears to me then that even if I accept the finding of the Trying Court that Exhibit E was *benami* there was a misrepresentation by the testator that it was a genuine debt, which misrepresentation binds the residuary legatee who claims under the Will and the plea that there was

no real debt cannot be advanced by the 2nd defendant against one who was no party to the sale Exhibit D. For the purposes of this case it must be held that Exhibit D was genuine sale for the discharge of a genuine debt and, therefore, valid and binding on the testator's legatee under the authority given by the Will which the second defendant cannot reprobate.

I would hold, therefore, that second defendant can have no *locus standi* to challenge the title of Rajagopal under Exhibit D or his ability to hand on a good title to first defendant and through him to plaintiff. It is no part of second defendant's business to challenge the consideration paid by the first defendant to Rajagopal or plaintiff's title as against Rajagopal, since, even if Exhibit L was *benami*, plaintiff can, if it were necessary for him to do so, plead in this case that he was a *bona fide* purchaser without notice of the *benami* nature of Exhibit L, and hold up his mortgage against Rajagopal.

In the view, then, that second defendant has no real legal claim which can be heard to this property, the question of constructive notice to plaintiff of her claim which has been argued at length before us will not arise nor would it matter whether or not he knew the extent of her claim before his mortgage. It is only if her claim is a good one in law that it is worth while contending that plaintiff, a mortgagee for value, was guilty of wilful abstention from enquiry or gross negligence, and consequently must be deemed to have had notice of her claim and his mortgagor's inability to convey to him a good title. That, even so, there was any such wilful abstention or gross negligence I find it difficult to deduce. I do not go further into this question as I agree with the learned Chief Justice for the reasons given by him that no wilful abstention or gross negligence on the part of plaintiff has been established.

V. N. V.

Z. K.

Appeal allowed.

CHHAJJU RAM v. NEKI.

PRIVY COUNCIL.

APPEAL FROM PUNJAB CHIEF COURT.

February 27, 1922.

Present:—Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.
CHHAJJU RAM—DEFENDANT—APPELLANT
versus

NEKI AND OTHERS—PLAINTIFFS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—"Any other sufficient reason," meaning of—Decision wrong on merits—Review, whether permissible.

Rule 1 of O. XLVII of the Civil Procedure Code must be read as in itself definitive of the limits within which a review is permitted, and the words "any other sufficient reason" occurring in the rule, mean a reason sufficient, on grounds at least analogous to those specified immediately previously. [p. 569, col. 1.]

The fact that a judgment is wrong on the merits is no ground for granting a review. [p. 569, col. 2.]

Charles Bright & Co. v. Sellar, (1904) 1 K. B. 6; 72 L. J. K. B. 921; 89 L. T. 431; 20 T. L. R. 12; 52 W. R. 148 and *Roy Meghraj v. Beejoy Gobind Bural*, 1 C. 197; 23 W. R. 438; 1 Ind. Dec. (N. S.) 126 referred to.

Appeal from two judgments of the Chief Court of the Punjab, dated July 22, 1918, and December 11, 1918, and a decree of that Court of the latter date, which affirmed a decree of the Subordinate Judge of Hissar.

Sir George Lowndes, K. C., and Mr. Dube, for the Appellant.

JUDGMENT.

Viscount Haldane.—This appeal is brought from two judgments of the Chief Court of the Punjab and a decree following on them, which affirmed a decree of the Subordinate Judge of Hissar. In the litigation out of which the appeal arises the respondents were plaintiffs. They claimed to have validly exercised a right of pre-emption over certain lands which the respondent Mrs. Forbes, who was made a defendant only formally, had sold to the appellant. Into the details of the transaction it is not necessary to enter at great length, for their Lordships are of opinion that the case must be disposed of on a principle governing procedure which will appear presently. It is sufficient to state that Mrs. Forbes sold to the appellant her proprietary rights in the subject-matter of the suit, two villages called Mauza Kagsar and Mauza Jamni Kera, by a deed of sale on 2nd October

1912. The price, Rs. 42,000, was paid, and, the appellant took possession. Shortly afterwards, the respondents other than Mrs. Forbes sued the appellant to set aside the sale and for a decree for possession of the former of the two *Mouzas* on payment of Rs. 15,000. They claimed that they were Gaur Brahmins by caste, and were occupancy tenants of that village and members of an agricultural tribe of the village within the meaning of the Alienation of Land Act, XIII of 1900 of the Punjab. They further alleged that no formal notice or information had been given to them of the proposed sale of the village, which sale had been completed secretly and collusively, and that they were entitled to a right of pre-emption. Among other defences raised by the appellant was this, that in reality the plaintiffs-respondents were suing on behalf of third persons who had no right to purchase the village, and that in consequence no such right of pre-emption could be asserted on the part of the persons suing.

The learned Subordinate Judge tried a number of issues in the suit, which raised, among others, the question whether the plaintiffs were suing for their own benefit and had a right of pre-emption. In the end, he found in favour of the plaintiffs on all the material issues, including those raising the questions just referred to. The present appellant then appealed to the Chief Court of the Punjab. A Division Bench of that Court, consisting of Scott-Smith and Leslie-Jones, JJ., reversed the judgment of the Subordinate Judge, holding that the plaintiffs' claim for pre-emption was really one on behalf of third persons who had no such right. They had allowed, as an additional ground of appeal, the contention to be brought before them that the suit had been instituted in the interests of third persons who were non-agriculturists and had on that account no right of pre-emption, and had given leave to the defendant to adduce further evidence on the point, including the records of certain proceedings. In the result they allowed the appeal, holding that, because the plaintiffs were not suing for themselves alone, but for themselves in conjunction with other persons, their claim to pre-emption was not maintainable. The plaintiffs then applied, under O.

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XLVII, r. I, of the Code of Civil Procedure, 1908, for a review of the judgment of the Division Bench on the ground that the Division Bench ought not to have admitted the additional ground of appeal, and that the learned Judges were misled into holding that the facts found by them disentitled the plaintiffs to a decree.

The application for review came before the same Chief Court, not constituted as before but differently. At the second hearing the Division Bench was made up of Wilberforce, J., another Judge of the Chief Court and Scott-Smith, J., who had sat at the previous hearing. These learned Judges held that the previous Division Bench was right in admitting the additional evidence, especially as no objection had been taken by the plaintiffs to its admission, and that that Bench did right in considering it. But the second Division Bench thus newly constituted then proceeded to deal on the merits with the judgment brought before them under the Code for review, treating the view of the law taken by the previous Division Bench as a matter that was open to them as if on an appeal. They held that the previous decision of the case had "proceeded upon an incorrect exposition of the law." Accepting on this ground the application for review, they directed the "appeal to go before the Bench for their decision." In accordance with this direction the case was heard by a Division Bench of the Chief Court constituted of Wilberforce, J. and another Judge who had not previously heard it, LeRossignol, J. These learned Judges considered certain other grounds of appeal which had not been decided by Scott-Smith and Leslie-Jones, JJ., being immaterial in the view which they had taken. They decided these points adversely to the appellants and then followed the decision of Wilberforce and Scott-Smith, JJ., at the second hearing by the Chief Court, and dismissed the appeal.

It will be observed that the question with which their Lordships have to deal is one concerned not with appeal to a Court of Appeal, but with review by the Court which had already disposed of the case. In England it is only under strictly limited circumstances that an application for such a review can be entertained. In

India, however, provision has for long past been made by legislation for review in addition to appeal. But as the right is the creation of Indian statute-law, it is, necessary to see what such statutory law really allows.

The law applicable to the present case is laid down by O. XLVII, r. I of the Code of Civil Procedure, 1908. This rule is enacted in the following terms:—

"Any person considering himself aggrieved, (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, (b) by a decree or order from which no appeal is allowed, or (c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

By rule 5 of the same Order it is provided that—

"Where the Judge, or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when an application for the review is presented, and is not or are precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same."

Their Lordships observe that Wilberforce, J., was not one of the Judges who passed the decree or made the order reviewed. They understand that Leslie-Jones, J., was precluded by absence from sitting. But this circumstance makes no difference to what is prescribed by rule 5. It is clear that Wilberforce, J., was precluded by the language from hearing the application, and this in itself would

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be a fatal objection to the judgment in review. The Court of review had to be composed of Scott-Smith, J., alone, a circumstance not without importance for the large considerations which follow.

But larger considerations present themselves. The Order re-enacts with important variations legislation on the subject of review which has been in operation for a long time past.

If their Lordships felt themselves at liberty to construe the language of O. XLVII of the Code of Civil Procedure, 1908, without reference to its history and to the decisions upon it, their task would not appear to be a difficult one. For it is obvious that the Code contemplates procedure by way of review by the Court which has already given judgment as being different from that by way of appeal to a Court of Appeal. The three cases in which alone mere review is permitted are those of new material overlooked by excusable misfortune, mistake or error apparent on the face of the record, or "any other sufficient reason." The first two alternatives do not apply in the present case, and the expression "sufficient," if this were all, would naturally be read as meaning sufficiency of a kind analogous to the two already specified, that is to say, to excusable failure to bring to the notice of the Court new and important matters, or error on the face of the record. But before adopting this restricted construction of the expression "sufficient" it is necessary to have in mind, in the first place, that the provision as to review was not introduced into the Code for the first time in 1908, but appears there as a modification of previous provision made in earlier legislation; and, in the second place, that the extent of the power of a Court in India to review its own decree under successive forms of legislative provision has been the subject of a good deal of judicial interpretation, not, however, in all cases harmonious. That the power given by the Indian Code is different from the very restricted power which exists in England appears plain from the decision in *Charles Bright & Co. v. Sellar* (1) where the Court of Appeal discussed the history of

the procedure in England and explained its limits.

Turning first to the earlier forms assumed in Indian legislation on the matter in question, their Lordships observe that the Bengal Regulation XXVI of 1814, by section 2, confers on the Courts there mentioned a power of review analogous to that under consideration, excepting that the expression "otherwise requisite for the ends of justice" is added, an expression which may have been regarded as enlarging the scope of the word "sufficient," used as it was in much the same way as in the present Code. The expression "requisite for the ends of justice" is again introduced in section 8 of the Code of the Civil Procedure of 1859. But in the Code of 1877 the language is varied, and the law is enacted in substantially the more restricted words in which it is enacted in the Code of 1908. Upon the construction of the language used from time to time by the legislature, there has been much divergence of judicial opinion. For example, even on the wider words in the Code of 1859, the High Court at Calcutta in the case of *Kcy Mcghraj v. Beejoy Gobind Bural* (2) adopted the restricted construction and laid down emphatically that there could be no re-hearing for the purpose of seeing whether a different conclusion on the merits should be adopted. On the other hand, in *Nusseerooddien Khan v. Indumorain Chowdkry* (3) the majority of the Court appear to have considered that the wider meaning should be attributed to the language.

Their Lordships have examined numerous authorities, and they have found much conflict of judicial opinion on the point referred to. There is plainly no such preponderance of view in either direction as to render it clear that there is any settled course of decision which they are under obligation to follow. Some of the decisions in the earlier cases may have been influenced by the wider form of expression then in force, and these decisions may have had weight with the learned Judges, who in cases turning on the subsequent Code, had regarded the intention of the legislature as

(1) (1904) 1 K. B. 6; 72 L. J. K. B. 921; 89 L. T. 431; 20 T. L. R. 12; 52 W. R. 148.

(2) 1 C. 197; 23 W. R. 438; 1 Ind. Dec. (N. S.) 126.

(3) 5 W. R. 93; B. L. R. Sup. Vol. 367.

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remaining unaltered. But their Lordships are unable to assume that the language used in the Codes of 1877 and 1908 is intended to leave open the questions which were raised on the language used in the earlier legislation. They think that r. 1 of O. XLVII must be read as in itself definitive of the limits within which review is to-day permitted, and the reference to practice under former and different Statutes is misleading. So construing it they interpret the words "any other sufficient reason" as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. Such an interpretation excludes from the power of review conferred the course taken by the second and third Division Benches, composed of Wilberforce, J., and Scott-Smith, J., and by Wilberforce, J., and LeRossignol, J., respectively. The result is that the judgments given by these two Division Benches ought to be set aside, and that of the Bench of the Chief Court composed of Scott-Smith, J., and Leslie-Jones, J., restored, so that the suit will stand dismissed. The respondent-plaintiffs must pay the costs here and in the Courts below.

Their Lordships will humbly advise His Majesty accordingly.

W. C. A.

Appeal accepted.

Solicitors for the Appellant.—Messrs. T. L. Wilton & Co.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL, NO. 1580 OF 1922.

August 3, 1922.

Present.—Mr. Justice Campbell.

THE FIRM RAGHBIR SINGH-JASWANT SINGH OF QUETTA—DEFENDANTS—
APPELLANTS

versus

NARINJAN SINGH AND OTHERS

—PLAINTIFFS

AUTAR SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1, O. XL, r. 1, O. XLIII, r. 1 (s)—Order directing defendant to prepare inventory and keep accounts; nature of—Order declaring that appointment of Receiver is necessary—Appeal—Receiver, when to be appointed—Hindu Law—Joint family—Manager, whether necessary—Presumption.

An order directing a defendant to prepare an inventory of the property in dispute and to keep accounts falls under O. XXXIX, r. 1, of the Civil Procedure Code and is appealable. [p. 574, col. 1.]

An order of a Court that a Receiver should be appointed in a case, without appointing anybody by name as Receiver, and adjourning the case to a later date for so appointing one is an order under O. XL, r. 1 of the Civil Procedure Code and is appealable under O. XLIII r. 1 (s) of the Code. [p. 571, col. 2.]

(Case-law discussed.)

In a suit for partition of joint family property the Court should not appoint a Receiver except by consent or upon proof by the plaintiff that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in the plaint, and that the property in possession of the opposite party is in danger of being wasted. [p. 573, col. 1.]

In such a case, ordinarily, the defendant's share in the property would be ample security for any claim which plaintiff might be able to substantiate in any suit for damages. [p. 573, col. 1.]

A Civil Court should not appoint a Receiver in respect of agricultural land of which the plaintiff is not in possession and which the Court has no jurisdiction to partition, or to apportion the produce of. [p. 574, col. 2.]

Semble:—There can be no joint Hindu family without a manager.

Miscellaneous first appeal from an order of the Senior Sub-Judge, First Class, Gujranwala, dated the 8th June 1922.

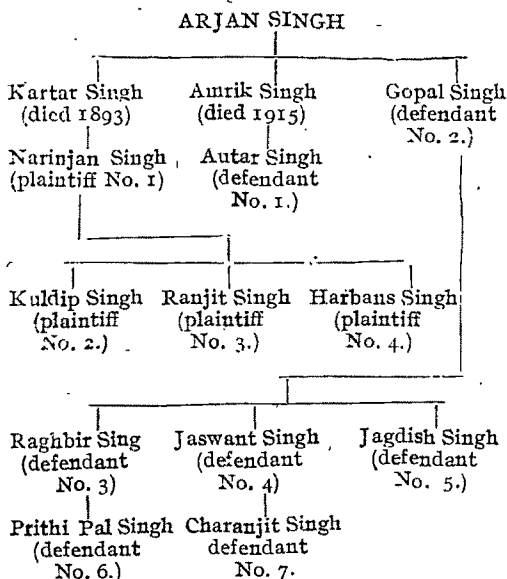
Mr. G. S. Salariya, and Lala Badri Das R. B., for the Appellants.

Lala Moti Sagar R. B. and Kunwar Dalip Singh, for the Respondents.

JUDGMENT.—This judgment will dispose of two appeals preferred under O. XLIII,

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r. 1 (s). The parties concerned are entered in the following pedigree-table :



The plaintiffs lodged the suit on the 21st December 1921 alleging that the parties formed a joint Hindu family. The suit was filed on a Rs. 10 stamp, and was described as one for partition of the one-third share of the plaintiffs in joint family property, immoveable and moveable, in various districts of the Punjab and in Baluchistan. The property was stated to be of the value of Rs. 30, 00,000.

It was stated, further, that the joint family had been carrying on business in Quetta under the names of two distinct firms Amrik Singh-Gopal-Singh and Raghbir Singh-Jaswant Singh. The final prayer in the plaint was as follows:—

(1) Accounts to be taken from Gopal Singh, defendant, of the Quetta businesses, Amrik Singh-Gopal Singh and Raghbir Singh-Jaswant Singh, and whatever money be found due to the plaintiffs to be paid over to them.

(2) The other property specified in the plaint, immoveable and moveable, to be partitioned, and one-third share to be given to the plaintiffs except those properties numbered 11, 14, and 15, in respect of which, being agricultural land, a share of the

plaintiffs only should be declared with a view to future partition by a Revenue Officer.

On the 5th May 1922 the plaintiffs applied for the appointment of a Receiver of the *rabi* crop of the lands in Kotli Mughalan in the District of Gujranwala which are said to measure 5143 *kanals* and to be the most valuable portion of the immoveable property in suit. The application alleged that Gopal Singh and Raghbir Singh would not allow the plaintiffs' servants to cut the crop and take away the grain. The application was opposed and a date was fixed for arguments on 2nd June 1922. On the 20th May 1922 another application was filed for the appointment of a Receiver of the whole property, on the ground that the defendants did not allow the plaintiffs their share in Kotli Mughalan produce, and that they denied the plaintiffs' right to a one-third share in the property, the whole of which they wished to appropriate. This application was warmly contested and was disposed of by the lower Court's order dated 8th June 1922 which is the subject of the present appeals.

The orders passed were as follows:—

(a) The appointment of a Receiver of the moveable property, houses and shops in the exclusive possession of the respective parties was refused.

(b) It was ordered that a separate Receiver of the property of the firm, Amrik Singh-Gopal Singh of Quetta, should be appointed and that since the parties were not inclined to suggest the name of any person at Quetta, the District Judge of that place should be asked for the names of respectable and honest business-men from whom a Receiver could be selected.

(c) It was ordered that no Receiver should be appointed for the firm Raghbir Singh-Jaswant Singh at Quetta, but Raghbir Singh and Jaswant Singh were directed to prepare an inventory of the effects of the firm, to keep accounts regularly and to furnish security in the sum of Rs. 5,000 for compliance with these orders.

(d) One Lala Bishamber Das was appointed Receiver of the immoveable property in the Punjab, that is to say, the properties in the Gujranwala, Gujrat and Shahpur districts numbered 5, 6, 7, 8, 9, 10, 11, 13, 14, and 15 in the plaint. He was to manage these

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properties, realize rents and profits, keep accounts and submit them to Court every six months, to furnish security in the sum of Rs. 10,000 and to pay receipts in the manner directed by the Court.

Two appeals, as already stated, have been filed against this order. One is by Gopal Singh against orders (b) and (d) and the other by Raghubir Singh and Jaswant Singh against the order (c).

It should have been mentioned above that Autar Singh, defendant No. 1, is alleged by Gopal Singh to be colluding with the plaintiffs for the reason that he and Narinjan Singh were married to first cousins.

I deal first with order (b). The property of the firm Amrik Singh-Gopal Singh includes house property at Quetta, and it is admitted that Amrik Singh up to his death in 1915 was the manager of the firm. A preliminary objection is taken that no appeal lies against this part of the order since no particular Receiver has been appointed, and, therefore, the order is not one under O. XL, r. 1. Several cases have been cited in support of this argument.

The first, *Birajan Kooer v. Ram Churn Lall* (1), is not directly in point and two of the others, *Mathuria Debi v. Shib Dyal Singh* (2) and *Ramji v. Koman Das* (3), also give no particular assistance. The former is a short judgment which does not state precisely what the order of the Court below was, and the question of the appeal being competent was not fought out, the appeal being withdrawn. In the Allahabad case the Court's order on the application for the appointment of a Receiver was to allow the application "provisionally." Three other cases are *Upendra Nath Nag v. Bhupendra Nath Nag Chowdhury* (4), *Srinivas Prosad Singh v. Kesho Prosad Singh* (5) and *Narbadashankar Mugatram Vyas v. Kevaldas Raghunathdas* (6).

In the first of these the order of the Court below was as follows:—"I think the whole of the property in suit will be better

managed and the interest of all the parties will be better served if the property in suit be placed in the hands of a competent Receiver."

It was held that this was not a final order appointing a Receiver and was not open to appeal.

In *Srinivas Prosad Singh v. Kesho Prosad Singh* (5) the Sub-Judge had appointed a Receiver conditionally on his furnishing security, and it was held that there was no effective appointment until security had been given and that no appointment had been made within the meaning of O. XL, r. 1. *Narbadashankar Mugatram Vyas v. Kevaldas Raghunathdas* (6) followed *Upendra Nath Nag v. Bhupendra Nath Nag Chowdhury* (4) and ruled that an order in the following terms was not appealable:—"I, therefore, hold that a proper person should be appointed a Receiver. The parties will be further heard on the point as to who should be appointed the Receiver." The learned Judges held that the simple words of the Code must be regarded which are "appointed a Receiver."

There is some force in the argument on behalf of the appellant that the terms of the order now under appeal, are distinctly more definite than any of those quoted above, but, however that may be, there are two direct authorities to the contrary that an order of a Court that a Receiver should be appointed in a case without appointing anybody by name as Receiver, and adjourning the case to a later date for so appointing one is an order under O. XL, r. 1, and appealable under O. XLIII, r. 1 (s). This was laid down by the majority of a Full Bench in *Palaniappa Chetty v. Palaniapp Chetty* (7). The learned Counsel for the respondents contends before me that the dissenting judgment of Mr. Justice Spencer (who, incidentally, considered that *Srinivas Prosad Singh v. Kesho Prosad Singh* (5) went too far) contains a sounder view of law than that of the other two Judges. But the second authority in favour of such an appeal as the present being allowable is one by a Division Bench of this Court, *Budhwanti v. Bishen Kaur* (8). In

(1) 7 C. 719; 9 C. L. R. 203; 3 Ind. Dec. (N. S.) 1011.

(2) 3 Ind. Cas. 430.

(3) 27 Ind. Cas. 646; 13 A. L. J. 79.

(4) 9 Ind. Cas. 582; 13 C. L. J. 157.

(5) 12 Ind. Cas. 745; 14 C. L. J. 489.

(6) 29 Ind. Cas. 504; 17 Bom. L. R. 510.

(7) 40 Ind. Cas. 185; 40 M. 18; 32 M. I. J. 341; (1917) M. W. N. 393; 5 L. W. 776 (F. B.).

(8) 73 P. R. 1902; 59 P. L. R. 1902.

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that case the District Judge passed an order on the application for the appointment of a Receiver nominating the Collector who could not legally be appointed without his consent, and the Collector declined to act. An objection was taken that the order was not appealable and was overruled on the ground that the Court below had finally adjudicated on the question whether a Receiver should be appointed or not, and that, therefore, its order was a complete one under section 503 of the former Code.

It seems to me that the present order must be accepted to be one under O. XL, r. 1. It has been held in decisions by three High Courts which are quoted and accepted by Mr. Justice Rattigan in *Sant Ram v. Ram Chand* (9) that an appeal lies against an order refusing to appoint a Receiver under O. XL, r. 1, and thus there is ample authority that literal adherence to the actual words of the Order is not necessary. The majority of the Madras Full Bench ruled that an order for the appointment of a Receiver is as much an order appointing a Receiver, as an order naming a particular person as Receiver; and this being the latest authority and also being supported by the only pronouncement by this Court cited, I hold in accordance with it that the present appeal is competent. The Calcutta rulings are in direct conflict and a choice has got to be made.

On the merits the position is this: The plaintiffs-respondents have asserted in their plaint that the property is that of a joint Hindu family consisting of the descendants of Kartar Singh. They admitted in their plaint that Amrik Singh had been manager of the family and stated that since his death the possession and management of the business and the realization of income from the other property had been in the hands of Gopal Singh and his sons. The order now in question was passed before the pleas of the defendants were filed, but in contesting the application for the appointment of a Receiver the defendants denied the existence of the joint Hindu family, and denied that the property was joint between them and the plaintiffs. The parties admittedly are Sikhs.

I have heard a great deal of argument addressed to me on the question of whether the parties form a joint Hindu family or not and I refrain from giving this in detail since the question appears to be the main question for decision in the suit and it is necessary at this stage to be very careful not to say anything which may prejudice its ultimate decision by the lower Court. After consideration of those arguments, however, I do not think that the Court was justified in presuming before hearing evidence or receiving the defendants' pleadings that the parties constituted a joint Hindu family. There is a number of documents on the record, and some of them support the plaintiffs while others support the defendants.

Mr. Tek Chand for the appellant Gopal Singh while denying that there is any joint Hindu family points out that, if a presumption be made to the contrary, then Gopal Singh is the manager not only by right but also admitted to be such in the plaint. Mr. Moti Sagar for the respondents asserts that there is a joint Hindu family without a manager and that such a thing is quite possible. He has quoted no authority for this proposition and *prima facie* it seems unlikely that there should be no management for seven years of Joint Hindu family property worth 30 lacs of rupees.

At any rate if a joint Hindu family is to be presumed a manager also must be presumed and Gopal Singh as senior member of the family would have legal right to physical possession of the family property until the family is dissolved (Gour's Hindu Code, section 105).

The lower Court's reasons for appointing a Receiver are not given in any great detail although the order is a lengthy one. It seems to have been influenced principally by the idea that the produce of the agricultural land in the Punjab was likely to be wasted if a Receiver was not appointed. There is, however, no specific allegation of waste or misappropriation in the application for the appointment of a Receiver, and although the possibility of a breach of the peace seems to have been mentioned in arguments before the lower Court about this produce, there is no affidavit that actual disturbance was likely to occur and this has not been suggested before me.

(9) 6 Ind. Cas. 659; 36 P. R. 1910; 53 P. W. R. 1910; 72 P. L. R. 1910.

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The presumption of jointness appears to have been arrived at by the lower Court on the strength of the entries in the Revenue Records regarding the agricultural land but the fact that the defendants strenuously denied jointness and have had no opportunity of going any further than doing so has not, I think, received sufficient attention. The lower Court quoted with approval *Ramji Ram v. Salig Ram* (10) and thought that this was an authority justifying its order. That suit was for the partition of joint Hindu family property and a Receiver was appointed because one of the co-owners was being kept out of possession by the other and all supplies were cut off from his branch of the family. But there the share of the plaintiff was admitted and had also been declared by arbitration; here there is neither admission nor adjudication.

For the appellants particular reliance is placed upon two rulings, *Govind Narain Rao v. Vallabhrao* (11) and *Sant Ram v. Ram Chand* (9). The former dealt with a partition suit between members of a joint family and apparently the plaintiff's membership of that family was not in dispute. The relations, however, between the parties were found to be strained and it was held that the appointment of a Receiver on this ground was not justified. It was further ruled that the Court should not in such a case appoint a Receiver except by consent and upon proof by the plaintiff that *prima facie* he had a very excellent chance of succeeding in establishing the case made out in the plaint, and that the property in possession of the opposite party was in danger of being wasted. It was pointed out that the defendants' share would be ample security for any claim which plaintiff would be able to substantiate in the case for damages. The appointment of the Receiver was set aside.

In *Sant Ram v. Ram Chand* (9) the Chief Court refused to interfere with the refusal of the subordinate Court to appoint a Receiver in a somewhat similar case. One of three Hindu brothers sought partition of the joint family property. It was

not denied that one of the defendants, the eldest brother, had been acting for sometime as manager of the property and the Court held that the property could not be taken out of his control merely because a younger brother asked for partition and applied for the appointment of a Receiver upon a mere apprehension that the manager after institution of the suit would proceed to waste the property.

The main argument for the respondent is that as the law now stands it is not necessary in a suit for partition to allege or to make out waste or misappropriation for the purpose of appointing a Receiver. The rulings quoted were *Suprasanna Roy v. Upendra Narayan Roy* (12), *Poreshnath Mookerjee v. Omerto Nauth Mitter* (13) and *Budhwanti v. Bishen Kaur* (8), as well as *Ramji Ram v. Salig Ram* (10) already alluded to. In the three Calcutta cases the fact of the appellant being a co-sharer was not denied and distinguishes them from the present case. *Suprasanna Roy v. Upendra Narayan Roy* (12) was not, apparently, a case between coparceners. In *Poreshnath Mookerjee v. Omerto Nauth Mitter* (13) there was no contest regarding title and practically all that was decided was that a Court has jurisdiction to place the whole of a joint estate out of which the plaintiff seeks to have his share partitioned, in the hands of the Receiver. *Budhwanti v. Bishen Kaur* (8) was a contest between two Hindu widows and it was held that the actual possession was in the hands of a servant of the family whose practically uncontrolled and masterful management constituted a grave danger to the plaintiff's interest. This person and the defendant widow also were engaged in carrying out the purpose of a Will which was in dispute in the suit, that purpose being to build a temple, and it was ruled that the danger to the plaintiff's interest was immediate and beyond question and further that the parties being widows with a life-tenancy the plaintiff would have no security for restitution in the event of her success except a mere life-interest. In this suit as in the present there was landed property for which the prayer was merely

(10) 5 Ind. Cas. 96; 14 C. W. N. 248; 14 C. I. J. 215.

(11) 55 Ind. Cas. 227; 22 Bom. L. R. 217.

(12) 22 Ind. Cas. 601; 18 C. L. J. 638; 18 C. W. N. 533.

(13) 17 C. 614; 8 Ind. Dec. (N. S.) 949.

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for a declaration and this also had been placed in the hands of a Receiver. The Chief Court held in regard to it that the lower Court had good grounds for believing that the plaintiff herself had been in possession, and upheld the order without prejudice to the defendants moving for its discharge if a certain issue was decided eventually against the plaintiff.

None of these rulings helps the respondents to justify the taking out of the hands of the defendants at the present stage of the suit all the property in dispute nor do they prove what Mr. Moti Sagar contends that the decision in *Govind Narain Rao v. Vallabhrao* (11) is bad law. This latter ruling is almost conclusive in the appellant's favour. The defendants in the present case are admitted to have a one-third interest in an estate of 30 lakhs and manifestly the plaintiffs have plenty of security for compensation for damage or mesne profit. There also appears to me much force in the contention that, if there is a joint family, Gopal Singh is the manager, and no case has been cited in which a manager has been ousted from control of the family property in the present summary manner. If there is no joint Hindu family there is less justification still for the lower Court's order, since the plaintiff's title is denied and has not been established in any way.

It is pointed out that the lower Court's order was discretionary and that the exercise by it of its discretion should not be disturbed lightly; but the exercise, I think, has not been made on sound legal principles.

In regard to order (d) the appointment of Bishambar Das to manage the properties in the Punjab, Nos. 11, 14 and 15 are agricultural lands in the Districts of Gujrat, Gujranwala and Shahpur and the other properties are certain houses mostly in Kunjah in Gujrat District which are of small value and are admittedly joint. This admission of jointness is one of the considerations pleaded by the respondents in support of a presumption that all the property is joint, but, as already stated, on consideration of all the other circumstances I do not think that the presumption is justified at the present stage of the case. In regard to the land, a declaration only is sought and there is no material on which it can be assumed that the plaintiff

is in actual possession. At present everything points to the defendants being in possession. The learned Sub-Judge's order indicates that he was influenced in appointing a Receiver of this land by the allegation that the defendants were withholding from the plaintiffs their share in the produce. That produce is not in suit and, assuming the parties to be co-sharers could not be in suit in a Civil Court (section 77 (3) (h) of the Punjab Tenancy Act). If the order is maintained for the appointment of a Receiver of these lands it is a little difficult to see what would happen in the event of the plaintiff getting his declaration. There could be no order of the Court to give possession to the plaintiff and the Receiver presumably would have to hand the land back to the defendants. In any case, the facts that a mere declaration is sought for the land, that the Civil Court cannot divide it, that the plaintiffs appear from the materials at present on the record to be out of possession, and that the Court has no jurisdiction over the apportionment of the produce, make the order for the appointment of a Receiver for the agricultural lands still less justifiable than that regarding the Quetta property. As for the houses they are of small value and no necessity for making them over to a Receiver is apparent.

It remains to deal with order (c). It has been argued that this, too, is not appealable, clearly it is not an order under O. XL, r. 1, but it appears to me to have been passed under O. XXXIX, r. 1. The reasons for directing Raghbir Singh-Jaswant Singh to prepare an inventory and to keep accounts are not expressly given, and it is true that there is no proof on the record that the property of the firm was in danger of being wasted or damaged or alienated. But the only possible reason for the Court passing the order can be that it was of opinion that this was likely to occur. Mr. Moti Sagar has argued that the order was under the inherent powers conferred by section 151 of the Code, but I do not think that this is so. Taking it as an order under O. XXXIX, r. 1, I hold it to be appealable. Lala Badri Das for Raghbir Singh and Jaswant Singh has contended with some reason that the order, involving as it does the furnishing of Rs. 5,000 security, will seriously

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affect the credit of the firm. There is an affidavit that this firm has no connection with the other property and that it is conducted on borrowed capital. There is no counter-affidavit. I see no justification for presuming at this stage that the plaintiffs have any rights in it or that waste and misappropriation (which are not alleged) are likely to occur, and the defendants should not be burdened with an order for security with matters in their present state.

As the result I accept both appeals and set aside the orders dealt with above. In each case the appellants will have their costs in this Court.

Z. K.

*Appeals accepted.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL No. 1130 OF 1919.

August 3, 1922.

Present.—Mr. Justice Martineau and Mr. Justice Brasher.

MUNSHI RAM—DEFENDANT**APPELLANT***versus***NAURANGA AND OTHERS—PLAINTIFFS****RESPONDENTS.**

Bengal Regulation (XVII of 1806)—Foreclosure proceedings—Notice—Proof—Presumption.

A Court will not presume that all the formalities required by Regulation XVII of 1806 in proceedings for foreclosure have been observed. The mortgagee must prove affirmatively the due performance of every necessary condition. [p. 576, col. 1.]

The mere fact that the notice issued in the proceedings is not forthcoming does not relieve the mortgagee of the burden of proving that the notice satisfied the requirements of the Regulation. On the contrary, the non-existence of the notice is fatal to the validity of the foreclosure proceedings. [p. 576, cols. 1 & 2.]

Sochet Singh v. Dial Singh, 46 P.R. 1907; 192 P. L. R. 1908; 122 P. W. R. 1907, followed.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 1st March 1919, affirming that of the Munsif, First Class, Hoshiarpur, dated the 2nd October 1918.

Lala Mehar Chand Mahajan and Bakhshi

Tek Chand, the for Appellants.

Mr. Des Raj Sawhney, for the Respondents.

JUDGMENT.—In 1874 Kahna and Singhu mortgaged the land in suit to the defendant's father Kirpa Ram with possession for Rs. 402. The land was to be redeemed within 8 years, and there was a stipulation in the deed that if the mortgagors did not redeem the land they would sell it. Kahna and Singhu are dead and the present suit was brought by their heirs for redemption. The defendant pleaded that foreclosure proceedings had been taken in 1894, that a notice was served on Singhu, the surviving mortgagor, and that as Singhu had not paid the mortgage money within a year of the receipt of the notice the defendant had become absolute owner of the land.

The record of the proceedings of 1894 shows that on the application of Kirpa Ram a notice of foreclosure was issued to Singhu, who appeared in Court and admitted having received the notice and a copy of the application, and said that he had not paid the mortgage-money, but urged that Kirpa Ram cut down trees of the value of Rs. 352 without permission and that this sum should be deducted and said he would pay the balance.

The notice of foreclosure issued by the Court is, however, not on the record and the Munsif held that its validity could not be presumed and that the defendant was bound to prove that the foreclosure proceedings were valid, and as he had not done so the Munsif passed a decree for redemption.

The District Judge on appeal took a different view of the case, holding that the mortgage was not one by way of conditional sale, but a mortgage with an agreement that the mortgagors would sell the land if they failed to redeem it, and that, therefore, the mortgagee was not competent to take foreclosure proceedings, but that his remedy should have been to sue to enforce performance of the agreement to sell. The learned Judge also found that an oral sale to the defendant, which was alleged in the grounds of appeal, had not been proved, and he dismissed the appeal. The defendant has presented a second appeal to this Court.

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We do not agree with the District Judge in his construction of the mortgage of 1874. Although the words entered in the mortgage deed were "*agar fakul-raim na karaingc to bxi kardenge*," we think there is no doubt that what the mortgagors really meant was that if they did not redeem the land it would be deemed to be sold. An agreement to sell would be useless without an agreement as to the price for which the land was to be sold. Moreover the plaintiffs in the First Court admitted that the mortgage was one by conditional sale, and the lower Appellate Court has put an interpretation on the mortgage-deed which the plaintiffs themselves had not put on it.

But although we differ from the lower Appellate Court on that point we think that the suit must fail for the reason given by the Munsif. It is settled law that the Court will not presume that all the formalities required by Regulation XVII of 1806 in proceedings for foreclosure have been observed, but the mortgagee must prove affirmatively the due performance of every necessary condition. There are numerous authorities on this point to which it is unnecessary to refer. It is argued for the appellant that as Singhu appeared in Court in 1894 and admitted the receipt of the notice and took no objection to its validity it may be presumed that the notice fulfilled the requirements of the Regulation, but we cannot agree with the contention. Singhu may not have read the notice, and he may even have been illiterate. At any rate, the mere fact of his raising no objection to the validity of the notice does not warrant the presumption that the notice fulfilled all the necessary conditions. The notice is unfortunately not forthcoming, and this fact makes it impossible for the appellant to prove that all necessary formalities were observed. We recognize the difficulty of his position, but we are unable to hold that the non-existence of the notice relieves him of the burden of proving that the notice satisfied the requirements of Regulation XVII of 1806. It was in fact held in *Sochet Singh v. Dial Singh* (1) that the non-existence

of the notice was fatal to the validity of the foreclosure proceedings. We must, therefore, decide that as the defendant had not shown that the foreclosure proceedings in 1894 fulfilled the requirements of the Regulation the mortgage subsists.

A plea of limitation has been raised based on the fact that in 1897 Kirpa Ram got the land mutated in his own favour, Singhu's name being removed from the records. But Singhu was not present and there is nothing to show that he was informed of the mutation. Kirpa Ram's possession, therefore, cannot be said to have become adverse to Singhu, and the plea that the suit is barred by limitation must be rejected.

There was also a plea of estoppel, but it is not pressed. Nauranga, one of the plaintiffs, was present at the mutation of 1897, and identified Kirpa Ram, but this fact does not debar the plaintiffs from suing for redemption. Nauranga had no title to the land in 1897 as Singhu was then alive.

We dismiss the appeal, but under the circumstances we leave the parties to bear their own costs in this Court.

Z K.

*Appeal dismissed.***CALCUTTA HIGH COURT.**

APPEAL FROM ORIGINAL DECREE NO. 204 OF 1920.

August 2, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

Sreematy SAROJINI DEBYA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KRISTA LAL HALDAR PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Easement—Right to light and air—Right to privacy or prospect—Principles applicable—Severance of tenement by partition—Implied reservation of easement.

(1) 46 P. R. 1907; 192 P. L. R. 1908; 122 P. W. R. 1907.

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Every one may build upon or otherwise utilise his own land, regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and building of another person. On the other hand, every man may open any number of windows looking over his neighbour's land, for the interference with a neighbour's privacy or with his prospect, does not, by itself, give the latter a cause of action, in the absence of other circumstances. If windows are so opened, the neighbour may, by building on his own land, obstruct the light which would otherwise reach them. The problem, therefore, which really arises in a suit for declaration of the plaintiff's right to obstruct the doors and windows of the defendant is, whether the latter has acquired the right to use unobstructed the doors and windows. [p. 579, col. 1.]

Tustu Mondal v. Kenaram Mondal, 65 Ind. Cas. 22; 34 C. L. J. 518, *Tapling v. Jones*, (1865) 11 H. L. C. 290 at p. 305; 20 C. B. (N. s.) 166; 34 L. J. C. P. 342; 11 Jur. (N. s.) 309; 12 L. T. 555; 13 W. R. 617; 145 R. R. 192; 11 E. R. 1344, *In the matter of W. C. Penny and the South Eastern Ry. Co.*, (1857) 7 El. & Bl. 660; 110 R. R. 773; 26 L. J. Q. B. 225; 3 Jur. (N. s.) 957; 5 W. R. 612; 29 L. T. O. S. 124; 119 E. R. 1390, *Turner v. Spooner*, (1861) 1 Dr. & Sm. 467; 127 R. R. 192; 30 L. J. Ch. 801; 7 Jur. (N. s.) 1068; 4 L. T. 732; 9 W. R. 684; 62 E. R. 457 and *Chandler v. Thompson*, (1811) 3 Camp. 80; 13 R. R. 756, referred to.

Whether a grant of an easement arises by implication on a conveyance of land depends on the intent of the parties, which must clearly appear; in order to determine the intent, the Court will take into consideration the circumstances attending the transaction, the particular situation of the parties and the state of the thing granted. This principle holds only where there is no express contract relating to the matter; for, where there is a valid express agreement fairly made, the law does not indulge in presumptions, and the rights of the parties will be upheld according to the terms of such agreement; in such circumstances, no question arises as to grant of easement by implication. [p. 580, col. 1.]

On a severance of tenements by a partition of joint property, and in the absence of a contrary intention, expressed or necessarily implied, all such easements as are apparent, continuous and necessary for enjoying any of the undivided shares when the partition was effected, pass to the coparceners to whom such shares are respectively allotted in severalty. [p. 581, col. 2.]

Bolye Chunder Sen v. Lalmoni Dasi, 14 C. 797; 7 Ind. Dec. (N. s.) 527, *Dwarka Nath Paul v. Sunder Lal Seal*, 3 C. W. N. 407, *Ratanji v. Idaji*, 8 B. H. C. R. 181, *Purshotam Sakharam v. Durgaji Tukaram*, 14 B. 452; 7 Ind. Dec. (N. s.) 762 and *Krishnamarazu v. Marraju*, 28 M. 495; 15 M. L. J. 255, relied on.

Although, generally speaking, the modes in which a right to the access of light and a right to the access of defined air can be acquired are similar, the grounds upon which the Court will restrain

the obstruction of light may sometimes differ widely from the grounds upon which it will restrain the obstruction of air. [p. 582, col. 1.]

City of London Brewery Co. v. Tennant, (1874) 9 Ch. A. 212; 43 L. J. Ch. 457; 29 L. T. 755; 22 W. R. 172, *Baxter v. Bower*, (1875) 44 L. J. Ch. 625; 33 L. T. 41; 23 W. R. 805, *Cable v. Bryant*, (1908) 1 Ch. 259 at p. 263; 77 L. J. Ch. 78; 98 L. T. 98, *Webb v. Bird*, (1861) 10 C. B. (N. s.) 268; 30 L. J. C. P. 384; 4 L. T. 445; 9 W. R. 899; 128 R. R. 707; 14 E. R. 455, affirmed on appeal (1863) 13 C. B. (N. s.) 841; 31 L. J. C. P. 335; 8 Jur. (N. s.) 621; 134 R. R. 756; 143 E. R. 332, *Barrow v. Archer*, (1863) 2 Hyde 125; *John George Bagram v. Kheltranath Karformah*, 3 B. L. R. O. C. J. 18 at p. 46 and *Goodman & Gore's Case*, (1612) Godbolt 189; 78 E. R. 115, referred to.

There is no easement for the free access of wind. [p. 582, col. 1.]

Webb v. Bird, (1861) 10 C. B. (N. s.) 268; 30 L. J. C. P. 384; 4 L. T. 445; 9 W. R. 899; 128 R. R. 707; 14 E. R. 455, affirmed on appeal (1863) 13 C. B. (N. s.) 841; 31 L. J. C. P. 335; 8 Jur. (N. s.) 621; 134 R. R. 756; 153 E. R. 332 and *Goodman & Gore's case*, (1612) Godbolt 189; 78 E. R. 115 relied on.

Appeal against a decree of the Subordinate Judge, First Court, 24-Parganas, dated the 17th August 1920.

Babu Amarendra Nath Bose (with him Babu Panna Lal Chatterjee), for the Appellant.—The defendants are the appellants. The appeal arises out of a suit for a declaration of the plaintiff's right to obstruct the doors and windows of the defendants by erecting walls and for an injunction restraining defendants from interfering with the plaintiff's constructions. The matter arises thus. The property in suit—the family dwelling house—belonged to one Hari Mohan who died leaving behind him a widow and two sons by a predeceased wife. The sons were named Amritlal and Rajkumar. Amrita died leaving behind his widow, defendant No. 1. She has gifted away her share of the property to her brother who is defendant No. 5. Rajkumar left 3 sons—Hiralal, whose interest was transferred to defendant No. 4 by his widow; Joharlal, who is defendant No. 3 and Krishnalal, who is the plaintiff. In 1907 there was a partition between the heirs of Amrita Lal and Rajkumar on the basis of an award of the arbitrators. In 1909 there was a similar partition as between the sons of Rajkumar. The present suit relates to the portions awarded to defendant No. 1, the widow of Amrita and to the plaintiff. The house is two-storeyed. On the ground-floor there are two windows

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and one door, on the first floor there are three windows and one door. The plaintiff's case is that these openings render access to his house and, in consequence of their overlooking the rooms, his privacy is violated. The Court below has decreed the suit, my contention is that his right to privacy is not affected and that he is not entitled to obstruct my doors and windows. I submit the learned Court has not considered the inconvenience that would be caused by the blocking up of these openings. There will be no sufficient light or ventilation if they are closed up. The case of *Barrow v. Archer* (1) does not apply. Refers to sections 5, 13, 15, 28 and 30 of the Indian Easements Act; *Kadambini Debi v. Kali Kumar Haldar* (2). I submit in this view of the case the decree of the Court below should be set aside.

Babu Peary Mohan Chatterjee, for the Respondent.—They are now relying upon an easement by implied grant upon partition. Such an easement is based upon two considerations, viz., (1) the grantor must derogate from his own grant, and (2) there must be intention express or implied. See *Kadambini Debi v. Kali Kumar Haldar* (2). Here it is a case for partition. Every body is a grantor. I was a minor at the time under the guardianship of this very lady, the defendant No. 1, who is the appellant. How can a minor effectively grant an easement? It is admitted that at the time of the first partition there were two doors and a window. They were not ancient lights. The doors were meant for passing and re-passing. They were closed up after partition. The learned Subordinate Judge who had himself inspected the premises found that the doors to be not at all necessary. See *Mitra's Prescription* (3rd Edition) 408, *Trevelyan on Law relating to Minors* (5th Edition) 298; *Charu Surnokar v. Dokouri Chunder Thakoor* (3). *Gale on Easements* (9th Edition) 474; *Delhi & London Bank, Limited v. Hem Lal* (4), *Colls v.*

Home & Colonial Stores, Limited (5), *Peter Charles Ernest Paul v. William Robson* (6).

Babu Amarendranath Bose, in reply.—With regard to the question of minority the reference to *Mitra's Prescription* is not at all to the point. He had a guardian appointed under his father's Will. He had also a guardian appointed by the Court. Therefore, the acts of such guardian would be binding on the minor. He cannot now turn round and question the acts of his guardian. His interests were sufficiently and well looked after.

JUDGMENT.—The subject-matter of the litigation which has culminated in this appeal, is a family dwelling house, at one time the property of Hari Mohan Haldar. He died in or about the year 1890, and left a widow, Giribala, who was made the second defendant in this suit but has died during its progress. Hari Mohan also left two sons by a predeceased wife, namely, Amrita Lal Haldar and Raj Kumar Haldar, who inherited his properties in equal shares. Amrita Lal died in 1899 and left a widow, Sarojini, the first defendant in this suit, during the pendency of the litigation, she made a gift of her right, title and interest in the disputed property to her brother, Satyendra Nath Banerjee, who was thereupon added as the fifth defendant. Raj Kumar died in 1903 and left three sons; Hiralal, now deceased, Jaharlal, who is the third defendant, and Krishna Lal, the plaintiff. The share of Hiralal has been transferred by his widow, Arun Bala, to Panchanan Saha, the fourth defendant. The family dwelling house was partitioned, in the first instance, as between the branches of Amrita Lal and Raj Kumar, by an award of arbitrators which was pronounced on the 7th July 1907 and was made a rule of Court on the 9th August 1907. Later on, a partition was effected amongst the sons of Raj Kumar by an award of arbitrators which was made on the 22nd June 1909 and was confirmed by a decree of Court

(1) (1863) 2 Hyde 125.

(2) 3 C. W. N. 409; 26 C. 516; 13 Ind. Dec. (N. S.) 932.

(3) 8 C. 956; 10 C. L. R. 577; 7 Ind. Jur. 86; 4 Ind. Dec. (N. S.) 616.

(4) 14 C. 839; 7 Ind. Dec. (N. S.) 555.

(5) (1904) A. C. 179; 73 L. J. Ch. 484; 53 W. R. 30; 90 L. T. 687; 20 T. L. R. 475.

(6) 24 Ind. Cas. 300; 42 C. 46; 18 C. W. N. 933; 27 M. L. J. 117; 1 L. W. 561; 16 M. L. T. 204; (1914) M. W. N. 631; 12 A. L. J. 1166; 16 Bom. L. R. 803; 20 C. L. J. 353; 41 L. A. 180 (P. C.).

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on the 1st October 1909. The dispute in the present litigation relates to the allotment made to Sarojini, the widow of Amrita Lal, under the first arbitration award, and the allotment given to Krishnalal, the son of Raj Kumar, by the second arbitration award. In the eastern wall of the portion of the house allotted to Sarojini, there are three openings on the ground floor and four on the first floor. Of the three openings on the ground floor, two are windows and one is a door; of the four openings on the first floor, one was a window and three were doors at the time of the partition, two of the doors have since then been converted into windows, so that, at the time of the suit, there were on the first floor wall three windows and one door. The existence of the windows and the doors on the ground floor and on the first floor render it possible for people in the portion of the house occupied by the first defendant, to obtain access to the premises now held by the plaintiff, to overlook his rooms and to destroy his privacy. The plaintiff accordingly erected walls on his own lands to stop these openings but they were demolished by force by the first defendant. The plaintiff has accordingly instituted this suit for declaration of his right to obstruct the doors and windows and for an injunction to restrain the first defendant from interference with the construction and maintenance of the wall which he proposes to erect. The defendant denied the right of the plaintiff to obstruct the door and windows in any manner. The Subordinate Judge has held that the plaintiff was entitled to obstruct the doors and windows, but only by the erection of wooden structures with blinds fixed up, and he has made a decree accordingly. On the present appeal, the first defendant has contended that the plaintiff was not competent to obstruct at all the doors and windows. The plaintiff, on the other hand, has presented a memorandum of cross-objection and has urged that he cannot be compelled to adopt a prescribed method for the obstruction of the doors and windows, and, that, if he so chooses, he may, for the purpose, erect a brick wall on his land instead of a wooden structure.

The principle applicable to cases of this character is well-known and was explained

recently in the case of *Tustu Mondal v. Kenaram Mondal* (7). But before we deal with the question, it may be useful to point out, as was done by Lord Westbury in *Tapling v. Jones* (8), that the expression "right to obstruct" has a tendency to mislead. "If my adjoining neighbour builds upon his land and, opens numerous windows which look over my gardens or pleasure grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. I have simply the same right of building or raising any erection I please on my own land, unless that right has been by some antecedent matter either lost or impaired, and I gain no new or enlarged right by the act of my neighbour." The erection of a wall or other obstacle is, indeed, the only remedy available to a landowner if he is annoyed by the opening of new windows overlooking his ground, he can maintain no action nor can he obtain other relief at law or in equity, in building to obstruct new windows, however, he must be careful to avoid obstructing ancient lights, *In the matter of W.C. Penny and the South Eastern Ry. Co.* (9), *Turner v. Spooner* (10), *Chandler v. Thompson* (11). To put the matter briefly, every one may build upon or otherwise utilise his own land, regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and building of another person. On the other hand, every man may open any number of windows looking over his neighbour's land, for the interference with a neighbour's privacy or with his prospect, does not, by itself, give the latter a cause of action, in the absence of other circumstances. If windows are so opened, the neighbour may, by building on his own land, obstruct the light which would otherwise reach them. The problem, therefore, which really arises in this case is, whether the first defendant

(7) 65 Ind. Cas. 22; 34 C. L. J. 518.

(8) (1865) 11 H. L. C. 290 at p. 305; 20 C. B. (N. S.) 166; 34 L. J. C. P. 342; 11 Jur. (N. S.) 309; 12 L. T. 555; 13 W. R. 617; 145 R. R. 192; 11 E. R. 1344.

(9) (1857) 7 El. & Bl. 660; 110 R. R. 773; 26 L. J. Q. B. 225; 3 Jur. (N. S.) 957; 5 W. R. 612; 29 L. T. O. S. 124; 119 E. R. 1390.

(10) (1861) 1 Dr. & Sm. 467; 127 R. R. 192; 30 L. J. Ch. 801; 7 Jur. (N. S.) 1068; 4 L. T. 732; 9 W. R. 684; 62 E. R. 457.

(11) (1811) 3 Camp. 80; 13 R. R. 756.

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has acquired the right to use unobstructed the doors and windows. It is not disputed that she has not acquired such a right by prescription, by lapse of the statutory period since the date of the partition. Consequently, the question reduces itself to this, whether such right was impliedly reserved in her favour at the time of the partition.

It may be stated as a general rule that, whether a grant of an easement arises by implication on a conveyance of land depends on the intent of the parties, which must clearly appear; in order to determine the intent, the Court will take into consideration the circumstances attending the transaction, the particular situation of the parties and the state of the thing granted. This principle holds only where there is no express contract relating to the matter, for, where there is a valid express agreement fairly made, the law does not indulge in presumptions, and the rights of the parties will be upheld according to the terms of such agreement; in such circumstances, no question arises as to grant of easement by implication.

Thus, where the owner of an entire tract of land or of two or more adjoining parcels employs a part thereof, so that one derives from the other a benefit or an advantage of a continuous and apparent nature, and, sells the one in favour of which such continuous and apparent *quasi*-easement exists, the easement, being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication, *Ewart v. Cochran* (12), *Suffield v. Brown* (13), *Wheeldon v. Burrows* (14), *Bayley v. G. W. Ry.* (15), *Brown v. Alabaster* (16), *Watts v. Kelson* (17), *Schwamm v. Cotton* (18).

The reasons for this rule have been formulated in a variety of ways: (1) where a man grants a thing, he grants with it everything necessary to its enjoyment; (2) a grantor cannot derogate from his own grant; (3) the grant should be construed against the grant so far as to pass the privileges annexed by himself to the property conveyed; (4) if, at the time of the transfer, there are visible and apparent easements and privileges annexed to it, necessary for its reasonable enjoyment, it must be assumed that they were taken into consideration when the price was fixed. It has been maintained that these reasons, as also the rule founded thereon, become inapplicable where the tenement in respect of which the easement is claimed is carved out for the first time from the entirety, by the deed relied upon, and is substantially different from that in connection with which the easement had formerly been enjoyed: *Horsfall v. Braye* (19).

The principles just mentioned have been applied to cases of transfer of two tenements, and it has been ruled that if the owner of an estate, part of which is *quasi* dominant and part *quasi* servient, transfers the two portions to two different persons, the respective transferees will take the portions granted to them, burdened or benefited, as the case may be, by those rights in the nature of apparent and continuous easements which the previous owner has the right to attach to them, *Barnes v. Louch* (20) *Allen v. Taylor* (21). This rule is held applicable where there are several grants, not absolutely at the same moment, but so far at the same time that they are considered as one transaction: *Russell v. Watts* (22).

Analogous to the creation of easements by severance of unity of possession at Common Law, is the creation by what is known as *estimation du pere defamille* under the Civil Law; in other words, the disposition or arrangement which the proprietor of several heritages has made for their respective use,

(12) (1861) 4 Macq. 117; 123 R. R. 938; 7 Jur. (N. S.) 925; 10 W. R. 3; 5 L. T. 1.

(13) (1863) 4 De G. J. & S. 185; 146 R. R. 267; 33 L. J. Ch. 249; 3 N. R. 340; 10 Jur. (N. S.) 111; 9 L. T. 627; 12 W. R. 356; 46 E. R. 888.

(14) (1879) 12 Ch. D. 31; 48 L. J. Ch. 853; 41 L. T. 327; 28 W. R. 196.

(15) (1884) 26 Ch. D. 434; 51 L. T. 337.

(16) (1888) 37 Ch. D. 490; 57 L. J. Ch. 255; 58 L. T. 265; 36 W. R. 155.

(17) (1871) 6 Ch. A. 166; 40 L. J. Ch. 126; 24 L. T. 209; 19 W. R. 833.

(18) (1916) 2 Ch. 459; 85 L. J. Ch. 689; 115 L. T. 168; 60 S. J. 654.

(19) (1908) 7 Com. L. R. 629.

(20) (1879) 4 Q. B. D. 494; 48 L. J. Q. B. 756; 41 L. T. 278; 28 W. R. 32.

(21) (1881) 16 Ch. D. 355; 50 L. J. Ch. 178.

(22) (1884) 25 Ch. D. 559; 50 L. T. 673; 32 W. R. 626 affirmed on Appeal (1885) 10 A. C. 590; 55 L. J. Ch. 158; 53 L. T. 876; 34 W. R. 277; 50 J. P. 68.

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see the judgment of Lord Westbury in *Suffield v. Brown* (13). Under the Civil Law, if the owner of two estates, between which there exists an apparent sign of servitude, sells one of these estates, and if the deed of sale is silent respecting the servitude, the same continues to exist, actively or passively, in favour of or upon the estate which has been sold. The Civil Law thus does not recognise a distinction analogous to that between implied grant and implied reservation at the Common Law. This latter rule, as explained in the cases reviewed in *Tustu Mondal v. Kenaram Mondal* (7), has been very much shaken in recent years, if not "almost swept away."

The doctrine which we have already explained, has been applied to cases of partition of joint properties, and it has been ruled that on partition of land between heirs, the general rule is that each heir will take his share, subject to any apparent, permanent, and reasonably necessary *quasi*-easement, which existed thereon for the benefit of another part of such land at the death of the ancestor, unless the existence of such *quasi*-easement has been discontinued by the heirs before partition, or unless provision is made in the partition for a discontinuance, see *Nicholls v. Nicholls* (23). The substance of the matter is, that permanency, continuity and necessity are all essential qualities of the easement or accommodation claimed by implied grant. There has been some apparent divergence of judicial opinion as to the degree of necessity required, and it is plain that no inelastic formula can be framed to comprehend all concrete cases. The test is not, whether the easement or accommodation will make the enjoyment convenient; but whether it is necessary for the comfortable enjoyment of the property as it existed at the time of the severance of the title, *Ewart v. Cochran* (12), *Union Lighterage Co. v. London Graving Dock Co.* (24) *Ray v. Hazeldine* (25), *Schwann v. Cotton* (18), *Derry v. Sanders* (26), *Gordon*

v. Ogilvie (27), *Wheeldon v. Burrows* (14) *Richards v. Rose* (28). We may take it, then, as well settled that, on a severance of tenements by a partition of joint property, and in the absence of a contrary intention, expressed or necessarily implied, all such easements as are apparent, continuous and necessary for enjoying any of the undivided shares when the partition was effected, pass to the coparceners to whom such shares are respectively allotted in severalty. This view is supported by the decisions in *Bolye Chunder Sen v. Lalmoni Dasi* (29), *Dwarika Nath Paul v. Sunder Lal Seal* (30), *Kadambini Debi v. Kali Kumar Haldar* (2), *Ratanji v. Idalji* (31), *Purshotam Sakhararam v. Durgaji Tukaram* (32) *Krishnamarazu v. Marraju* (33). Reference may in this connection be also made to section 13 of the Indian Easements Act and Illustrations (d) (e) (f) and (m) appended thereto, which though not directly applicable, may be regarded as enunciating principles of justice, equity and good conscience, *Kadambini Debi v. Kali Kumar Haldar* (2). The statutory provisions mentioned make necessity an assential test.

Tested in the light of these principles, the case for the first defendant completely breaks down. The Subordinate Judge, upon a careful review of the evidence recorded before him and after inspection of the premises on two occasions at the request of the parties, came to the conclusion that the retention of the doors and windows was not necessary for the use by the defendant of the rooms allotted to her. He has taken the rooms, one by one, considered its situation, and given adequate reasons for his conclusion that the rooms could be comfortably occupied, even if the doors and windows in dispute were closed. The only serious dispute was as regards what is called the middle room. There is no doubt that the room would have sufficient light at all times of the day, even if the windows

(23) (1900) 81 L. T. 811.

(24) (1902) 2 Ch. 537; 71 L. J. Ch. 791; 87 L. T. 381; 18 T. L. R. 754.

(25) (1904) 2 Ch. 17; 73 L. J. Ch. 537; 90 L. T. 703.

(26) (1919) 1 K. B. 223; 88 L. J. K. B. 410; 120 L. T. 194; 63 S. J. 115; 35 T. L. R. 105.

(27) (1899) 15 T. L. R. 239.

(28) (1853) 9 Ex. 218; 96 R.R. 675; 2 Com. L.R. 311; 23 L. J. Ex. 3; 17 Jur. 1036; 156 E.R. 93.

(29) 14 C. 797; 7 Ind. Dec. (N. S.) 527.

(30) 3 C. W. N. 407.

(31) 8 Bom. H. C. R. 181.

(32) 14 B. 452; 7 Ind. Dec. (N. S.) 762.

(33) 28 M. 495 15 M. L. J. 255.

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should be closed. There would also be sufficient ventilation for habitable or sanitary purposes, but the defendant urged that if the eastern windows were closed, there might not be a continuous current of air. The Subordinate Judge overruled this contention and held, on the authority of the decision of Peterson, J., in *Barrow v. Archer* (1), that if the light were sufficient, the access of air might be presumed to be sufficient. This may not always be strictly true, for the grounds upon which the Court will restrain the obstruction of light may sometimes differ widely from the grounds upon which it will restrain the obstruction of air, *City of London Brewery Co. v. Tennant* (34) and *Baxter v. Bower* (35), although, generally speaking, the modes in which a right to the access of light and a right to the access of defined air can be acquired are similar, *Cable v. Bryant* (36). But, apart from this, the principle established in *Webb v. Bird* (37) was applied in this country in *Barrow v. Archer* (1), where the plaintiff claimed the right to have the south window on to his premises free from all obstruction. The Court declined to give effect to this argument, on the ground that it was necessary for it to see that the servient tenement was not made subservient to more than the law required. A similar claim was negatived by Peacock, C. J., in *John George Bagram v. Khettranath Karjormah* (38), and the same principle was followed in the case of *Delhi & London Bank Limited v. Hem Lall* (4). The substance of the matter is, that there is no easement for the free access of wind, *Webb v. Bird* (37) and *Goodman & Gore's case* (39) cited in *Webb v. Bird* (37). We have thus, on the one hand, the fact that the doors and windows are not necessary for the enjoyment of the rooms allotted to the defendant, and, on the other hand, the fact

that their continuance is destructive of the security and privacy of the portion of the premises allotted to the plaintiff. In such circumstances, the defendant cannot invoke the aid of the principle of an implied grant of easement in her favour, upon severance of the tenements by partition. This, however, inevitably leads to the inference that the plaintiff cannot be restricted in his choice of the method he might adopt for the obstruction of the doors and windows, and his cross-objection must consequently prevail.

The result is, that this appeal is dismissed and the cross-objection allowed. The decree of the Subordinate Judge will be modified so as to entitle the plaintiff to close all the doors and windows by the erection of walls or such other structures as he may choose to place on his own land. Subject to this variation, the decree made by the Subordinate Judge will stand confirmed. The appellants will pay the plaintiff-respondent his costs in this Court. We assess the hearing-fee at five gold mohurs.

B. N.

Appeal dismissed.
Cross-objection allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 419 OF 1920.

December 11, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Wallace.

KOONAMVELLI UNNARA (DEAD) AND OTHERS—DEFENDANT NO. 4 AND HIS LEGAL REPRESENTATIVES—APPELLANTS

versus

KOYIPARAMBATH PERINKITAVIL
KUNHI RAMAN AND OTHERS—

PLAINTIFFS Nos. 1, 2, 4 to 15, 3

AND DEFENDANTS Nos. 1, 2, 3 AND 5

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Civil Procedure Code (Act XIV of 1822), s. 331—Res judicata—Ambiguous judgment—Extraneous evidence—Claim proceedings under s. 331—Procedure not followed—Order, whether res judicata.

A judgment in a matter of *res judicata* must stand by itself. It decides what it purports to decide no more and no less. If there is any ambiguity as to what it decided, which cannot be cleared up without further evidence, then it will

(34) (1874) 9 Ch. A. 212; 43 L. J. Ch. 457; 29 L. T. 755; 22 W. R. 172.

(35) (1875) 44 L. J. Ch. 625; 33 L. T. 41; 23 W. R. 805.

(36) (1908) 1 Ch. 259 at p. 263; 77 L. J. Ch. 78; 98 L. T. 98.

(37) (1861) 10 C. B. (N. S.) 268; 30 L. J. C. P. 384; 4 L. T. 445; 9 W. R. 899; 128 R. R. 707; 142 E. R. 455 Affirmed on appeal (1863) 13 C. B. (N. S.) 841; 31 L. J. C. P. 335; 8 Jur. (N. S.) 621; 134 R. R. 756; 143 E. R. 332.

(38) 3 B. L. R. O. C. J. 18 at p. 46.

(39) (1612) Godbolt 189; 78 E. R. 115.

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not be a clear finding and not a case of *res judicata* at all. [p. 584, col. 1.]

On the death of one S, the *karnavan* of a Malabar *tarwad* sued the son of S. for money belonging to S. on the ground that S. was governed by the Marumakkattayam law and that the *tarwad* was his heir. The Court dismissed the suit holding that S. followed Makkathayam Law and the *tarwad* was not his heir. A subsequent suit was brought by the junior members of the *tarwad* to eject a person claiming under the son of S. from possession of certain other properties of S. on the ground that the *tarwad* was the successor-in-title to S. It was sought to be shown that the prior suit dealt only with the self-acquisitions of S. and not with his family properties which were comprised in the latter suit. There was nothing in the judgment in the previous case to show that only self-acquisitions were dealt with in that case:

Held, (1) that the question of the inheritance of the property of S. whether self-acquired or not, was directly and substantially in issue between the predecessors-in-title of the present litigants and the finding in the prior suit that S. followed the Makkathayam and not the Marumakkathayam Law was *res judicata* and was a final decision binding on the parties and their successors-in-title; [p. 584, col. 2.]

(2) that it was not open to the plaintiff to adduce extraneous evidence to prove that the Court was dealing only with the self-acquisitions of S. in the previous suit. [p. 584, col. 1.]

Where in a case governed by the Civil Procedure Code of 1882, on a claim by a third party obstructing delivery of possession to the decree-holder, the Court did not follow the procedure laid down in section 331 of the Code and the claim was not registered as a suit, and the matter was disposed of merely on petitions and an order passed directing the removal of the obstruction:

Held, that the order had not the force of a decree and would not operate as *res judicata* in a subsequent suit between the parties. [p. 585, col. 2; p. 586, col. 1.]

Where it is sought to give the formality of the legal effect of a decree to an order under section 331 of the Civil Procedure Code of 1882 in order that it may be used as *res judicata*, it must be shown that there was a formal array of parties, framing of issues and trial as laid down in the section, but if the petition has been wrongly treated as a merely interlocutory application in the suit, it cannot be on the same footing as a suit itself. [p. 586, col. 1.]

Gopala v. Fernandes, 16 M. 127; 5 Ind. Dec. (N. S.) 736, *Ponindro Deb Raihu v. Rani Jugodishwari*, 14 C. 234; 7 Ind. Dec. (N. S.) 155, *Muttammal v. Chinnana Gounaen*, 4 M. 220; 1 Ind. Dec. (N. S.) 989, *Vishnu v. Ramchandra*, 9 Bom. L. R. 936, relied upon.

Second appeal against a decree of the Court of the Temporary Subordinate Judge, Tellicherry, in A. S. No. 396 of 1918, (A. S. No. 507 of 1915, District Court) preferred against the decree of the Court of the District Munsif, Quilandy, in O. S. No. 287 of 1914.

Mr. C. V. Ananthakrishna Aiyar, for the Appellant.

Messrs. C. Madhavan Nair, K. P. Rama Krishna Aiyar and B. Poker, for the Respondents.

JUDGMENT.—The substantive points for decision in this appeal are two, both questions of *res judicata*. The plaintiffs (contesting respondents) are the junior members of a Marumakkattayam *tarwad* in Malabar and they bring this suit to eject among others the appellant from the plaintiff-property on the ground that the plaintiff-property is the property of a Devaswom which is itself the property of their *tarwad*. The appellant claims under the third defendant, who was the son of Sankaran, and claims that the plaintiff property was the property of the Sankaran, that Sankaran followed Makkathayam Law, and that the third defendant, therefore, succeeded to the property after his father's death and passed it on to him. On this point, the plaintiffs claim that Sankaran followed Marumakkathayam law, and, therefore, his successor-in-title to the property was not the third defendant but their own *tarwad*; of which, according to them, Sankaran was the *karnavan* when he died. One of the main points for decision by the lower Courts, therefore, was whether Sankaran's property descended to his son or to the plaintiff's *tarwad*, in other words, whether Sankaran followed Makkathayam or Marumakkathayam Law. This very question was raised and decided in a previous suit, Original Suit No. 433 of 1898, on the file of the District Munsif of Payyoli, to which the third defendant and the then *karnavan* of the plaintiff's *tarwad* were parties, and it was then decided that Sankaran followed Makkathayam Law, and that the *karnavan* of the *tarwad* was not his heir. This finding was upheld on appeal by the District Court of North Malabar and is a final decision binding on the parties and their successors-in-title. The plaintiffs contend that this decision is not *res judicata* against them, but we are of opinion that that contention cannot prevail and that the lower Courts have erred in holding that it is not.

2. The plaintiffs' contention, which has been upheld by the lower Appellate Court in that Original Suit No. 433 of 1898, was

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dealing with a case of self-acquisition of Sankaran and that in such a case it was not necessary for the Court to record a general finding that Sankaran followed Makkathayam Law, and that, therefore, the finding, being unnecessary for the decision of that case, does not constitute *res judicata*. It was argued further that, even if it did not appear on the face of the record in that suit that the Court was dealing with a case of self-acquisition, it will still be open to the plaintiffs in this suit to adduce evidence to prove that it was so. To the latter proposition we must demur. A judgment in a matter of *res judicata* must stand by itself. It decides what it purports to decide, no more and no less. If there is any ambiguity as to what it decided, which cannot be cleared up without further evidence, then it will not be a clear finding and, therefore, not a case of *res judicata* at all.

3. A consequential contention by the plaintiffs that Sankaran followed Makkathayam as regards his self acquisition and Marumakkathayam as regards his *tarwad* property appear to us to be a pure speculation and contrary to the decision in Original Suit No. 433 of 1898. Taking the judgment in that suit as it stands, we can find nothing in it to indicate that the Judge was dealing with any case of self-acquisition, but much to the contrary effect. The subject-matter of the suit was an amount due to Sankaran on the redemption of a *kanom* which had been paid into Court pending the decision as to who was his legal representative, and the issue to be decided definitely was who was his legal representative entitled to the money. The *karnavan* sued on the ground that Sankaran followed Marumakkathayam and the third defendant pleaded that Sankaran followed Makkathayam. The issue was perfectly clear, and the finding equally clear, that Sankaran followed Makkathayam. There is no suggestion anywhere that it was a case of intestacy in the matter of self-acquired property. The lower Appellate Court has assumed without giving any reasons that the suit related to self-acquisition. It was obviously strongly influenced to that assumption by its conclusions that the property in the suit before it belonged to the plaintiffs' *tarwad* and not to the San-

karan's son. We must dissent from its assumption and hold that the question whether Sankaran followed Marumakkathayam or Makkathayam is *res judicata* in a decision binding on the plaintiff and their *tarwad*.

4. Apart from the judgment in that suit, there are three strong indications that the plaintiffs' *tarwad* had never dreamt that the judgment applied only to Sankaran's self-acquisition until the appeal in the lower Appellate Court. The first is the grounds of appeal to the District Court against the decision in Original Suit No. 433 of 1898, *vide* Exhibit II, which shows clearly that the general point as to the law governing Sankaran's property was directly raised.

5. As to the second, in order to make this clear it is necessary to refer to a further litigation covering the very property now in this suit. In Original Suit No. 195 of 1902 on the file of the District Munsif of Quilandy, the third defendant sued as heir of Sankaran a lessee under Sankaran for the recovery of the present property, and the suit was resisted by the present first defendant, (now *Karnavan* of plaintiffs' *tarwad* but not then *karnavan*), on the ground that he held the property as manager of the Perikintayil Bhagavathi Devaswom which owned it. According to the plaintiffs in the present suit the Devaswom belongs to the plaintiffs' *tarwad*. So the issue in that suit again raised the question whether the successor to Sankaran's rights was his son or the plaintiffs' *tarwad*. It was there again held that Sankaran followed Makkathayam and not Marumakkathayam and that his son was his successor-in-title.

6. When the third defendant took out execution proceedings and attempted to get delivery through the Court, the then *karnavan* of the plaintiffs' *tarwad* obstructed the delivery and claimed the property for the *tarwad*. This matter was decided by the District Munsif in Miscellaneous Petition No. 936 of 1903, and by his order in that, he decided against the *tarwad*, and ordered the obstruction to be removed on the ground that the *tarwad*'s claim had already been negatived and the third defendant got delivery of the property on 2nd May 1903. It is significant that even

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in these proceedings there was no suggestion that the previous suit, Original Suit No. 433 of 1898, which was referred to and relied on by the third defendant throughout in Original Suit No. 195 of 1902, related to Sankaran's self-acquisition. Some attempt to save the property for the *tarwad* was made in the execution proceedings, but even there, so far as appears from the order, the contention in the reply petition by the *karnavan* which had not been produced before us, was merely that the previous suit referred only to *some* property of Sankaran apparently not that it referred to self-acquired property. So that even so much nearer the date of the judgment in the 1898 suit as 1903 the *karnavan* did not plead that the 1898 suit was concerned with a case of self-acquisition. It is important to note that although in the suit, Original Suit No. 195 of 1902, the same claim as is now put forward, namely, that the suit property belonged to the Devaswom was advanced, still it was there never sought to distinguish the nature of the third defendant's title to *kanom* money in Original Suit No. 433 of 1898 from that of his claim to the alleged Devaswom property in Original Suit No. 195 of 1902. It is very unlikely that if such a distinction could, with any plausibility, have been then made, it would not have been made.

7. The third point of significance is that the *tarwad* sat down under this decision in the execution proceedings for 11 years and then brought the present suit, and that the present suit is one not by the *karnavan* but by the junior members of the *tarwad*, while the *karnavan* is made the first defendant, although he, throughout his written statement, fully supports the plaintiffs with a merely nominal plea, as an excuse for making him defendant that the plaintiffs are not entitled to possession of the property as against their *karnavan*. With the question whether such a suit for ejectment by the junior members of the *tarwad* only, will lie at all we are not here concerned. But, apart from that, it is obvious that the position of the *karnavan* as a defendant instead of as a plaintiff in the suit was dictated by the strong consciousness of the plaintiffs that the

karnavan was already bound by the decision in Original Suit No. 433 of 1898, if not also by that in the execution proceedings, and that the present suit is filed in a sort of desperate hope that the Court might not hold this matter *res judicata* against the junior members, and that the idea that it might be contended that the property in the Original Suit No. 433 was self-acquisition had not then occurred to the plaintiffs' *tarwad*.

8. It is, therefore, evident that there is not even any real probability that the property in the Original Suit No. 433 was self-acquisition, and that the plaintiffs were aware of that. We hold, however, for reasons, already given, that the question of inheritance of the property of Sankaran, whether self-acquired or family, was directly and substantially in issue between the predecessor-in-title of the present litigants and was once for all decided between the third defendant and the predecessor-in-title of the plaintiffs in Original Suit No. 433 of 1898, and that that finding is binding on the plaintiffs and we would uphold the decision of the Court of the first instance on this point. As remarked by that Court, this is enough to dispose of the suit, but we will deal with the other part of the appellant's argument, namely, that the decision in execution proceedings in Miscellaneous Petition No. 936 of 1903 already noted is also *res judicata* and had the force of a decree which not being set aside by appeal or otherwise still binds the plaintiffs.

9. The proceedings on the claim petition in 1903 fell under sections 328 to 331 of the previous Civil Procedure Code. Under section 331 when such a claim of a third party was put in, the claim had to be registered as a suit, the result being that the order passed therein would have the force of a decree. We are satisfied that in this miscellaneous petition, the District Munsif did not follow the procedure laid down in section 331. He disposed of the matter merely on the petitions and on his decision in the suit itself. The appellant contends that, notwithstanding the defect in procedure, the order directing the removal of the *karnavan's* obstruction is, nevertheless

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less, a decree, and relies on *Gopala v. Fernandes* (1) and *Fonindro Deb Raikut v. Rani Jugodishwari* (2). These cases do not seem to be in point. They were cases where the Court had refused altogether to act under section 331 and the rulings were to the effect that such refusal was tantamount to rejecting a plaint. No doubt, when the procedure under section 331 has been properly followed the decision will have the force of a decree, *vide Muttammal v. Chinmana Gounden* (3); but we are satisfied that in this case the order has not been based upon the proper procedure and that where it is sought to give the formality of the legal effect of a decree to such an order in order that it may be used as *res judicata* there ought to have been a formal array of parties, framing of issues and trial as laid down in section 331 and we hold, as it was held in *Vishnu v. Ramchandra* (4), that if the petition has been wrongly treated as a merely interlocutory application in the suit, it cannot be placed on the same footing as a suit itself. We, therefore, hold that the order in the miscellaneous petition is no bar to the present suit and is not *res judicata* against the plaintiffs.

10. We will note very briefly one other point raised before us on behalf of the *karnavan* first defendant. When the appeal from the original Court first came up to the District Court, the latter remanded the case for findings on three points. On the first two of these the original Court on remand held that the plaint-property was not the exclusive property of Sankaran, but belonged to the Devaswom and was trust property owned by the plaintiffs' *tarwad*. In these findings the lower Appellate Court concurred. It is contended that here we have concurrent findings of fact binding upon this Court. But these concurrent findings of fact are not based on the consideration of any title in the plaintiffs' *tarwad* separate from their pleaded title to succeed to Sankaran. It may be that the plaint property was originally Devaswom property and that Sankaran succeeded to it as *uralan* from his

maternal uncle and not from his father. But the question whether plaintiffs are the heirs of Sankaran has, as we have held, been finally decided against them in Original Suit No. 433 of 1898, and plaintiffs are not now suing on any other footing than their right to succeed to Sankaran, and if the lower Courts have erred, as they have in law, in holding that the plaintiffs' succeeded Sankaran, the concurrent finding of fact is also wrong in law. The plaintiffs, who are the junior members of a *tarwad*, are not suing on the footing of trustees or *uralans* to recover trust property. They sue under title from Sankaran to eject the fourth defendant from property which he holds through the son of Sankaran, and their title to succeed to Sankaran has been finally negatived by a decision which lays down in effect that Sankaran was not the *karnavan* of any Marumakkathayam *tarwad*, and, therefore, that *uralanship*, could not descend by Marumakkathayam Law to them or their *tarwad*.

We are, therefore, of opinion that the lower Appellate Court has erred in law in his decision. Its decision is, therefore, reversed and the plaintiffs' suit dismissed with costs throughout to the fourth defendant.

V. N. V.

Appeal allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 662 OF 1919.

July 28, 1922.

Present:—Mr. Justice Broadway and
Mr. Justice Brasher.SHER SINGH OF LYALLPUR—
DEFENDANT—APPELLANT

versus

UDHAM SINGH OF LYALLPUR—
PLAINTIFF—RESPONDENT.*Specific Relief Act* (I. of 1877), s. 22—*Specific performance—Unfair advantage—Discretion of Court.*

- (1) 16 M. 127; 5 Ind. Dec. (N. S.) 796.
- (2) 14 C. 234; 7 Ind. Dec. (N. S.) 155.
- (3) 4 M. 220; 1 Ind. Dec. (N. S.) 989.
- (4) 9 Bom. L. R. 936.

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Under section 22 of the Specific Relief Act, a Court may properly exercise its discretion where the circumstances under which the contract was made are such as to give the plaintiff an unfair advantage over the defendant though there may be no fraud or misrepresentation on the plaintiff's part.

Where it was found that at the time when the contract was entered into the plaintiff held an unfair advantage over the defendant owing to the fact that the latter's faculties were enfeebled but that there was no fraud or misrepresentation and the bargain was not unequitable:

Held, that specific performance should not, under the circumstances, be decreed.

First appeal from the decree of the Senior Subordinate Judge, Lyallpur, dated the 12th of March 1919.

Lala Badri Das, R. B., and Pundit Sheo Narian, R. B., for the Appellant.

Lala Ram Chand Manchanda, for the Respondent.

JUDGMENT.—The defendant in this case was the owner of a square of land at *Chak* No. 90 R. B. in the Lyallpur District. The plaintiff alleged that on June the 7th, 1918 the defendant had executed an agreement in his favour by which he undertook to sell his square of land for Rs. 6,700. Rs. 100 were received as earnest-money; Rs. 5,000 were to be taken at the time of registration of the deed of sale and the balance of Rs. 1,600 was to be paid in *Sawan Sambat* 1976. The deed further provided that if the defendant committed a breach, the plaintiff would be entitled to Rs. 1,000 as damages. The defendant pleaded that the document was executed through fraud. His case was that he borrowed Rs. 100 from the plaintiff and while in a drunken condition executed what he understood to be an entry in the plaintiff's account-book relating to the repayment of this sum. An objection was also raised that the agreement required registration. The Senior Subordinate Judge has held that the document did not require registration and that it has been proved to have been duly executed by the defendant. A decree for specific performance has been passed, but the plaintiff has not been allowed damages which he claimed in addition. The defendant has appealed to this Court.

The question of registration is raised in the grounds of appeal but has now been abandoned. The main question in the case is, whether the agreement was executed

by the defendant and whether he was aware of its contents. The agreement was written by Mehr Singh at the plaintiff's village and was attested by Narain Singh, Natha Singh, Harnam Singh and Amir Chand. All these persons have given evidence in the plaintiff's favour. The defendant has produced a *Patwari*, Gopal Chand, who states that he obtained a copy of the agreement from the plaintiff, which copy has been filed in Court, and that this copy did not contain the names of two of the attesting witnesses, Amir Chand and Harnam Singh. This copy, it is said, was obtained in consequence of a request made by the defendant who had been informed by the witness of the agreement to sell the square of land. The defendant has not produced any witness who was present at the time of the transaction. He has, however, produced evidence to show that he is addicted to opium and drink and that a *Panchayat* went to the plaintiff offering Rs. 100 with interest which the plaintiff refused, demanding Rs. 1,000. We think that the lower Court has quite rightly held that the defendant's version of the affair cannot be accepted. The sum of Rs. 100 is said to have been borrowed by him for the purpose of a criminal case. It has not, however, been shown that any such case was pending. The defendant had had no previous dealings with the plaintiff and his own money-lender lived a short distance from his *Chak*. The defendant's statement as a witness also shows that he went without any pre-arrangement to demand a loan from the plaintiff and that he was then given liquor to drink and the document was afterwards executed. It is highly improbable that the plaintiff, if he had been unprepared for the defendant's visit, would have suddenly considered the scheme of making him intoxicated and getting the agreement executed by him forthwith.

In regard to the copy of the agreement obtained by the *Patwari* Gopal Chand, it is probable, as the lower Court has held, that the omission of the names of two witnesses was either due to a clerical error at the time of preparing the copy or was intentionally made by the *Patwari* in the interest of the defendant. The omission of the defendant to take any action after the agreement had been brought to his notice by the

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Patwari is another point which tends to show that his story is false. Though, however, we do not believe the defendant's version in its entirety we consider that there are some suspicious circumstances in the case which certainly render it probable that the defendant was under the influence of liquor or drugs at the time when the agreement was executed. The agreement was hastily written at the plaintiff's *Chak* by a school-boy and a one-anna stamp was affixed. For an agreement of this nature the services of a deed-writer would ordinarily be employed, and the plaintiff must have known that a stamped paper was required. It is admitted by the plaintiff's witnesses that the defendant is addicted to drink and opium, and his square appears to be managed entirely by his son. The circumstances certainly raise a presumption that at the time of the execution of the agreement the defendant was not in a condition to appreciate fully the effect which it would have on his interests. He had no necessity to sell the square, and the only reason suggested for his action is that he wished to buy land in his own village instead. It cannot be said that the price for which the land was to be sold was an unfair one and the bargain was not in itself inequitable; but we think that in the circumstances specific performance should not be enforced. Under section 22 of the Specific Relief Act the Court may properly exercise this discretion where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant though there may be no fraud or misrepresentation on the plaintiff's part. We consider that the plaintiff, at the time when the contract was made, held an unfair advantage owing to the fact that the defendant's faculties were enfeebled.

We accordingly accept this appeal to this extent that the decree for specific performance will be set aside and the plaintiff will be given a decree for Rs. 1,000 as damages. The parties will pay their own costs in this Court.

Z. K.

Appeal partly accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2026 of 1920.

August 22, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

BISAI NATH—DEFENDANT NO. 1—
APPELLANT

versus

TARA NATH DEB AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Remand—Inherent power of Court—Remand on second appeal—Order, whether can be attacked in appeal from decree.

The validity or propriety of a remand order made on second appeal cannot be questioned on a subsequent second appeal. The party dissatisfied with the order of remand should either apply for a review of judgment or get the decision set aside by an appeal to a superior Tribunal. Where recourse is not taken to either of these possible methods for contesting the validity of the order of remand, its propriety is not open to consideration in second appeal against the decree made after remand. [p. 590, cols. 1 & 2.]

The power of an Appellate Court to direct a remand is wider than that indicated in O. XLI, r. 23, of the Civil Procedure Code. The Appellate Court has inherent power to direct a remand where such remand is needed in the ends of justice. [p. 589, col. 2.]

The policy of the Legislature as indicated in the Civil Procedure Code is in favour of finality of orders of remand. [p. 590, col. 2.]

Appeal against the decree of the Additional District Judge, Sylhet, dated the 20th April 1920, affirming that of the Subordinate Judge, First Court of that District, dated the 30th of July 1915.

Babu Mon Mohon Bose, for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for recovery of possession. The First Court decreed the suit. Upon appeal that decree was reversed. On appeal to this Court the case was sent back for deciding the question of limitation. Upon remand the Court below has decreed the suit. This Court having set aside the decree of the Appellate Court and remanded the case, I submit the entire appeal was re-opened. See *Tarinee Kant Lahoree v. Koonj Beharee* (1); *Gudadhur Dutt v. Shushee Monee* (2). I submit the order of remand was not regular. Such orders are not contemplated by the Code of Civil Pro-

(1) 12 W. R. 112.

(2) 21 W. R. 7.

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cedure: See O. XLI, r. 23 Civil, Procedure Code, *Durga Kinkar Norha v. Konchai Ronza* (3); *Official Assignee of the Calcutta High Court v. Bidyasundari Dasi* (4); *Ganendra Nath Roy v. Surja Kanta Roy* (5); *Abdul Karim Abu Ahmed Khan v. Allahabad Bank, Limited* (6); *Radha Prasad Singh v. Lal Sahib Rai* (7).

Babu Hemendra Kumar Das, for the Respondent.—The order of remand was passed with their consent, see *Brojo Soondur Gossamee v. Juggut Chund Dey* (8); *Latchumammal v. Gengammal* (9). There it has been held that one Division Court cannot interfere with the directions given by another Division Court.

Babu Mon Mchan Bose, replied in brief.

JUDGMENT.—This is an appeal by the defendant in a suit for recovery of possession of land on establishment of title. The Court of first instance decreed the suit. Upon appeal that decree was reversed and the suit dismissed. The plaintiffs thereupon appealed to this Court, and on the 19th February 1919, Chatterjee and Panton, JJ., set aside the decree of dismissal made by the lower Appellate Court and remanded the case for decision of the question of limitation. That question has now been decided in favour of the plaintiffs and the decree made by the Primary Court in the first instance has been restored. On the present appeal, the defendant has attacked the order of remand, and has invited us to hold that the case should never have been remanded; that not only the order of remand but whatever has followed therein should be treated as null and void; that the question in controversy should be heard in the present appeal as if there had been no order of remand. We are of opinion that this contention cannot possibly be upheld.

There were two questions involved in the suit, namely, (1) the question of title,

and (2) the question of limitation. The Trial Court found in favour of the plaintiffs upon both the questions. The lower Appellate Court found in their favour upon the question of title but dismissed the suit on the ground that it was barred by limitation. Upon second appeal to this Court, Chatterjee and Panton, JJ., were of opinion that the finding upon the question of title could not be successfully impeached in second appeal, and they accordingly affirmed the decision of the District Judge thereon. The question of limitation stood on a different footing. The Court was of opinion that the findings were not sufficient and consistent, and accordingly allowed the appeal. The decree of the lower Appellate Court which proceeded on the assumption that the claim was barred by limitation was necessarily reversed and the case was remanded for investigation of the question of limitation. We are now asked to hold that this order was without jurisdiction and that it is open to us to ignore it. In support of this position, reference has been made to the cases of *Tarinee Kant Lahoree v. Koonj Beharee* (1) and *Gudadhar Dutt v. Shushee Monee* (2) which are of no real assistance to the appellant, because they merely lay down that, when a case is remanded for re-trial, all the questions in controversy are open for consideration. In the present case there is no dispute possible as to the scope of the remand order. The Court expressly stated that the question of title would not be open for consideration and the only question for decision would be that of limitation. Reference has been made to the character of the order of remand and we have been urged to hold that the order was in contravention of r. 23 of O. XLI of the Code, inasmuch as the decision appealed against had not been pronounced on a preliminary point. It may be conceded that the decision was not upon a preliminary point; but it was ruled by a Full Bench of this Court in *Abdul Karim Abu Ahmed Khan v. Allahabad Bank, Limited* (6) that the power of the Appellate Court to direct a remand is wider than that indicated in O. XLI, r. 23. The Appellate Court has inherent power to direct a remand where such remand is needed in the ends

(3) 5 C. L. J. 71.

(4) 54 Ind. Cas. 700; 24 C. W. N. 145; 30 C. L. J. 428.

(5) 15 Ind. Cas. 39; 17 C. W. N. 462.

(6) 41 Ind. Cas. 598; 26 C. L. J. 49; 21 C. W. N. 877; 44 C. 929.

(7) 17 I. A. 150; 13 A. 53; 5 Sar. P. C. J. 600; 7 Ind. Dec. (N.S.) 33.

(8) 21 W. R. 199.

(9) 7 Ind. Cas. 858; 34 M. 72; 8 M. L. 233; (1910) M. W. N. 632.

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of justice. The same view was indicated by the Judicial Committee in *Brij Indar Singh v. Kanshi Ram* (10). There may, indeed, be a controversy, notwithstanding the rule in its wider form, whether in a concrete case an order of remand is or is not necessary in the interests of justice. As an illustration of this, reference may be made to the decision of the Judicial Committee in *Radha Prasad Singh v. Lal Sahib Rai* (7).

But this argument has been addressed to us on the assumption that the question of the validity or propriety of the order of remand is open for consideration. We are clearly of opinion that the question is not so open. It has been contended, however, that an order of remand not made in accordance with O. XLI, r. 23 is null and void and may be ignored. But it is plain that an order of remand may be valid even though it is not covered by O. XLI, r. 23. Assume for a moment that an order made in the exercise of the inherent powers of this Court has been improperly made; that is made under circumstances which do not justify it. Such an order is not without jurisdiction. It is an order made with jurisdiction, though the jurisdiction may have been erroneously exercised. This view is supported by the decisions in *Mohesh Chandra v. Jamiraddin* (11), *Durga Kinkar Norha v. Konchai Ronza* (3) and *Nabin Chandra v. Pran Krishna* (12). There are instances to be found in the books where an attempt of this description had been made before, but failed. We need refer only to the decisions in *Brojo Soondur Gossamee v. Juggut Chunder Dey* (8), *Latchumammal v. Gengammal* (9), *Gungaram Dutt v. Jummajoy Mullick* (13), *Suraj Din v. Chaltar* (14), *Ramkuwarbai v. Damodhar* (15). In the case last mentioned, Sir Richard Couch, C.J., observed that a remand order made

on second appeal is, unless a review of it be obtained within the prescribed time, a conclusive determination of the points of law involved in it; and the correctness of the law laid down upon a remand cannot be questioned on a subsequent second appeal; nor is the fact of the Court's adopting a different view of the law after an order has been made in general a good ground for allowing a review of such order after the time for a review has elapsed. We may point out that the policy of the Legislature as indicated in the Civil Procedure Code of 1908 is in favour of finality of orders of remand. Section 105, sub-section (2), provides that, notwithstanding the provision contained in sub-section (1), where any party aggrieved by an order of remand, made after the commencement of the Code, from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. This provision was inserted to nullify the effect of the decision of a Full Bench of this Court in *Khadem Hussein v. Emdad Hossein* (16) where it had been ruled by a majority that the validity of an order of remand or of a preliminary decree may be assailed either by a direct appeal or by way of an appeal against the final decree. That view was based on the opinion expressed by the Judicial Committee in the cases of *Maharajah Moheshur Sing v. Bengal Government* (17); *Forbes v. Amceroonissa Begum* (18), and *Shah Mukhun Lal v. Baboo Sree Kishen Singh* (19). Under the law as it now stands, the appellant, if he was dissatisfied with the order of remand, should either have applied for a review of judgment or got the decision set aside by an appeal to a superior Tribunal. He has not taken recourse to either of the possible methods for contesting the validity of that order. Consequently, that order is binding on the appellant. If that order stands, it is indisputable that what has followed has been

(10) 42 Ind. Cas. 43; 44 I. A. 218; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; 1917 M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 45 C. 94 (P. C.).

(11) 24 C. 324; 5 C. W. N. 509.

(12) 20 Ind. Cas. 39; 14 C. 108, 18 C. L. J. 613.

(13) 1 C. L. R. 144.

(14) 3 A. 755; A. W. N. (1881) 55; 2 Ind. Dec. (N. S.) 437.

(15) 6 Bom. H. C. R. 146.

(16) 29 C. 758; 5 C. W. N. 617.

(17) 7 M. I. A. 283; 3 W. R. P. C. 45; 1 Suth. P. C. J. 325; 1 Sar. P. C. J. 645; 19 E. R. 283.

(18) 10 M. I. A. 340; 5 W. R. P. C. 47; 1 Suth. P. C. J. 521; 2 Sar. P. C. J. 153; 1 Ind. Jur. (N.S.) 117; 19 E. R. 1002.

(19) 12 M. I. A. 1571; 11 W. R. P. C. 19; 2 B. L. R. P. C. 44; 2 Suth. P. C. J. 190; 2 Sar. P. C. J. 403; 20 E. R. 299.

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made with jurisdiction and the judgment of the District Judge pronounced after remand cannot be successfully attacked in second appeal.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

B. N.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND APPEAL NO. 285
OF 1922.

July 10, 1922.

Present.—Mr. Justice Martineau.

WADHAWA MAL,—DEFENDANT

—APPELLANT

versus

LACHMAN DAS—PLAINTIFF AND OTHERS

—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 5 (a)—“Shop,” what is.

A “shop” within the meaning of section 5 (a) of the Punjab Pre-emption Act denotes a building or an apartment which is primarily used for buying and selling goods.

Bhamba Ram v. Allah Bakhsh 31 Ind. Cas. 191; 69 P. R. 1915; 156 P. W. R. 1915, followed.

A building used for the purpose of storing sleepers or grain in which no goods are sold cannot be regarded as a “shop” within the meaning of section 5 (a) of the Punjab Pre-emption Act.

Attar Singh v. Sant Singh 113 P. R. 1906; 99 P. L. R. 1907, distinguished.

Miscellaneous second appeal from the order of the District Judge, Ferozepore, dated the 17th November 1921, reversing that of the Additional Munsif, Second Class, Ferozepore, dated the 18th July 1921.

Lala Hargopal, for the Appellant.

Lala Badri Das, R. B., for the Respondents.

JUDGMENT.—This is a pre-emption case and the question in dispute is, whether the building which the plaintiff seeks to

pre-empt is a shop as described in the sale-deed. The lower Appellate Court has held, differing from the view taken by the First Court, that it is not a shop, and it has remanded the case for the decision of the remaining issues. The vendee has presented a second appeal to this Court.

It is pointed out that in a plan which the plaintiff got prepared in 1917, when he applied to the Municipal Committee for sanction to some additions that he wished to make to his house, the building in dispute was mentioned as a shop. This is, however, of no importance as the plaintiff very likely signed and filed the plan without troubling to see how the building adjoining his house had been described in it. The same remarks apply with regard to a plan filed by the plaintiff in 1905. What has to be determined is simply the purpose for which the building in suit was used, and this purpose is clear from the evidence produced on both sides, which shows that the building has been rented by the firm of Ram Lal-Ishar Das, who stored their sleepers in it, and that, formerly, it was used for storing grain. No goods were sold in the building, and, this being so, the building cannot be said to be a shop, which, as was stated in *Bhamba Ram v. Allah Bakhsh* (1), denotes a building or an apartment which is primarily used for buying and selling goods. Counsel for the appellant has referred to *Attar Singh v. Sant Singh* (2) in which warehouses attached to shops were regarded as being in the nature of shop property, but the building now in dispute is not attached to a shop, although some shop-keepers have rented it and have been using it for storing their goods.

It is urged that if, as was held by the lower Appellate Court, the vendee had to prove that the building was a shop he should have been given an opportunity of producing further evidence since the onus had been placed by the first Court on the plaintiff, but I do not see that there is any necessity for a remand since it is not disputed that the building has been used merely for the storage of goods, and

(1) 31 Ind. Cas. 191; 69 P. R. 1915; 156 P. W. R. 1915.

(2) 113 P. R. 1906; 99 P. L. R. 1907.

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the question is only whether a building used for such a purpose is a shop.

I agree with the lower Appellate Court that the building in suit is not a shop, and I accordingly dismiss the appeal with costs.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPLICATION NO. 335
OF 1922.

July 31, 1922.

Present.—Mr. Justice Martineau.

BANARSI DAS, SON OF NANHI MAL,
AND OTHERS—DEFENDANTS—PETITIONERS
versus

KISHORI LAL AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 22, 23
—Transfer of case—Balance of convenience.

Plaintiff sued defendants for an account of transactions carried on by the latter's Karachi firm as Commission Agents for the former for the purchase and sale of cloth at Karachi. The dealings all took place at Karachi, the persons from whom goods were bought and to whom goods were sold were at Karachi, and all the accounts relating to the dealings in question were at Karachi.

Held, that, in these circumstances, the balance of convenience was greatly in favour of the case being tried at Karachi and the case should, therefore, be transferred to Karachi.

Application, under sections 22 and 23, clause (3), of the Civil Procedure Code, for transfer of the case, the firm Ram Richpal-Sham Lal, of Delhi, and the firm Phul Chand-Fateh Chand of Cawnpore and Delhi, plaintiffs v. The firm Nanhe Mal-Janki Das of Delhi and the firm Nanhe Mal-Banarsi Das, Karachi, Defendants, from the Court of the Senior Subordinate Judge at Delhi, to a Court of competent jurisdiction at Karachi.

Lala Saradha Ram, for the Petitioners.

Lala Jagan Nath, for the Respondents.

ORDER.—This is an application under sections 22 and 23 of the Civil Procedure Code for the transfer to a Court at Karachi of a suit for rendition of accounts which has been brought by the respondents against the petitioners in the Court of the Subordinate Judge of Delhi.

The parties live and carry on business in Delhi, but the respondents are suing for an account of transactions carried on by the petitioners' Karachi firm as Commission Agents for the respondents for the purchase and sale of cloth at Karachi.

The dealings all took place at Karachi, the persons from whom goods were bought, and to whom goods were sold, by the petitioners, are at Karachi, and all the accounts relating to the dealings in question are at Karachi. In these circumstances, it seems manifest that the balance of convenience is greatly in favour of the case being tried at Karachi.

Mr. Jagan Nath, on behalf of the respondents, has cited various authorities in support of his contention that the suit should not be transferred, but they are not in point as they relate to cases in which the parties were at issue regarding some particular contract or transaction, whereas the present case relates to accounts of a whole series of transactions extending over several years. Witnesses belonging to various Karachi firms may have to be examined with their accounts. It would probably be impossible for them to come with their accounts to Delhi, and it would be extremely inconvenient to examine them on commission.

I accordingly direct that the suit shall proceed in the Court competent to try it at Karachi. The respondents will pay the costs of this application.

Z. K.

Application granted.

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LAHORE HIGH COURT.

CRIMINAL CASE NO. 527 OF 1922.

June 20, 1922.

Present.—Mr. Justice Abdul Qadir.

MUL SINGH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 439, 494—Withdrawal of case—Failure to record reasons—Revision—Penal Code (Act XLV of 1860), s. 174—Non-attendance in obedience to summons, what constitutes.

Section 494 of the Criminal Procedure Code does not require the Public Prosecutor to state his reasons for withdrawing a case. [p. 597, col. 2; p. 598, col. 1.]

A Magistrate when giving his consent to the withdrawal of a case under section 494 of the Criminal Procedure Code should record his reasons, but the failure to do so does not vitiate the order so as to entitle the High Court to interfere in revision with what is virtually an order of acquittal. [p. 597, cols. 1 & 2.]

Umesh Chandra Roy v. Satis Chandra Roy, 41 Ind. Cas. 998; 26 C. L. J. 208; 18 Cr. L. J. 886; 22 C. W. N. 69, not followed.

The High Court will not ordinarily set aside an order of acquittal in revision. [p. 597, col. 2.]

In re Sinnu Gounden, 23 Ind. Cas. 188; 38 M. 1028; 26 M. L. J. 160; (1914) M. W. N. 273; 15 Cr. L. J. 236, relied upon.

Obiter:—What is made punishable by the law under section 174 of the Penal Code is an intentional disobedience to the summons of a Court, that is to say, non-attendance which amounts to wilful disobedience. [p. 598, col. 2; p. 599, col. 1.]

In the case of Sreenath Ghose 10 W.R.Cr. 33; *Empress v. Ramdhar*, 22 P. R. 1880 Cr. relied upon.

Case reported by the Sessions Judge, Rawalpindi, with his No. 358 of 30th March 1922.

FACTS.—“One Mul Singh, a Station Master in the North-Western Railway, was served with summons to attend my Court on the 20th day of December 1921, in order to give evidence as a witness in Sessions Case No. 36 of 1921. *Crown v. Sharif*, charge under sections 457-75, Indian Penal Code. Exhibit P-1 is the summons in question, which was sent by a special constable and was duly served on Mul Singh at Mari-Indus Station on 11th December 1921 after the following endorsement had been made in the office of the District Traffic Superintendent, Rawalpindi:—

“Station Master, Mari-Indus,
For service and early return. Please arrange duties in case no relief arrives.”

“On the 20th December, I proceeded to hear the Sessions case knowing that all summons had been served. After the rest

of the prosecution evidence had been taken it was found that Mul Singh was not present. I wrote to the office of the District Traffic Superintendent and he appeared and gave evidence on the 22nd December 1921. In this way my work was disorganised and the assessors had to wait for three days to try the case in question. Accordingly, after he gave his evidence I called upon him to show cause why he should not be tried under section 174, Indian Penal Code, for intentionally not attending to give evidence on the 20th day of December 1921 before me after he had been duly and properly served. He admitted that the summons had been properly served upon him after permission obtained from the District Traffic Superintendent's office in which it was stated that he should arrange for his own duties in case no relief arrived. On 19th December 1921, however, which was the day he was going to leave the Station, the District Traffic Superintendent, Mr. Brereton, arrived at his Station and told him not to go to Court and that he would arrange with the Deputy Commissioner that Mul Singh would not be fined. Though Mul Singh represented to the District Traffic Superintendent that the Court would fine him, still Mr. Brereton refused to allow him to go. He was afraid of his District Traffic Superintendent and, therefore, did not come.

“Accordingly, on 22nd December 1921, I recorded an order under section 476, Criminal Procedure Code, and sent Mul Singh for trial under section 174, Indian Penal Code, to the District Magistrate. I pointed out in this order that matters have come to such a head in this District that no Railway Official ever dreams of attending before a Magistrate till he has been summoned three to four times. I understand that it takes sometimes even more than that to get their attendance. In fact, the behaviour of Railway Officials in this District had become a public scandal and as the summons had been properly served after permission was obtained from the District Traffic Superintendent, I considered his trial to be necessary. The District Magistrate sent the case to Mr. Abdul Haq, Magistrate 1st class. He fixed 12th January 1922 to hear the case. On that date it would appear that the accused was present along with

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Mr. Brereton, District Traffic Superintendent. The latter seems to have gone to the District Magistrate who wrote on the judicial record in his own hand and under his own signature that the case may be withdrawn against Mul Singh. This was what Mul Singh said Mr. Brereton told him at the spot he would have done.

"This order of the District Magistrate upon the judicial record was not a proper one as it does not follow the procedure laid down in section 494, Criminal Procedure Code. It was objectionable for that reason and also as exercising pressure upon the Magistrate. However, the Public Prosecutor who was conducting the case for the prosecution saw the District Magistrate's order on the judicial record, treating it as instructions to him from the District Magistrate told the Court that, under the instructions of the District Magistrate, he withdrew the case. The Magistrate then recorded the following order :—

'As the case has been withdrawn the accused is hereby discharged.'

"He gave no reason of any kind and did not even record his own consent to the case being withdrawn."

GROUND.—"On the 18th January 1922 I sent for the record and as I considered that the accused had been improperly discharged I ordered notice to issue to the District Magistrate to appear and show cause why the said order should not be set aside either by me or by the High Court. The District Magistrate, however, has not appeared before me after he was served with this notice.

"I also called upon the Magistrate to explain whether he understood that his consent was necessary to the withdrawal or whether he thought he had to discharge the accused as it had been ordered by the District Magistrate. I further asked him to explain why he simply discharged the accused without specially noting his consent to the withdrawal. He has replied that he did not know at the time that his consent was necessary, and that he believed that he had no alternative but to pass an order of discharge which he did.

"It is admitted, therefore, by the Magistrate that he did not apply his mind as to whether his consent should be given or

not. It is also clear from the order itself that he never read section 494, Criminal Procedure Code. There it is specially noted that the Magistrate's consent is necessary. It is also laid down there that in summons-cases the Magistrate shall record an acquittal and not a discharge. He recorded a discharge which further proves that he never read the section or knew of it.

"It seems to me, however, that I must treat this order of discharge as an order of acquittal. The accused should have been acquitted and I must, therefore, treat the order as being one of acquittal. It is not possible, therefore, for me to revise the order of the Magistrate. The question is, whether the record should be sent to the High Court for this purpose ?

"It was held in *Gopi Bari v. Emperor* (1) that an order passed under section 494, Criminal Procedure Code, by a Magistrate is a judicial order and if the discretion invested in Magistrates by that section is arbitrarily exercised the High Court is entitled to interfere and would be justified in passing the order which ought to have been passed by the Magistrate. A still clearer case is *Rajani Kanti Shaha v. Idris Thakur* (2) where it was held by the Calcutta High Court that an order by which a Court acting under section 494, Criminal Procedure Code, accords consent to the withdrawal from a prosecution is a judicial order and the reasons for such an order should be recorded. I have shown in the present case that no reasons are recorded by the Magistrate and that he did not think that he had any power to do anything except to discharge the accused. He was probably also influenced by the fact that the District Magistrate had recorded the order of withdrawal himself on his judicial record instead of leaving the Public Prosecutor to move the Court. It is true that the Public Prosecutor regularised this act of the District Magistrate by acting on what he saw written but that did not take away the effect of this order. In the case quoted, the High Court interfered and set aside the order of the Sessions Judge granting consent to the Public Prose-

(1) 57 Ind. Cas. 657; 1 P. L. T. 400; 21 Cr. L. J. 641.

(2) 64 Ind. Cas. 280; 25 C. W. N. 615; 34 C. L. J. 511; 22 Cr. L. J. 760; 48 C. 1105.

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cutor's withdrawal from the prosecution in question and the consequent order of acquittal. There the Sessions Judge did give his consent but did not give his reasons. There is no doubt, therefore, that the High Court has power to set aside the order of the Magistrate dated 12th January 1922 in the present case.

"I would also refer to *Municipal Board, Fyzabad v. Vidyadhari* (3). There it was held that the law gives the power to Courts of revision to interfere with orders of acquittal and though interference with such orders is unusual it may be resorted to in exceptional circumstances. I have already quoted one instance of the Calcutta High Court setting aside an order of acquittal in circumstances like the present. Further, the person to move the Local Government to appeal against an order of acquittal would be the District Magistrate and this is a case in which he would never appeal as it was he himself who ordered the withdrawal of the case. This, therefore, is pre-eminently a case in which the High Court would exercise its powers of revision, if it considers it necessary to do so.

"I would like to say a few words as regards the merits which would tend to show that Mul Singh intentionally omitted to attend. I accept his word that when Mr. Brereton arrived, Mr. Brereton refused to allow him to go although the summons had already been endorsed in his own office to the effect that Mul Singh should arrange for a local relief in case no relief did come. It is probable that Mr. Brereton wanted him there for his own private convenience. Mul Singh wanted to go, which means that he had arranged his own relief. The question is, does that amount to intentional omission to attend? To hold otherwise, would mean that any servant of any person need never attend the Courts. All he need say would be that his master refused to allow him to go. I consider that Mul Singh intentionally omitted to attend in order not to displease his superior, the District Traffic Superintendent, after he had been properly served with summons

with permission of the same Traffic Superintendent who was told by Mul Singh that he would be fined if he did not attend.

"Further, my purpose in taking action was to set right what has become a public scandal. In cases which come on appeal to me from the Magistrates I have frequently seen that Railway witnesses attend after many adjournments and all the Magistrates have frequently complained to me as regards this. My intention was to rectify this state of affairs by a test case. The accused was present on 12th January 1922 and I consider that it is a matter for regret that the District Magistrate should have interfered with my order in these circumstances especially when the Traffic Department of the Railway has been acting in this way for a long time.

"To give one instance of what goes on in this office I need go no further than the present record. On 4th February 1922 I issued a notice to Mul Singh to attend on 15th February 1922. On that date he was not present and I wrote a letter to the District Traffic Superintendent asking him why he had not served the notice and at the same time I enclosed fresh notices. On the next day, i. e., 16th February, 1922, I received a note from the District Traffic Superintendent, which purports to be dated 14th February 1922, asking for another date to be fixed. No reason was given for this request. In reply, however, to my letter of the 15th February he did serve the notices for the subsequent hearing and at the same time explained that he had never received the first notice. This was obviously wrong as his office returned them to me long with the note asking for another date.

"In the present case, therefore, I took action because forced to do so. I and the assessors were greatly inconvenienced by having to wait three days for this witness who had been properly served and who, owing to the personal desire of the District Traffic Superintendent, did not attend. The Government further had to pay for the three days on which the assessors attended. In all the Magistrate's Courts summons are completely neglected if issued to the District Traffic Superintendent. The case was fixed for trial before the Magistrate for 12th January 1922. It was a test case meant to stop this department from acting in future as it

(3) 63 Ind. Cas. 334; 24 C. C. 155; 22 Cr. L. J. 638; 8 O. L. J. 646.

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had done in the past. It would have taken half an hour to be decided. Instead of that, the District Magistrate, at the request of the District Traffic Superintendent, wrote an order on the judicial record of the Magistrate withdrawing the case instituted by me whereupon the Magistrate discharged the accused instead of acquitting him without giving his consent and without recording his reasons for this consent. It has also been shown that the Magistrate thought that he had to obey the District Magistrate's order and that he himself had no power of any kind. I have also made it clear that in a case like this the High Court has power to interfere if it considers it necessary, and I think I have given good enough reasons why it should interfere in the present case. The principle of this is that there was no reason why a special favour should have been shown to the Traffic Department of the Railway by the District Magistrate. It is extremely unlikely that he would have interfered with the case of a private person.

"I would, therefore, send up the record of the Magistrate to the High Court with the recommendation that it should set aside the order of the Magistrate dated 12th January 1922, acquitting the accused and return the case to a specially selected Magistrate for trial according to law.

"Order announced to Mul Singh's Counsel."

ORDER.—This case has been reported for revision by the Sessions Judge, Rawalpindi; by his order dated the 27th March 1922, which fully sets forth all the facts of the case and which may be only briefly referred to here.

One Mul Singh, Station Master of Mari-Indus Railway Station, on the North-Western Railway, was summoned to give evidence in a dacoity case, fixed for trial in the Sessions Court for the 20th December 1921. The summons had been duly served on him through the District Traffic Superintendent and the instructions given to him by the office of the District Traffic Superintendent were that he should arrange for his duties in case no relief arrived. He did not, however, turn up on that date, but he sent a telegram to the Sessions Judge to the following effect, on the morning of the 20th December.

"Due to Agent's Special not allowed by District Traffic Superintendent to attend Court to-day kindly postpone case *Crown v. Sharif*."

As Mul Singh was an important witness for the prosecution, the Sessions case could not be finished on the 20th December and fresh date had to be given for his attendance, of which the office of the District Traffic Superintendent was informed. The District Traffic Superintendent then sent a telegram to the Station Master, asking him "to attend the Sessions Court on the 22nd." He appeared on that date and gave his evidence. After he had done so, he was called upon by the learned Sessions Judge to show cause why he should not be prosecuted under section 174, Indian Penal Code, for intentionally omitting to attend the Court at the time mentioned in his summons. Mul Singh repeated what he had stated in his telegram, dated the 21st December 1921, but the Court was not satisfied with his explanation and, taking the view that his absence did amount to intentional non-attendance, sent him up to the District Magistrate for trial, purporting to take action under section 476, Criminal Procedure Code. The District Magistrate entrusted the case for trial to a Magistrate 1st Class who fixed the 12th January 1922 as the date of hearing. The District Traffic Superintendent wrote to the Sessions Judge on the 4th January 1922, explaining the circumstances to which the absence of Mul Singh from Court was due on the 20th December 1921, and requested that the prosecution against him might be withdrawn. Failing to get any favourable consideration of this request from the Sessions Judge, the District Traffic Superintendent approached the District Magistrate and explained matters to him and asked for the withdrawal of the case. Thereupon the District Magistrate made a note on the judicial record of the case against Mul Singh to the following effect:—

"The case may be withdrawn against Mul Singh."

It does not appear from this note for whom this direction was meant, but the Public Prosecutor, who, it seems, was in charge of the case, understood the note to be addressed to himself and made a state-

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ment to the Magistrate in whose Court the case was pending, that under instructions from the District Magistrate he withdrew the case. On this the following order was passed by the Magistrate concerned:—
 "As the case has been withdrawn the accused is hereby discharged."

The learned Sessions Judge, for reasons given at length in his order dated the 27th March 1922, wants the High Court to revise this last order of the Magistrate allowing the withdrawal. He recognises that this order should have been an order of acquittal and must be treated as such, because the case under section 174, Indian Penal Code, was a summons-case in which the Code of Criminal Procedure does not contemplate an order of discharge if the case is withdrawn. He urges, however, that though, as a rule, the High Court does not interfere with orders of acquittal in cases in which no appeal has been filed against them by the Local Government under section 417, Criminal Procedure Code, this order may be interfered with under the special circumstances of this case, inasmuch as the District Magistrate, who has withdrawn the case, cannot be expected to move the Local Government under section 417, Criminal Procedure Code. He adds that the case was an important one from an administrative point of view and has not been properly withdrawn in conformity with the procedure laid down for such withdrawals, particularly because the Magistrate allowing the withdrawal has given no reasons for it and did not even understand at the time of passing the order that his consent was necessary for such a withdrawal. He also complains that the action of the District Magistrate in interfering in this case in the way above described was not proper. An exception is specially taken to the District Magistrate recording the order dated the 12th January 1922 on the judicial record of the case, of which a Subordinate Magistrate was duly seized.

Reference is made in the report of the Sessions Judge to *Umesh Chandra Roy v. Satis Chandra Roy* (4), in which a Division Bench of the Calcutta High Court has laid down that in withholding or according consent to the withdrawal of a prosecution under

section 494, Criminal Procedure Code, the Court acts in a judicial capacity and should record its reasons for its order. Exactly the same opinion is expressed in another decision of the Calcutta High Court published as *Rajani Kante Shaha v. Idris Thakur* (2). *Gopi Bari v. Emperor* (1) is also referred to. This is a case decided by the Patna High Court, in which it is held that if the discretion vested in a Magistrate by that section is arbitrarily exercised, the High Court is entitled to interfere in revision. Another case relied on by the Sessions Judge is *Municipal Board, Fyzabad v. Vidyadhari* (3), in which the Oudh Judicial Commissioner's Court has held that the law gives the power to Courts of revision to interfere even with orders of acquittal, and adds that, although interference with such orders is not usual, it may be resorted to in exceptional circumstances.

It is contended on behalf of Mul Singh, who is present before me with Counsel, that the order of the Magistrate, dated the 12th January 1922, allowing the case to be withdrawn, clearly amounts to an order of acquittal, which should not be interfered with when Government is not appealing against it. Reliance is placed in support of this argument on *In re Sinnu Gounden* (5). This was a case in which an accused person procured his acquittal by a fraud on the Court concerned, and the High Court was moved in revision to set aside that acquittal and to order a new trial, but the High Court declined to interfere on the ground that it was a case in which the Local Government might have directed the filing of an appeal against the acquittal but did not do so. The High Court recognised that the case was a fit one for a retrial being ordered if the matter had come before it by way of appeal presented by the Local Government, but it did not see its way to interfere in revision in the absence of any indication of an error in law apparent on the face of the record. Now, what has happened here is, that the Public Prosecutor, who was in charge of the case, took action under section 494, Criminal Procedure Code, to withdraw it. This he was empowered by law to do and

(4) 41 Ind. Cas. 998; 26 C. L. J. 208; 18 Cr. L. J. 886; 22 C. W. N. 69.

(5) 23 Ind. Cas. 188; 38 M. 1028; 26 M. L. J. 160; (1914) M. W. N. 273; 15 Cr. L. J. 236.

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it is not laid down in section 494, Criminal Procedure Code, that he is bound to state his reasons for doing so. It is true that, according to the authorities referred to by the learned Sessions Judge, the Magistrate should have given his reasons for allowing withdrawal and did not act properly in passing the very brief order he did, without reference to section 494, Criminal Procedure Code, which would have shown him that his consent was necessary and that under certain authorities he had to state his reasons for giving that consent; but I do not think that the absence of any statement of reasons in the present case vitiates that order to such an extent as to make this case a fit case for exceptional treatment and to justify the setting aside of an acquittal on revision. In the first place, it may be pointed out that there is some conflict of opinion between the High Courts of Calcutta and Madras on the point under discussion. The Counsel for the respondent draws my attention to *In re Sadayan* (6) in which it is laid down by the Madras High Court that, where a Public Prosecutor withdrew a charge at a Sessions trial, the accused had a statutory right to an acquittal and the High Court could not set it aside even though the Sessions Judge recorded no reasons for the action he took and the Public Prosecutor offered no reasons for the withdrawal. This is no doubt dissented from by the Calcutta High Court in *Umesh Chandra Roy v. Satis Chandra Roy* (4) but inasmuch as this, too, is a ruling by a Division Bench, it is entitled to weight, until the conflict between the two Courts is set at rest by a pronouncement more authoritative than either. One of the reasons mentioned by the Sessions Judge for treating this case as an exceptional one is, that here the District Magistrate having authorised the withdrawal of the case, would not obviously take action under section 417 to move the Local Government for filing an appeal against the acquittal, but I think that cannot be a justification for substituting a revision in place of an appeal. So far as the wording of section 417, Criminal Procedure Code, is concerned, there is

nothing in it which shows that it is the District Magistrate alone who can move the Local Government to file an appeal. It is, in ordinary cases, a matter of practice that the Local Government is moved by private applicants or the Police through the District Magistrate, or the latter, as the head of Criminal administration in his District, himself moves the Local Government, but in a case like the present, I think the Government could have been moved otherwise, but that has not been done. I see no reason why the salutary rule laid down in *In re Sinnu Gounden* (5) be not followed in this case and why the order of acquittal should not be allowed to stand.

In the above view of the case it is hardly necessary to say anything about its merits, but as a reference to the merits has been made in the report dated the 27th March 1922, it may be added that this case does not appear to me to be one in which a retrial could have been ordered with any advantage, even if what is virtually an order of acquittal had not been in existence. What is made punishable by the law under section 174, Indian Penal Code, is an intentional disobedience to the summons of a Court. The word 'intentional' does not appear to have been defined in the Indian Penal Code, but it has been interpreted to mean non-attendance which amounts to wilful disobedience (*vide* Gour's Penal Law of India, Volume I, paragraph 1525, II Edition).

Counsel for the respondent cites before me *In the case of Sreenath Ghose* (7), where Jackson and Hobhouse, J.J., laid down that a conviction for non-attendance in obedience to an order from a public servant, under section 174, Penal Code, cannot be had unless the person summoned was legally bound to attend, and *refused or intentionally refused to attend*. In the said case a man employed in the District Judge's Court was summoned to attend the Court of Small Causes to give evidence. He failed to attend. On being prosecuted he stated that he did not attend because the Judge under whom he was employed would not let him go. It was held by the learned Judges that on these facts there was no intentional omission on the part of the accused to attend in obedience to the summons, as he obeyed the

(5) 4 Ind. Cas. 1126; 5 M. L. T. 216; 11 Cr. L. J. 193.

(7) 10 W. R. Cr. 33.

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orders of his superiors whether those orders were right or wrong. Another case cited on behalf of the respondent is *Empress v. Ramdhir* (8) in which a Division Bench of the Punjab Chief Court consisting of Brendreth and Rattigan, JJ., expressed the view that the word 'intentional' seemed to limit the application under section 174 to cases where the omission was clearly wilful and was not intended to be applied to a case where the omission arose from some circumstance which rendered it impracticable for the person to attend. I am not sure if the two rulings above cited do not go a little too far, but the report under consideration has no reference to any authority expressing an opinion to the contrary and in the light of the above no good object could be served by persisting in the prosecution of Mul Singh. He was not only admittedly detained under the express orders of his superior but was prevented because neither a relief was available nor was any of his subordinates able to carry on his duties owing to abnormal sickness among the Staff. This was pointed out to the Sessions Judge by the District Traffic Superintendent in his letter No. 485E, dated the 4th January 1922. If the learned Sessions Judge is anxious, in the interests of the administration, to have a test case put up to prevent the frequent non-attendance of Railway servants, I am afraid he has chosen a somewhat bad case for a test. Mul Singh's conduct further negatives all intention of wilful disobedience inasmuch as he promptly informed the Court on the date of hearing as to the reasons of his unavoidable detention. The learned Sessions Judge urges that if the principle was once laid down that a superior officer could prevent a subordinate of his from attending a Court in obedience to summons, the logical conclusion would be irresistible that any servant could be so detained by his master and this would have a very pernicious effect. There is considerable force in this reasoning, as I do not see that the law, in this respect, makes any difference between a man in private employ and a man in State service. There is, however, this much to be said in favour of construing the provisions of the law liberally in

favour of persons in State employ that they would be detained in many cases by exigencies of public service, which may be entitled to as much respect as the needs of the judicial administration.

In conclusion, I may point out that, though this particular individual who had been proceeded against under the orders of the learned Sessions Judge has got off, yet the complaint of the Judge is justified that the Railway Authorities failed properly to assist the Court, inasmuch as they did not arrange to relieve Mul Singh in time to attend the Court on the date of hearing originally fixed. They had been warned sufficiently before and could have made some arrangement for relieving the Station Master for a day, if they realized the importance of their duty in this respect, especially in case of a Sessions trial, which cannot be postponed without serious dislocation of judicial work and involves great expense. With these remarks, I decline to interfere in revision with the order of acquittal passed in this case.

Z. K.

Order accordingly.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 695 OF 1922.

October 11, 1922.

Present.—Mr. Justice Oldfield and
Mr. Justice Devadoss.

K. KUNHAMMAD HAJI—PRISONER

—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 420, 421—Jail appeal dismissed by Vacation Judge—Appeal, second, whether maintainable—Review in criminal cases—Powers of Vacation Judge—Constitution of Benches.

Where an appeal presented by a convict under section 420 of the Criminal Procedure Code through the officer in charge of the Jail is dismissed under section 421 by the Vacation Judge of the High Court, a second appeal to the High Court against the same conviction is barred and is not maintainable.

Per Oldfield, J.—There is no power of revision under the Criminal Procedure Code against the judgment of one or more Judges of the High Court in a criminal appeal. The High Court is a Court of Record and can direct any mistake of the Court Clerk in making up the record and in general all

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slips in legal proceedings, to be amended by an order of the Court to be obtained in a summary way. But there is no power of review in a criminal case vested in the High Court either by virtue of any power conferred by the Criminal Procedure Code or of the position of the High Court as a Court of Record or any general inherent power. [p. 602, col. 2; p. 603, col. 1.]

Rajjab Ali v. Emperor, 50 Ind. Cas. 25; 46 C. 60; 20 Cr. L. J. 265 distinguished.

In the matter of *Gibbons*, 14 C. 42; 7 Ind. Dec. (N. S.) 29, *Queen-Empress v. Durga Charan*, 7 A. 672; A. W. N. (1885) 177; 4 Ind. Dec. (N. S.) 867 and *Queen-Empress v. Fox*, 10 B. 176; 5 Ind. Dec. (N. S.) 502, relied on.

Ranga Row v. Emperor, 16 Ind. Cas. 518; 12 M. L. T. 350; 23 M. L. J. 371; 13 Cr. L. J. 710; (1912) M. W. N. 982, relied on.

The powers of the Vacation Judge of the High Court are not to be looked for in the Registrar's Notification as though it was a self-contained and exhaustive advertisement to the public of their scope and nature. Such a Notification is no more than a general statement of the powers which a Vacation Judge will ordinarily exercise and cannot be read as derogating from those which by virtue of Statutes and Rules he possesses and of which he cannot consistently with them be deprived. [p. 603, col. 2.]

Per *Devadoss, J.*—Under section 14 of Charter, 24 and 25 Victoria, Chap. 104, it is the function of the Chief Justice to determine what Judges in each case shall sit alone and what Judges shall constitute a Division Bench. When once work has been assigned, the Judge or Judges have full jurisdiction to dispose of all matters except those which by Statute they could not dispose of. A Vacation Judge has, therefore, jurisdiction to dispose of not only urgent matters but also all other matters coming up. [p. 605, col. 1.]

In the case of a criminal appeal or a criminal revision petition, there is no provision in the Code of Criminal Procedure for dismissal for default of appearance. In a criminal case the matter is not between party and party and it is the duty of the Court to go into the case and dispose of it on the merits. Where a criminal appeal or a revision is dismissed without hearing, there is no judgment at all and the Judge or the Bench which disposed of the matter for default of appearance can re-hear the matter. [p. 608, col. 1.]

The order of dismissal for default in such cases is no judgment at all and the order is tantamount to an adjournment of the case till someone appears and moves the Court to hear him. [p. 608, col. 1.] (Case-law discussed.)

The High Court, although it is not bound to hear Counsel in support of a criminal revision petition is not entitled to dismiss it for default of appearance but can only dispose of it on the merits. [p. 608, col. 1.]

Ranga Row v. Emperor, 16 Ind. Cas. 518; 12 M. L. T. 350; 23 M. L. J. 371; 13 Cr. L. J. 710; (1912) M. W. N. 982, dissented from.

The exception contained in section 369 of the Criminal Procedure Code in favour of the High Court is with reference to the power of review in regard to cases decided by a Judge of the

High Court presiding over the Sessions when points are reserved for consideration by the Full Bench or on the certification of the Advocate-General. [p. 603, col. 1.]

A Division Bench of the High Court has no power to revise its judgment pronounced in a criminal revision case or a criminal appeal. [p. 609, col. 1.]

Where a Judge or a Bench of Judges is properly asked to dispose of a certain matter he or they have jurisdiction to dispose of it. [p. 606, col. 1.]

The constitution of Benches is the province of the Chief Justice and if the Judges refuse or neglect to be constituted into Benches, arranged by him and choose to dispose of cases as they please they would be acting without jurisdiction. [p. 606, col. 1.]

Appeal against the sentence of the Court of the Special First Class Magistrate, Tirur, in Summary Case No. 3 of the Calendar for 1922.

Mr. S. T. Srinivasa Gopalachariar, for the Accused.—A Jail appeal presented by the present accused against the same conviction was dismissed by His Lordship Mr. Justice Krishnan during the summer vacation on the ground that the appeal was out of time and that there was no ground to excuse the delay. The present appeal was filed in ignorance of the said order of dismissal. Mr. Justice Krishnan admitted it as regards sentence, also without knowing the prior dismissal order. The preliminary point to be met is, whether the first order of dismissal is a bar to the hearing of this present appeal.

Mr. Justice Krishnan's first order of dismissal is *ultra vires* and a nullity. Firstly, a Vacation Judge of the High Court who has power to deal only with urgent matters has no jurisdiction to dispose of Jail appeals. Section 14 of the Charter Act empowers the Chief Justice to arrange for the sittings and the constitution of the Bench and in exercise of these powers, the Chief Justice had constituted the Vacation Judge to dispose of urgent work only as the notification under the Registrar's signature shows. Secondly, assuming that the Vacation Judge had all the powers of the High Court, the notification to the public is expressly limited only to receiving Jail appeals and not to hearing or disposing of them. If the notification extended to hearing them, the accused might have taken adequate steps to be represented by Counsel and present his case properly. He has now been deprived of the opportunity of being heard.

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The order of Mr. Justice Krishnan is without jurisdiction and is not a bar to the hearing of the appeal.

Even if the said order was passed with jurisdiction, the present appeal may be regarded as one to review it. True, the case was not admitted as on review but if this Court has jurisdiction and if there are grounds for review the character of the admission would not be a bar.

[OLDFIELD, J.—If it is a review, then only Mr. Justice Krishnan could hear this appeal.]

This is not a civil case and there is no statutory prohibition against other Judges hearing a review in criminal cases.

As to the grounds for review, the order of Mr. Justice Krishnan dismissing the appeal as out of time and refusing to excuse delay is obviously wrong. The new Limitation Act of 1922 will clearly apply and if time taken in obtaining copies is deducted the appeal would be in time. I may concede there is no power to excuse delay if the appeal was really out of time. But it is clear the new Act was not present in the Judge's mind at all. The order is wrong and liable to be reviewed.

On the question of High Court's jurisdiction to review, section 369 is conclusive. The language is "No Court other than a High Court can review" and there is no warrant to limiting the *prima facie* general reservation of the powers of High Court to the powers of review under section 434. The decisions in *Queen-Empress v. Durga Charan* (1), *Queen Empress v. Fox* (2); *In the matter of Gibbons* (3) are wrong. See *High Court Proceedings*, 7th November 1873 (4); *Emperor v. Komesh Chandra* (5); *Rajjab Ali v. Emperor* (6); *Amodini Dasee v. Darsan Ghose* (7), *Bibhuty Mohun Roy v. Dasimoni Dassi* (8). *Ranga Rao v. Emperor* (9) is not a decision on this point.

Apart from section 369, the High Court as a Court of Record has inherent powers of review. It is the duty of the High Court to see that its records are not tainted by manifest absurdity. *Vide* section 106 of the Government of India Act; Stephen's Commentaries, Volume III, page 501, also *Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad* (10); *High Court Proceedings*, 7th November 1873 (4); *Rajjab Ali v. Emperor* (6); *Emperor v. Kallu* (11). His Lordship Mr. Justice Spencer recently restored a criminal revision case dismissed for default.

On the admission of the appeal itself, the restrictive admission of the appeal as to sentence only is wrong. See *Nafar Sheikh v. Emperor* (12); *Lakhi Narain Sarongi v. Sri Ram Chandra* (13); *Rajjab Ali v. Emperor* (6), citing *In the matter of Gibbons* (3).

Mr. J. C. Adam, Public Prosecutor, for the Crown.—The powers of the Hon'ble the Judges are regulated by the Charter and cannot be derogated by any notification issued by the Chief Justice whose powers are limited to constituting the Bench and assigning work: Sections 13 and 14; *In the matter of Abdool Sobhan* (14); *Queen v. Zuhiruddin* (15) see also the observation of Mr. Justice Hamilton in *Ex parte George Wise* (16).

Further, the actual notification appointing His Lordship Mr. Justice Krishnan as Vacation Judge without any reservation or qualification whatever and the practice of the High Court has always been to dispose of jail appeals during the vacation. The Vacation Judge's powers were not and cannot be limited. The order of dismissal was, therefore, made with full jurisdiction.

There is no power of review vested in

(1) 7 A. 672; A. W. N. (1885) 177; 4 Ind. Dec. (N. S.) 867.

(2) 10 B. 176; 5 Ind. Dec. (N. S.) 502.

(3) 14 C. 42; 7 Ind. Dec. (N. S.) 29.

(4) 7 M. H. C. R. App. 29.

(5) 46 Ind. Cas. 157; 22 C. W. N. 168; 19 Cr. L. J. 701.

(6) 50 Ind. Cas. 25; 46 C. 60; 20 Cr. L. J. 265.

(7) 13 Ind. Cas. 776; 38 C. 828; 13 Cr. L. J. 120.

(8) 3 Ind. Cas. 393; 10 C. L. J. 80; 10 Cr. L. J. 287.

(9) 16 Ind. Cas. 518; 12 M. L. T. 350; 23 M. L. J. 371; 13 Cr. L. J. 210 (1912); M. W. N. 982.

(10) 14 M. L. A. 40 at p. 48; 7 B. L. R. 186; 2 Suth P. C. J. 434; 2 Sar. P. C. J. 656; 20 E. R. 701.

(11) 27 A. 92; 1 A. L. J. 495; 1 C. L. J. 710; A. W. N. (1904) 195.

(12) 20 Ind. Cas. 741; 41 C. 406; 14 Cr. L. J. 465; 18 C. L. J. 582; 582; 18 C. W. N. 147.

(13) 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146.

(14) 8 C. 63; 4 Shome L. R. 57; 4 Ind. Dec. (N. S.) 40.

(15) 1 C. 219; 25 W. R. Cr. 27; 1 Ind. Dec. (N. S.) 140.

(16) (1909) 127 L. T. Jo. 392.

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the High Court in a criminal case. Section 369 must be read with section 434. The position is well-settled by a series of decisions and it is too late now to question them. See *Queen-Empress v. Durga Charan* (1); *Queen-Empress v. Fox* (2); *In the matter of Gibbons* (3); *Ranga Row v. Emperor* (9) and as a Court of Record the powers of the High Court are the same as those of the inferior Courts under section 369.

There being no power of review and the order of Mr. Justice Krishnan being well within his powers, the present appeal is incompetent.

JUDGMENT.

Oldfield, J.—This appeal is by the third accused in S. C. No. 3 of 1922 on the file of the Special First Class Magistrate of Tirur, against the conviction and sentence therein. The Public Prosecutor opposes it on the ground that Criminal Appeal No. 395 of 1922 against the conviction and sentence has already been dismissed by a learned Judge of this Court. The facts are, that Criminal Appeal No. 395 was presented by the accused under section 420, Criminal Procedure Code, through the officer in charge of the Jail, where he is, on 6th May 1922, and was dismissed under section 421, as it was out of time, by Krishnan, J., sitting as Vacation Judge on 2nd June 1922. The accused, presumably in ignorance of this, presented the present appeal on 17th July 1922 on the re-opening of the Court through Counsel. It is not disputed that, unless the decision of 2nd June 1922 can, on some grounds, be disregarded, we are debarred from disposing of the present appeal on the merits.

We have been asked, first, to meet this difficulty by treating the present appeal as an application for the revision of the previous decision of Krishnan, J. But that is not the way in which it is expressed; and in any case section 439, Criminal Procedure Code, notwithstanding the reference to procedure ordinarily to trials in a High Court, does not empower a High Court to revise the judgment of one or more of its own Judges. For, that reference may be explained either, as it was by Mitter, J., in *In the matter of Gibbons* (3) as applicable to the exceptional cases in which the High Court

procedure has been extended to other Courts, or intended *ex abundantii cautela* to prevent any possible conflict with the Letters Patent or other legislation by which High Courts are affected. It cannot be read as conferring or recognising by implication a power the existence of which is negatived by the wording of the remainder of the section. That is supported by the case already referred to, and the obvious anomalies, which the contrary view entails are probably, the reason for the absence of further authority against it. On behalf of the accused we have been referred to no case in which revision of the judgment of one or more Judges of a High Court has been allowed. The conclusion must be that there is no power to revise it.

The next suggestion is, that the appeal before us should be treated as an application for a review of Krishnan, J.'s. previous order; and here again that is not the form of the petition. But, if that can be treated as immaterial, the accused relies next on the fact that the present appeal was, it happens, actually admitted by Krishnan, J., sitting in admission, and urges that this amounts to a setting aside by the learned Judge of his previous order and a re-opening of the case on its merits, such as takes place when an application for review is granted in civil proceedings. This can be rejected on the short ground that, as Mr. Srinivasagopalachariar admits on accused's behalf, the learned Judge was not conscious that there was any previous decision which would be a bar to the present appeal and which would have to be set aside before that appeal could be heard.

We have then to deal with the argument that we can ourselves review the decision of Krishnan, J., as that of the Court, although it was given by a Single Judge, and it is not necessary to rely on the fact that the Court is now constituted differently from the Court which passed that decision in order to hold that we cannot do so with reference either to any power conferred by the Code or to the position of the High Court as a Court of Record or any general inherent power. As regards this, section 369 expressly negatives (subject to certain exceptions not at present in question) the power of Courts other than High Courts to review and no other provision authorising High

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Courts to exercise that power, their exclusion from the purview of the section cannot be read as conferring it by implication. High Courts, no doubt, under section 106 (Government of India Act 5 and 6 Geo. V, Chap. 61) are Courts of Record and in a Court of Record, if there appears any mistake of the clerk in making up the record, the Court will direct him to amend it; and in general all slips in legal proceedings may be amended by an order of the Court to be obtained in a summary way. Stephen's Commentaries, 16th Edition, Vol. III, 501. But this which, in fact, goes no further than section 363 does as regards inferior Courts, is not sufficient to support accused's argument, since the question is of a dismissal which may or may not have been mistaken, but which was certainly deliberate, on a ground of limitation, to which the Court must be supposed to have applied its mind. As regards authority, decisions such as *Rajjab Ali v. Emperor* (6) and *High Court Proceedings*, 7th November 1873 (4) (if the latter was really given judicially) are not in point, because they deal with cases in which the accused not having had the reasonable notice enjoined in section 420, Criminal Procedure Code, a condition precedent to the exercise of the Court's jurisdiction, was not fulfilled, the conclusion not being reached strictly in review, but on the ground that there was no previous valid adjudication to bar a hearing on the merits, and the absence of reasonable notice is not in question here, since it is not disputed that accused had the notice to which the appellants from Jail are entitled under Criminal Rules of Practice No. 59. Generally, the course of authority is plainly against the power to review. For a fact conclusive, in the nature of the case, against the existence of an inherent power, no instance of its exercise has been produced and it is negatived in the case last referred to and in *In the matter of Gibbons* (3) *Queen-Empress v. Durga Charan* (1), *Queen-Empress v. Fox* (2) and in *Ranga Row v. Emperor* (c). The accused's claim must, therefore, fail if it is regarded as to a review.

The accused finally argues for his right to a hearing of this appeal on its merits on the ground that the dismissal of his previous appeal is void, because it was not within the power of Krishnan, J., sitting (as

he was) as Vacation Judge, to deal with it at all. This can, no doubt, at first sight be supported to some extent by the terms of the Notification of 20th March 1922 regarding Krishnan, J.'s sittings. For it is notified that the Vacation Judge will dispose of "urgent applications which require to be heard immediately" and, in spite of the wording of Appellate Side r. 1 (1) (f), it is doubtful whether an appeal can be described as an application, the only reference to appeals is that implied in the specification of "urgent criminal work" as to be disposed of by an Appellate Court of two Judges; and although there is no doubt provision for the reception of appeals under section 420, Criminal Procedure Code, from appellants in Jail, it is made in the portion of the Notification which refers to the Registrar's Office, not to the Judge. But, even so, the appointment of Krishnan, J. as Vacation Judge was notified with no qualification of his powers in the usual way in accordance with an order of the Chief Justice, nominating him for that function, which we have seen, and even if no definition of the powers and duties of the Vacation Judge could be deduced from Statute or Rules, the practice of the Court would afford guidance and the fact that, as we have ascertained, some Vacation Judges in past years have admitted or dismissed appeals from accused in Jail without complaint would go some way towards negating the argument before us. In fact, however, the answer to that argument is that the powers of the Vacation Judge are not to be looked for in the Notification, as though it was a self-contained and exhaustive advertisement to the public of their scope and nature. For it need not and must not be regarded as more than a general statement of the powers, which the Vacation Judge ordinarily will exercise and cannot be read as derogating from those, which in virtue of Statute and Rules he possesses and of which he cannot, consistently with them, be deprived. Appellate Side Rule 4, which has the force of law, directs that during the vacation of the Court its "appellate jurisdiction may be exercised by a Single Judge acting as Vacation Judge this being subject only to an exception not alleged to be in question at present. Section 108, Government of India Act, 1915-(5 and 6

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Geo. V, Chap. 61, provides that "each High Court may by its own rules (the Appellate Side Rules, above referred to) provide as it thinks fit for the exercise by one or more Judges of the appellate jurisdiction vested in the Court," and that "the Chief Justice shall determine what Judge is in each case to sit alone." Appellate Side Rule (1) provides for the hearing and determination by one Judge of appeals from the judgment or order of a Criminal Court. It is not necessary for the present purpose to attempt an exhaustive enumeration of the Vacation Judge's powers or to go beyond these references to establish that Krishnan, J., was competent to dismiss accused's appeal. Its dismissal, therefore, cannot be regarded as a nullity or otherwise than as a bar to the hearing of a second appeal against the same conviction.

The result is, that the appeal cannot be heard and must be dismissed.

Devadoss, J.—This is an appeal presented under section 419, Criminal Procedure Code, by one Kunhammad Haji against his conviction by the Special First Class Magistrate of Tirur, under section 436, Indian Penal Code. The appellant presented, under section 420, Criminal Procedure Code, what is commonly known as a Jail appeal, which was dismissed by Mr. Justice Krishnan, the Vacation Judge of 1922, with the remark "the appeal is out of time, and there is no proper ground for excusing the delay and the case is proved against the accused by the prosecution evidence which there is no reason to discredit. The sentence is a correct." Mr. Srinivasa Gopalachari who appears for the appellant urges that the judgment of Krishnan, J., on the appeal presented by the appellant through the Superintendent of Jails was passed without jurisdiction, and that this Court has power to hear the appeal presented by him on the merits.

He urges three points: (1) the order of Krishnan, J., having been passed without jurisdiction, the order is no order at all, and, therefore, his appeal could be heard on the merits; (2) the appellant had no reasonable opportunity of being heard in support of his appeal and so the appeal could be heard; (3) the order of Krishnan, J., could be reviewed by a Bench of two Judges hearing criminal appeals.

The appellant was convicted on 13th April 1922, the copy of the lower Court's judgment was given to him on 24th April 1922 and the Jail appeal was forwarded to the High Court on 4th May 1922. The High Court was closed for the long vacation on 6th May 1922 and the Jail appeal was dismissed on 2nd June 1922. Mr. Srinivasa Gopalachari presented the appeal petition on behalf of the appellant on 17th July 1922. It was moved before Krishnan, J., who was sitting in the Admission Court; he ordered notice on 27th July 1922 with the remark "Admitted as regards sentence only. It is not clear why the third accused should have been given a fine also." It is contended by Mr. Srinivasa Gopalachari that the learned Judge was not informed of the dismissal of the Jail appeal when he moved for notice on his appeal, and that both Counsel and Judge were not aware at the time of the order of 2nd June 1922.

The learned Counsel's contention is that the Vacation Judge could only hear urgent applications and the Jail appeal not being an application regarding an urgent matter, Mr. Justice Krishnan had no jurisdiction to dispose of it and that the notice published under the signature of the Registrar simply said that the office of the Registrar would be open for the receipt of urgent applications, Jail appeals under section 420 and application in non-contentious matters.

The question for determination is, whether a Judge of a High Court sitting as Vacation Judge has or has not jurisdiction to dispose of not only urgent matters but also matters which came up before him.

By section 2 of 24 and 25 Vict., Chap. 104, an Act for establishing High Courts of Judicature in India, it was provided that the High Court of Judicature at Madras shall consist of a Chief Justice and as many Judges, not exceeding 15, as Her Majesty may from time to time think fit and appoint. By section 13, of the Act it is provided "subject to any laws or regulations which may be made by the Governor-General in Council, the High Court established in any Presidency under this Act may, by its own rules, provide for the exercise by one or more Judges or by Divisional Courts constituted by two or more of the Judges of the said

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High Courts of the Original and Appellate Jurisdiction vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice."

Section 14 is in these terms: "The Chief Justice of each High Court shall from time to time determine what Judge in each case shall sit alone, and what Judges of the Court whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid." It is clear from these two sections that the High Court may by its own rules provide for the exercise by one or more Judges or by Division Courts of the Original and Appellate Jurisdiction of the Court. The rules framed by the High Court under section 13 would give jurisdiction to Judges to dispose of any matter excepting those which by Statute they could not dispose of. The function of the Chief Justice is to determine what Judge in each case shall sit alone, and what Judges of the Court shall constitute Divisional Benches. He has to assign work, and when work has once been assigned, the Judge or Judges have full jurisdiction to dispose of it. The contention of Mr. Srinivasa Gopalachari is that the learned Chief Justice restricted the power of the Vacation Judge to urgent applications. In the first place, there is no evidence that the learned Chief Justice, granting he has the power to do so, ever intended to restrict the jurisdiction of the Vacation Judge to urgent matters only. The Notification published under the signature of the Registrar is only to inform the public that the Vacation Judge was prepared to hear urgent applications and not that the Vacation Judge had power only to hear urgent matters. Secondly, the jurisdiction of a Judge can only be restricted by Statute as in the case of appeals by persons under sentence of death (*Vide* section 377, Criminal Procedure Code) and as in the trials under the Criminal Law Amendment Act of 1908, section 11 or by rules framed by the High Court under section 13.

The case of *In the matter of Abdool Sobhan* (14) throws considerable light on this question. In that case an objection application for transfer was made before a Division Bench consisting of Mr. Justice Cunningham and Mr. Justice

Prinsep. When the Counsel opened the case for transfer, the learned Judges intimated there was no use in going on further with the matter and dismissed the application. Thereupon, another Counsel moved the Chief Justice to have the matter re-heard on the ground that the learned Judges composing the Division Bench did not give full hearing to the case. In the course of the argument the Chief Justice Garth observed: "Suppose, I did the same thing, who is to set me in order? Is a Division Bench consisting of two puisne Judges in a different position from a Division Bench consisting of myself and another Judge? In such a case the proper course is to appeal to Government." The Counsel answered: "Your Lordship is undoubtedly above the other Judges of the Court." To which he replied, "As Chief Justice I have certain functions to perform in constituting Benches but having done so, have I power to call them to account?" The learned Chief Justice held that as Chief Justice he could not ask the learned Judge to re-hear the case. In that the application was an application for transfer of a case from one Court to another which could be renewed on proper grounds as the order on a transfer application is not *res judicata*. The learned Chief Justice intimated that they might renew the application or ask the Judges, if they were disposed to do so, to hear Counsel fully. In the course of the judgment reference was made to a precedent which happened during the time of Sir Barnes Peacock, Chief Justice of Bengal. To quote the words of Chief Justice Garth in respect of that case: "A Criminal Bench of this Court, consisting of two Judges, had been appointed by the Chief Justice in the usual way, for the purpose of hearing criminal appeals; instead of sitting together to hear these appeals, the Judges thought proper to hear them separately, that is to say, one Judge sitting alone heard some of them, and the other sitting alone heard the rest; but the judgments in all the cases were signed by both Judges. Upon this being represented to the Chief Justice, he considered that, in point of law, there had been no hearing at all of these appeals, because they had not been heard by a legally constituted Court, and one Judge sitting alone had no jurisdiction to hear them. He, therefore, ordered

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the same Criminal Bench to hear them again; and upon the Judges of that Bench declining to do so upon the ground, that they had been already judicially decided, the Chief Justice sent them to another Division Bench by whom they were finally determined. In this view of my learned predecessor I entirely agree. It is the province and duty of the Chief Justice under section 14 of the High Courts Act, to determine what Judge or Judges shall decide each case; and if two Judges are appointed by him to hear an appeal, it is quite clear, I think, that no Single Judge has any jurisdiction to hear it." With regard to the case of the *Queen v. Zuhiruddin* (15), the learned Chief Justice observed: "In that case a prisoner was committed to take his trial at Patna. On the application of the District Magistrate by letter to this Court, the Judge in the English Department made a summary order transferring the case for trial to Shahabad. The prisoner then applied to this Court for a Rule calling on the Crown to show cause why the order of the transfer should not be rescinded, upon the ground it had been made without notice to him, and that the Judge in the English Department had no power to make it. This Rule was heard by a Full Bench, of which the Judge of the English Department was a member, and with his entire concurrence the Rule was made absolute." It is clear, therefore, that where a Judge or a Bench of Judges is asked to dispose of a certain matter they have jurisdiction to dispose of it. The constitution of the Bench is the province of the Chief Justice and if the Judges refuse or neglect to be constituted into Benches as arranged by him and choose to dispose of cases as they please they would be acting without jurisdiction. If a learned Judge who has been asked to do admission work takes into his account or without his being asked to do Original Side work calls up Original Side cases of his own accord and disposes of them he may be said to be acting without jurisdiction. That a Vacation Judge has all the powers of the High Court can be inferred from clause 36 of the Letters Patent which is in these terms: "We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Madras in the exercise of its Original or Appellate

jurisdiction, may be performed by any Judge, or by any Division Court thereof appointed or constituted for such purpose under the provisions of the 13th section of the aforesaid Act of the 24th and 25th years of Our Reign." The Government India Act of 1915, 5 and 6 George V, Clal. (1, section 108 re-produces sections 13 and 14 of the older Act. In England the Rules of the Supreme Court regulate the sitting during vacation. Order XLIII, r. 11 provides for the selection of two Judges at the commencement of the long vacation to be Vacation Judges. Rule 12 provides for the arrangement of the sittings, Two Judges sit separately together as a Divisional Court as occasion shall require and may hear and dispose of all causes, matters and other business to whichever Division the same may be assigned. In *Ex parte George Wise* (16) Hamilton, J., (now Lord Sumner) issued a writ of mandamus during the vacation. In the course of the arguments by Mr. F. E. Smith, (now the Lord Chancellor) the learned Judge observed: "If you satisfy me that I have the jurisdiction to do so, I should certainly grant a Rule *Nisi*. A Vacation Judge is not a Divisional Court." The learned Counsel answered: "It is provided by O.LXIII; r. 12 that Vacation Judges may sit either separately or together as a Divisional Court as occasion shall require and may hear and dispose of all causes, matters and other business to whichever Division the same may be assigned." Hamilton, J., said "You may take your Rule *Nisi*," and passed an order to that effect. This shows that an application for a prerogative writ of mandamus which according to the Supreme Court Orders has to be made to a Divisional Court or King Bench was made before a Single Vacation Judge who granted a Rule *Nisi* and considering who the learned Judge is and who the learned Counsel who appeared before him is, we may assume that the issue of the Rule was within the jurisdiction of the Single Vacation Judge.

The practice for the office is to circulate Jail appeals presented under section 420 to the Judges. Jail appeals are disposed of by only one Judge. Notice is issued on Jail appeals or they are dismissed summarily by a Judge in Court after the appellant's name has been called. The Vacation Judge

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has been pursuing this practice at least for some years. The Vacation Judge disposes of matters which are ordinarily disposed of by a Bench of two Judges. Transfer applications are as a rule made to a Bench of two Judges. But during the vacation, a Single Judge disposed of transfer applications. Till recently, it was the practice in the High Court to post second appeals for notice before a Single Judge sitting in the Admission Court. The Admission Judge either ordered notice or dismissed the appeal. For the last few years, the practice has been changed, and second appeals are circulated to the Judges who order notice if they find there are sufficient grounds for notice and if they find there are no points of law they order the cases to be posted under O. XLI, r. II and then they come up before a Bench of two Judges who after hearing appellant's Counsel or Vakil either order notice or dismiss them.

If the practice obtaining here is an indication of what is considered to be the jurisdiction of a Vacation Judge we find he disposes of matters which are usually disposed of at other time by a Bench of the High Court consisting of two Judges. I hold that Krishnan, J.'s jurisdiction to dispose of Jail appeals was not in any way restricted by the Notification of the 20th March 1922 under the signature of the Registrar.

The next contention is, that the appellant had no opportunity to engage a Counsel to argue his case because the Notification specifically stated that only urgent applications could be made. The Notification runs thus: "The Vacation Judge will dispose of urgent applications which require to be heard immediately whether in proceedings on the Appellate or Original Side of the High Court. In any case of great urgency application may be made by delivering to the Registrar a request to transmit the necessary papers to the Vacation Judge." Under the heading "Registrar's Office" the Notification is "Except petitions and applications in non-contentious testamentary and intestate matters and appeals received under section 420 of the Code of Criminal Procedure from appellants who are in Jail, no application other than an urgent application as above-mentioned will be

received or filed during the vacation." The appellant contends that the office would not receive a memorandum of appearance on behalf of an appellant in Jail during the vacation because in the case of Jail appeals unless there is a bail application, the appeal is considered not to be an urgent matter. Under section 420 of the Criminal Procedure Code an appellant in Jail may present his petition of appeal to the officer in charge of the Jail who shall thereupon forward the same to the Appellate Court. Section 421 provides "that no appeal presented under section 419 shall be dismissed unless the appellant or his Pleader has had a reasonable opportunity of being heard in support of the same." This provision does not apply to appeals presented under section 420, Criminal Procedure Code. Rule 50 of the Criminal Rules of Practice lay down "that no appeal shall be summarily rejected until seven days have elapsed after its receipt by the Appellate Court. In forwarding such an appeal the officer in charge of the Jail shall invariably certify that the appellant has been informed that if he intends to appoint a Pleader, an appearance must be put in within seven days from the date on which his petition may reach the Appellate Court." Seven days' time is allowed before a Jail appeal is circulated to the Judges. So an appellant has an opportunity of engaging Counsel if he wishes to do so. I do not think the office could have refused to receive a memorandum of appearance from a Practitioner on behalf of an appellant in jail if it was brought to the notice of the office that the Jail appeal might be disposed of during the vacation. There is nothing to show that in this case the appellant had not had an opportunity of engaging a Counsel before his appeal was disposed of. So there is no substance in this contention.

It is further urged that as the appellant was not heard there ought to be a re-hearing of the case. When an appeal has once been disposed of, the Court is *functus officio* and cannot re-hear the appeal. This is quite clear from a number of decisions of the Madras High Court as well as of other High Courts. In *Ranga Row v. Emperor* (9) it was held that if a criminal revision petition is dismissed on account of the non-appearance of the Practitioner who had filed it, the High Court is not competent to restore to its file

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such a petition. In the course of the judgment reference is made to Referred Trial No. 40 of 1905 of this Court. It appears that after the dismissal of the appeal the learned Chief Justice thought that his order was wrong and he wanted to allow the appeal. On the matter being argued before him and Mr. Justice Moore, they both thought that they were *functus officio* the moment they delivered their judgment and that they had no power to re-open the matter and they directed that a letter be addressed to Government for the exercise of the prerogative of mercy in view of the doubt which they entertained as to his guilt. It has been brought to our notice that in a recent case Mr. Justice Spencer who dismissed a criminal revision petition for default of appearance of a Practitioner restored it to file and heard the case on the merits. In the case of a criminal appeal or criminal revision petition there is no provision in the Code of Criminal Procedure for dismissing an appeal or revision petition for default of appearance. In a criminal matter the question is not between party and party and it is the duty of the Court to go into the matter and dispose of it on the merits. The only way of reconciling the conflicting decisions on this point is to hold that when a criminal appeal or a criminal revision petition is dismissed for default of appearance there is no decision on the merits and, therefore, there is no proper disposal of it according to law and the Court may re-hear it. The order of dismissal for default of appearance in such cases is no judgment at all, and the order is tantamount to an adjournment of the case till some one appears and moves the Court to hear him. With due respect to the learned Judges who decided *Ranga Row v. Emperor* (9) I think that the High Court, though it is not bound to hear a Practitioner in support of a criminal revision petition, is not entitled to dismiss it for default of appearance but could only dispose of it on the merits.

In *High Court Proceedings*, 7th November, 1873, (4) a ruling is given to the effect that when a criminal appeal has been rejected without hearing the appellant's Pleader, under the corresponding section 421 of the Cri-

iminal Procedure Code and if it appears that an adequate excuse has been made for the Pleader's non-appearance, the Court could restore the case to its file and hear him. In *Emperor v. Kallu* (11) it was held that a Judge who passed an order on a Jail appeal to the effect that no appeal lay and that no sufficient ground appeared for interference in revision was not precluded from entertaining the application for review presented by a Counsel in relation to the same matter. It has been held in some cases that a judgment or order is not complete until it is signed and sealed and, therefore, the matter could be re-opened. Under section 369 of the Criminal Procedure Code when a judgment has been signed it is final, and there is no power left in the Court to re-open the case.

The Bombay High Court in *Empress v. Mahomed Yashin* (17) takes a narrow view with regard to the power to re-hear criminal appeals and revision petitions dismissed for default. But with great respect to the learned Judges of the Bombay High Court, I consider that when a criminal appeal or revision petition is dismissed without hearing, there is no judgment at all and the learned Judge of the Bench which disposed of the matter for default of appearance could re-hear the matter.

The third point argued is, that the High Court had power to revise an order passed in a criminal matter. I think this is concluded by authority. The earliest case on the point is in *Queen v. Godai Ravi* (18). A Full Bench of the Calcutta High Court presided over by Sir Barnes Peacock held that the High Court could not entertain the application to review a judgment passed by it in a criminal case. The learned Judge observed at page 63: "The Code of Criminal Procedure does not contain any provision expressly authorising a review of judgment in a criminal case after the judgment has been recorded. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a section expressly authorising review of judgment but the former contains no corresponding section. From this it may reasonably be

(17) 4 B. 101; 4 Ind. Jur. 579; 2 Ind. Dec. (N. S.) 577.

(18) 5 W. R. Cr. 61; B. L. R. Sup. Vol. 436.

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inferred that the Legislature did not intend to confer in criminal cases a power similar to that which they had been given in civil cases." Now, the Code of Criminal Procedure has been amended a number of times, and the Legislature has not chosen to give a power of review to any Court in a criminal case. Section 369 is relied upon as showing that the High Court had power by implication to review a judgment passed in a criminal case. I think such a contention is untenable. Section 369 runs thus: "No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in sections 395 and 484 or to correct a clerical error." The exception contained in section 369 is with reference to the power of review in regard to cases decided by a Judge of the High Court presiding over the Sessions when points are reserved for consideration by the Full Bench, or on the certificate of the Advocate-General. The cases reported as *Queen-Empress v. Durga Charan* (1), *Queen-Empress v. Fox* (2), *In the matter of Gibbons* (3) are all authorities for the position that a Division Bench of the High Court has no power to review its judgment pronounced in a criminal revision case or a criminal appeal.

In this case the appellant has not applied for review and I consider that this Bench which did not hear the case originally has no power to review the order. In these circumstances, the order of Mr. Justice Krishnan made during the vacation on the appeal of the appellant is good and the matter cannot be re-opened. That being so, we cannot hear the appeal before us and it must be dismissed.

V. N. V.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 701 AND 806 OF 1922.

(CRIMINAL REVISION PETITIONS NOS. 586 AND 675 OF 1922.)

January 31, 1923.

Present:—Mr. Justice Venkatasubba Rao.

P. STREENIVASA CHETTY—ACCUSED

—PETITIONER IN CR. R. C. No. 701 OF 1922

THANDAYUTHAPANI CHETTI—

ACCUSED—PETITIONER IN CR. R. C.

No. 806 OF 1922

versus

EMPEROR—OPPOSITE PARTY.

Prisons Act (IX of 1894), s. 42 (3)—Penal Code (Act XLV of 1860), s. 107—Communicating with prisoner—Abetment by prisoner.

A prisoner who by his active co-operation aids a stranger outside the Jail in communicating with himself abets the former in the commission of an offence under section 42 (3) of the Prisons Act and is himself guilty of an offence under the section.

Second accused sent a written message to first accused, a prisoner, through a Warder. First accused wrote an answer on the back of the paper containing the message and sent it back to the second accused:

Held, (1) that the second accused was guilty of communicating with a prisoner within the meaning of section 42 (3) of the Prisons Act;

(2) that the first accused was guilty of abetment of the same offence.

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Chief Presidency Magistrate, Egmore, Madras, dated the 3rd August 1922, in C. C. No. 11023 of 1922.

Mr. V. L. Ethiraj, for the Petitioners.

Mr. K. P. M. Menon, Crown Prosecutor, for the Crown.

ORDER.—The first accused was convicted of the offence specified in clause (3) of section 42 of the Prisons Act, IX of 1894. He was a prisoner in the Penitentiary and the second accused, an uncle of the first accused, who received a wire from a relation at Coimbatore which contained matters pertaining to the first accused, wrote a message on the back of the telegram intending that that writing should be read by the first accused, and handed the telegram to a Jail Warder who was employed to, and did, carry the telegram to the first accused in Jail. The latter, thereupon, read the telegram as well as the communi-

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cation written on the back of it and wrote a reply on the back of the same telegram and handed it to the Warder for being carried to the second accused. The Chief Presidency Magistrate convicted the first and the second accused of an offence under section 42 of the Prisons Act and sentenced each of them to pay a fine of Rs. 200.

The material portion of the section is as follows:—

"Whoever * * * * communicates or attempts to communicate with any prisoner shall, on conviction before a Magistrate, be liable to imprisonment * * * *."

Mr. V. L. Ethiraj, who appears for the accused, admits that the second accused has committed the offence but says that the sentence passed on him is unduly severe. As regards the first accused, he contends that it is communication with a prisoner that is made an offence under the section and that it makes only the person who communicates with a prisoner liable to punishment and that a prisoner cannot communicate with himself and that a prisoner cannot, therefore, commit the offence described in clause (3) of section 42. But the question still remains whether a prisoner may not abet the offence, for, the same section provides that whoever abets any offence shall also be liable to punishment. The word "abet" is not defined by the Prisons Act, but the General Clauses Act, X of 1897, says that the word "abet" shall have the same meaning as in the Penal Code. Under section 107 of the Indian Penal Code "a person abets the doing of a thing who intentionally aids, by any act, the doing of that thing." It is quite possible for a person to communicate with a prisoner without the latter's aid or co-operation, for instance, a person may walk into the Jail and when the prisoner has no intention to speak to him or does not even expect that the stranger will speak to him, the latter may do so, and the prisoner may unintentionally, without even an effort, hear the word spoken, or, to take another instance, the prisoner may find by accident a piece of paper which has been introduced into his cell without his knowledge; and picking it up, he may find that it contains a message for him. In these two instances the per-

son who communicates with the prisoner has committed the offence but the communication is made without the co-operation of the prisoner. But, if the prisoner is aware that a certain piece of paper contains a communication intended for him, receives it from the Warder and reads it, I am inclined to think that he has, by his active co-operation, aided the commission of the offence, for he, by his acts, facilitated the commission of it, and, in fact, the commission of the offence would have been impossible without the active participation in it of the prisoner himself.

In the present case, not only did the prisoner read the letter but he also wrote a reply and handed it to the Warder, who was acting in concert with the accused Nos. 1 and 2. In the view I have taken, it is unnecessary to consider what the effect of this additional act on the part of the prisoner is. It may be noted that the first accused pleaded guilty and the Magistrate thereupon convicted him; but, altogether apart from this, I am prepared to hold that he was rightly convicted of an offence under section 42 of the Prisons Act read with section 107, Indian Penal Code.

As regards the sentences passed I have just a word to say. I have been told that for the acts described above, constituting a breach of prison discipline, the first accused was adequately punished under the prison rules; and, in my opinion, it is not, therefore, necessary to sentence him to pay more than a nominal fine. I, therefore, reduce the fine in his case from Rs. 200 to one rupee, and direct that, if the fine has already been recovered, the balance shall be refunded to him. As regards the second accused, I am of the opinion that the punishment awarded is unduly severe and that an imposition of a fine of Rs. 50 will meet the ends of justice and I reduce the fine to Rs. 50 and direct that, if the fine has already been recovered from him, the balance shall be refunded to him.

I may add that the learned Crown Prosecutor has very properly not pressed for severe sentences in the circumstances of this case.

V N. V.
Z. K.

Fine reduced,

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LAHORE HIGH COURT.

CRIMINAL APPEAL NO. 329 OF 1922.

June 17, 1922.

Present:—Mr. Justice Broadway.

WARYAM SINGH AND ANOTHER—

CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 100, 304, 325—Fatal blow, doubtful which of two accused struck—Offence—Private defence, when Court to give effect to plea.

Where it is impossible to decide which of two accused struck the fatal blow, the offence committed by them falls under section 325 of the Penal Code, and not under section 304.

Agra v. Emperor, 27 Ind. Cas. 833; 37 P. R. 1914 Cr.; 16 Cr. L. J. 209; 219 P. L. R. 1915, relied on.

If on the record a right of private defence can be clearly raised, the Court should give effect to it, even although not pleaded by the accused.

In re Pachai Gounden, 26 Ind. Cas. 158; 15 Cr. L. J. 710, relied on.

Appeal from an order of the Sub-Divisional Magistrate, Ferozepur, dated the 31st March 1922.

Dr. Nand Lal, for the Appellants.

Mr. C. H. Carden Noad, for the Respondent.

JUDGMENT.—Waryam Singh and Godha Singh, sons of Pesar Singh, Jats of Mauza Wandar, in the District of Ferozepur, have been found guilty of having caused the death of their cousin Prem Singh, and, under the second part of section 304, Indian Penal Code, have each been sentenced to five years' rigorous imprisonment and a fine of Rs. 200. In default of payment of the fine the appellants were ordered to undergo further rigorous imprisonment for six months. The fine, if realised, is to be paid to the sons of the deceased. Against their convictions and sentences they have come to this Court in appeal through Dr. Nand Lal whom I have heard, and Mr. Carden Noad has addressed me on behalf of the Crown.

The facts of the case are detailed in the judgment under appeal and need not be repeated here. The evidence of P. W. No. 6 Sajjan, P. W. No. 8 Kehra and P. W. No. 9 Phumman clearly establishes the fact that the two appellants engaged in a fight with the deceased and his brother Harnam Singh. The dispute arose out of a trivial matter,

the appellants having used up certain water for irrigation of their fields which the deceased and his brother thought they were entitled to. There is no evidence to show how the actual fight commenced. The appellants, although bearing marks of injuries, denied having been anywhere near the place at the time. The brother of the deceased Harnam Singh, although hurt, states that he arrived after the affair was over and knew nothing about it. Thus, all that has been shown is that over a trivial matter the appellants, and it is said another brother of theirs named Urjan Singh who is absconding, had a fight with the deceased Prem Singh and Harnam Singh, all the parties being armed with *kahis* which they all used, taking care, however, to use the blunt portions. Dr. Nand Lal did not attempt to urge that his clients were not responsible for the injuries received by Prem Singh. He, however, contended that on the finding arrived at by the Court below, the offence is not one under section 204 but under section 325. According to the medical evidence Prem Singh received two injuries both of them on the head. One of these proved fatal and the other, according to the medical evidence, would not have proved fatal. Which of the two appellants struck the fatal blow it is impossible to decide. *Agra v. Emperor* (1) is, therefore, in point and I consider that the offence committed by the appellants falls under section 325, Indian Penal Code, and hold accordingly.

Next, Dr. Nand Lal contended that it should be presumed that the appellants were acting in self-defence and that the Court could give effect to the right of private defence even though self-defence was not specially pleaded. In support of this the learned Counsel cited *In re Pachai Gounden* (2). I have no doubt that if on the record a right of private defence can be clearly raised the Court would give effect to it, even although not pleaded by the person accused. In the present case, however, it seems to me that I am asked to presume too much. According to the evidence the appellants were accompanied

(1) 27 Ind. Cas. 833; 37 P. R. 1914 Cr.; 16 Cr. L. J. 209; 219 P. L. R. 1915.

(2) 26 Ind. Cas. 158; 15 Cr. L. J. 710.

In re VENKATAGURUNATHA SASTRI.

and assisted by their brother—thus the numbers were three to two. That Harnam Singh and Prem Singh used abusive language would, in the circumstances, be natural, but that they would attack the appellants and Arjan Singh is another matter. It seems to me far more likely that the appellants were actually the assailants and I am, therefore, not prepared to raise the presumption that Dr. Nand Lal wants me to. I hold that the appellants are guilty of an offence under section 325 of the Indian Penal Code. In the circumstances, however, I think the sentences are excessive, both parties were similarly armed and both parties were injured, while unfortunately Prem Singh received an injury on the head which resulted in his death. I think, therefore, that a sentence of two years' rigorous imprisonment will suffice. I accordingly reduce the term of imprisonment to one or two years in each case. The sentences of fine and the imprisonment in default will stand as also will the order as to payment of the fines to the sons of the deceased on the fines being recovered.

N. K.

Sentences reduced.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 807 OF 1922.

CRIMINAL REVISION PETITION NO. 676 OF

1922, AND CRIMINAL REVISION CASE

NO. 692 OF 1922 (CASE REFERRED

NO. 75 OF 1922).

February 16, 1923.

Present:—Mr. Justice Spencer.

In re VENKATAGURUNATHA SASTRI

—ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), ss. 406, 420—Criminal breach of trust—Cheating—Ingredients of offences.

Accused had pledged certain promissory-notes with the complainant as security for a loan. Subsequently, he dishonestly induced the complainant to hand over the promissory-notes to him by pretending that he required them to collect money from his debtors with the aid of which he would pay cash to the complainant. He then disposed of the pro-notes and himself appropriated the proceeds.

Held, that the accused was guilty of criminal breach of trust under section 406 of the Penal Code inasmuch as there was both entrustment and dishonest misappropriation;

Obiter, that the facts disclosed the offence of cheating under section 420 of the Penal Code.

IN CRIMINAL REVISION CASE NO. 897
OF 1922.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class, Magistrate, Tinnevely, in Criminal Appeal No. 36 of 1922, preferred against the judgment of the Court of the Stationary Second Class Magistrate, Tinnevely, in Calendar Case No. 1636 of 1921.

IN CRIMINAL REVISION CASE NO. 692 OF
1922.

CASE REFERRED NO. 75 OF 1922.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code by the District Magistrate, Tinnevely, in his letter No. C. R. C. No. 27 of 1922, dated the 2nd September 1922.

Mr. A. Narasimha Iyer, for the Petitioner.

Mr. V. L. Ethiraj, for Public Prosecutor, for the Crown.

ORDER.—The act of the accused in dishonestly inducing the complainant to hand over the promissory-notes which the accused had pledged with the complainant, as security for a loan of Rs. 2,500 by pretending that he required them to collect money from his debtors with the aid of which he would pay cash to the complainant would constitute, if proved, an offence of cheating punishable under section 420 of the Indian Penal Code.

It is argued that it does not constitute the offence of criminal breach of trust (section 406) for which the petitioner has been convicted, for the reason that the promissory-notes were his own.

I am not prepared to hold that it would be impossible under any circumstances for a person to commit criminal breach of trust in respect of his own property. The possession of the promissory-notes, even without endorsement in the hands of the person with whom they were pledged, was of some value to the complainant as it gave him control over the accused and, so long as they remained with him, prevented the accused from using them to discharge the debts due by him to other creditors in preference to him. The complainant thus had some sort of beneficial interest in this property and when he gave the notes to the accused for a definite purpose and the accused dishonestly disposed

NEWA LAL RAI v. EMPEROR.

of them in violation of the legal contract he had made with him, there was both entrustment and dishonest misappropriation.

Thus, I do not find any legal defect in the conviction. The sentence is, no doubt, light but considering the circumstances, and the absence of finding as to the extent to which the complainant was damaged, I decline to enhance it.

Both Criminal Revision cases are dismissed.

V. N. V.

Petitions dismissed.

Z. K.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 95 OF 1923.

March 14, 1923.

Present :—Mr. Justice Kulwant Sahay.

NEWA LAL RAI AND OTHERS

—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 423—Appeal, disposal of—Appellate Court, duty of, to write judgment.

Where a criminal appeal is once admitted it cannot be disposed of summarily without considering the whole evidence in the case and writing out a judgment under section 423 of the Code of Criminal Procedure. If Counsel for the appellant does not appear, it is the duty of the Appellate Court to go through the record and write out a proper judgment according to law.

Criminal appeal from a decision of the District Magistrate, Monghyr, dated the 23rd January 1923.

Mr. S. N. Bose, for the Petitioners.

The Government Advocate, for the Crown.

JUDGMENT.—The petitioners were convicted by the Sub-Deputy Magistrate of Begusarai under section 147, Indian Penal Code, and sentenced to one month's rigorous imprisonment each. They preferred an appeal which was admitted on the 11th December 1922. On the 5th January, when the appeal came on for hearing, the petitioners filed a petition for time to get copies of certain documents. This petition was rejected, and thereupon it appears that the appeal was not argued before him; but the learned Additional District Magistrate went through the record and in the order-sheet he made a note to the effect:

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"I have been through the record and judgment of the lower Court together with the grounds of appeal. The convictions and sentences appear to be fully justified. Appeal dismissed under section 423, Criminal Procedure Code, convictions and sentences 'upheld.'"

The appeal having been once admitted it could not be disposed of summarily without considering the whole evidence in the case and writing out a judgment under section 423, Criminal Procedure Code. If the Pleader of the appellants did not appear it was the duty of the Magistrate then to go through the record and write out a proper judgment according to law.

The order is set aside and the case is remanded to him for hearing according to law.

The order of bail passed by the District Magistrate on the 11th December 1922 will stand.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 720 OF 1922.

CRIMINAL REVISION PETITION NO. 603

OF 1922.

December 18, 1922.

Present :—Mr. Justice Krishnan.

GARINE SATYANARAYANA—

ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Madras District Municipalities Act (V of 1920), ss. 250, 317—Applicability of s. 250—Old machinery installed in new room—Offence.

Section 250 of the Madras District Municipalities Act only applies when a person intends for the first time to construct or establish any Factory, workshop, etc., in which it is proposed to employ steam power, water power or other mechanical or electric power. It is not applicable to a case where the machinery has not been interfered with but only the shed in which the machinery was kept has been altered by changing the original room into a new room of brick and mortar. [p. 614, cols. 1 & 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment, dated 30th May 1922, of the Additional

BODH KISHEN GOALA *v.* EMPEROR.

District Magistrate, Bezwada, in Criminal Appeal No. 34 of 1922, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Bezwada, in Calendar Case No. 587 of 1921.

Mr. G. Lakshmanna, for the Petitioner.

Mr. S. Venkatachala Sastri, for Public Prosecutor, for the Crown.

ORDER.—The accused is the proprietor of a rice-mill in Bezwada. He was convicted under the Municipal Act, Madras Act V of 1920, under sections 199, 216 and 250 read with section 317 and sentenced to fines of various amounts for the offences.

On appeal, the Appellate Magistrate, holding that it was unnecessary to punish him for an offence under section 199 of the Act, he being liable to be punished under section 250 of the Act, as the two offences really overlapped, acquitted him of the offence under section 199 and remitted him the fine on that charge, but confirmed his conviction under the other two sections, 216 and 250. It is argued in revision that no offence under section 250 has been made out and that he ought to be acquitted under that section.

As I understand the findings of the lower Court, part of the accused's rice-mill where the Sheller Machinery was installed was burnt down some time ago and what he did was to put up a brick building to install the old Sheller Machinery in it and he did so without obtaining the permission of the Municipal Chairman under section 199, and, further, in spite of a notice sent to him by the Chairman he carried on his work and completed it. The Machinery that was installed in the new room was, as I understand, the old Sheller Machinery that was in the Factory itself.

Section 250 of the Act, it seems to me, cannot well be applied to this case. For, the accused cannot be said to have established any Factory, or installed any new machinery in any Factory; he was not bound to apply in writing to the Council for permission to put in the old Sheller Machinery which was already in the Factory, in the room newly built. Section 250 only applies when a person intends for the first time to construct or establish any Factory, workshop or workplace in which it is proposed to employ steam-power, water-power or other mechanical power or electric power.

But it does not apply to a case like this where the machinery has not been interfered with, only the shed in which the machinery was kept has been altered by changing the original room into a new room of brick and mortar. The accused, therefore, must, I think, be acquitted on the charge under section 250. Section 250 itself expressly exempts the application of section 197 in clause (5) and accused was, therefore, clearly punishable for having put up the brick building that he did without the sanction of the Municipal Chairman. He has, however, been acquitted of this offence and as no steps have been taken to have that acquittal set aside, I regret I cannot interfere with the acquittal in revision. That acquittal, therefore, must stand. There can be no doubt whatever of his guilt under section 216 read with section 317, for he clearly disobeyed the Chairman's notice by constructing this new building without his permission. That being so, the conviction under sections 216 and 317 must be confirmed. In the result, the fine that has been imposed upon him under sections 250 and 317 must be remitted, but the fine under sections 216 and 317, *viz.*, Rs. 25 or simple imprisonment for five days in default must be confirmed.

V. N. V.

Sentence varied.

PATNA HIGH COURT.

CRIMINAL REVISION No. 733 OF 1922.
January 9, 1923.

Present.—Mr. Justice Ross.

BODH KISHEN GOALA—ACCUSED—
PETITIONER

versus

EMPEROR, THROUGH PEARY DUSADH
—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 379—Theft
—Bona fide belief of title—Offence.

Accused and complainant owned adjoining fields. Accused removed certain crops from the field belonging to the complainant under the *bona fide* belief that the crops had been sown by him and belonged to him:

Held, that the accused could not be convicted of theft.

RAMASWAMI THEVAN v. EMPEROR.

Appeal from the decision of the District and Sessions Judge, Patna, dated the 11th October 1922.

Mr. Hyder Imam, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

sentence are set aside. The fine, if paid, will be refunded.

Z. K.

Appeal allowed.

JUDGMENT.—The petitioner was fined Rs. 50 on conviction under section 379 of the Indian Penal Code on a charge of having removed the crops belonging to Peary Dusadh on the 24th March 1922. It appears that the lands are *diara* lands and the complainant and the accused have fields adjoining each other. As there was no dividing line an *Amin* was brought who demarcated the boundaries on the 23rd March. The case for the prosecution is that on the following day the accused removed some crops from the complainant's side of the line. The contention on behalf of the petitioner is that there is a distinction between the lands and the crops grown thereon and although the land on which the crops are alleged to have been grown by the complainant had been awarded to him the accused may have been under the belief that he was entitled to the crops. The distinction is obvious and it seems to me that the conviction in this case has rested merely on the facts that a demarcation had taken place and that the land on which the crop was grown had been awarded to the complainant. But it is not clear how on these facts the accused was guilty of theft in removing the crops if he removed them under the impression that the crops were sown by him and that he was entitled to them. In fact, the Magistrate expressly says that it may be that the accused may have been under the impression that he sowed that disputed portion and was, therefore, entitled to remove the crops thereon. He goes on to say that this plea could have been put forward with some force if there had been no demarcation on the 23rd March. But how the demarcation affects this question I have not been able to understand. In my opinion, there is no reason on the record for holding that the accused was not acting *bona fide* in taking the crops in dispute although the demarcation line had been given against him. The application is allowed and the conviction and the

MADRAS HIGH COURT.

CRIMINAL, APPEAL, NO. 1600 OF 1922.

January 25, 1923.

Present:—Mr. Justice Spencer.

RAMASWAMI THEVAN AND
ANOTHER—ACCUSED—APPELLANTS
versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 106
(2)—Penal Code (Act XLV of 1860), s. 323—
Order requiring security on conviction—Finding
as to breach of peace whether necessary—"Other
offence involving breach of the peace," meaning of.*

In order to give jurisdiction to a Court to take action under section 106 (1) of the Criminal Procedure Code, it is not necessary that the Court should record a finding that a breach of the peace was actually caused. If the offence of which the accused is convicted is one which does not of itself necessarily involve a breach of the peace such as criminal trespass, mischief or unlawful assembly, it is proper that the Court should make it clear in its order that a breach of the peace was committed, but where the offence is one which implies the use of violence it is unnecessary to say more.

The expression "other offences involving a breach of the peace" in section 106 of the Criminal Procedure Code embraces all offences *ejusdem generis* with the offences of assault and rioting mentioned in the section.

Where the offence of voluntarily causing hurt includes an assault on the person to whom the hurt has been caused, the Court has jurisdiction to pass an order under section 106 of the Criminal Procedure Code when convicting the accused.

Criminal appeal against an order of the Court of Session of the Tinnevely Division, in Case No. 51 of the Calendar for 1922.

Mr. F. S. Vaz, for the Appellants.

Mr. J. C. Adam, Public Prosecutor, for the Crown.

JUDGMENT.—The only question argued at the hearing of this is, whether the order under section 106, Criminal Procedure Code, requiring the accused to give security to keep the peace is a legal order. It is argued (1) that the offence of voluntarily causing hurt (section 323, Indian Penal

KANMA KONDIAH, *In re*.

Code) is not one of those specified in section 106, Criminal Procedure Code, and does not of itself necessarily involve a breach of the peace; (2) that there ought to be a finding by the Sessions Judge that a breach of the peace was actually caused, before the Court made the order under this section.

On the first point, I find that the accused's act included an assault on the prosecution 9th witness in a public place, and assault is one of the offences specified in section 106. The expression "other offences involving a breach of the peace" would embrace offences *ejusdem generis* with the offences of assault and rioting which are specified in the section. It is only because the accused's act was more serious than one of petty assault that they were not convicted of that minor offence.

But the circumstances spoken to by the witnesses as those in which hurt was caused to prosecution 9th witness were such that there can be no doubt that there was a breach of the peace on that occasion.

On the second point, I do not think it is necessary that the lower Court should record a finding that a breach of the peace, was involved in order to invest itself with power to make an order under section 105 (1), Criminal Procedure Code.

If the offence of which the accused were convicted was one which did not itself necessarily involve a breach of the peace such as criminal trespass, mischief, or unlawful assembly, it would be proper that the Magistrate or Judge should in his order make it clear that a breach of the peace was committed.

But the section does not require such a finding to be recorded, and when the offence of which the accused is convicted is one which implies the use of violence, it would be superfluous to say more. The Judge has recorded his opinion that it is necessary in this case to require the convicted persons to execute a bond for keeping the peace, and that is all that the section in terms demands.

The order will, therefore, stand. The appeal is dismissed.

V. N. V.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 857 OF 1922.

(CASE REFERRED NO. 857 OF 1922.)

January 26, 1923.

Present.—Mr. Justice Spencer.

In re KANMA KONDIAH AND OTHERS—
ACCUSED

Cattle Trespass Act (I of 1871), s. 24—Rescuing Cattle—Driving cattle away by shouts and cries—Force or violence, whether necessary.

Driving cattle away by shouts and cries constitutes "rescuing" them within the meaning of section 24 of the Cattle Trespass Act.

Semble:—The word "rescue" does not necessarily imply the use of force or violence.

Inducing an animal to move may even amount to using force.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate, Nellore, in his Letter No. 10318—22 C. 1 dated 11th October 1922.

The Public Prosecutor, on behalf of the Crown.

ORDER.—The Sub-Divisional Magistrate's opinion that driving cattle by shouts and cries does not constitute "rescuing" them under section 24 of the Cattle Trespass Act is erroneous. Inducing an animal to move may even amount to using "force" (see definition in section 349, Indian Penal Code, and illustration (h) to that section), so that, even if the Magistrate is right in saying that the word "rescue" implies the use of force or violence, it does not follow that there was no force used in this case.

The reasons given for acquitting the accused are unsound, the acquittal is set aside, and the appeal must be re-heard and disposed of according to law.

V. N. V.

Z. K.

Order set aside.

KHUSHI RAM V. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 1594 OF 1922.

March 6, 1923.

Present:—Mr. Justice Scott-Smith and
Mr. Justice Fforde.KHUSHI RAM AND OTHERS—
PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 133, 134, 135, 138, 439—Obstruction to public way—Question of title—Duty of Magistrate—Revision—Mode of service of notice—"Forthwith", in s. 138, meaning of.

Under section 133 of the Criminal Procedure Code the duty of determining whether the site of an obstruction is a public place or a public way is cast on the Magistrate in the first instance, and under no circumstances can it be left to the Jury. If the Magistrate finds, on the parties appearing before him to show cause against the conditional order, that a question of title to the *locus in quo* is involved, he must refuse to act in that particular case unless he comes to the conclusion that the claim of title is not *bona fide*; and unless he finds that the place or way, as the case may be, is public, he has no power to proceed with the investigation. [p. 620, col. 2.]

Dharam Mandal v. Gossain Das Mandal, 6 Ind. Cas. 271; 14 C. W. N. 544; 11 Cr. L. J. 365 and *Dularam Deb v. Baishnab Charan Deb*, 10 C.W.N. 845; 4 Cr. L. J. 42, relied upon.

Where the question as to the public nature or private ownership of the *locus* of an obstruction is left to a Jury under Chapter X of the Criminal Procedure Code, the order of the Magistrate referring the determination of such a question to the Jury is bad and should be quashed. [p. 620, col. 2.]

In the matter of the petition of Chund ramh Sen, 5 C. 875; 6 C. L. R. 379; 2 Ind. Dec. (N. S.) 1165, *Matuk Dhari Tewari v. Hari Madhab Das*, 31 C. 979; 9 C. W. N. 72, 2 Cr. L. J. 11, *Nasaruddi v. Akil-uddi*, 3 C. W. N. 345, *Dularam Deb v. Baishnab Charan Deb*, 10 C. W. N. 845; 4 Cr. L. J. 42 and *Churaman v. Emperor*, 26 Ind. Cas. 172; 12 A. L. J. 1024; 15 Cr. L. J. 724, relied upon.

Where an order under section 133 of the Criminal Procedure Code has been communicated to those concerned it is immaterial that the method in which it was served on them is not strictly in accordance with the provisions of section 134 of the Code. [p. 619, col. 2.]

Nur Jan v. Queen-Empress, 2 P. R. 1900 Cr.; P. L. R. 1900, p. 24, followed.

The word 'forthwith' in section 138 of the Criminal Procedure Code must be interpreted in a reasonable way. It merely means that the Magistrate shall appoint a Jury as soon as he reasonably can. [p. 619, col. 2.]

Petition under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Multan, dated the 14th November 1922, refusing to stay proceed-

ings in the case,—*King-Emperor v. Khushi Ram and others*, pending in the Court of District Magistrate, Multan.

Mr. B. R. Puri, for the Petitioners.

The Assistant Legal Remembrancer, for the Respondant.

JUDGMENT.

Scott-Smith, J.—On the 3rd and 4th September 1922, on the occasion of the Moharram Festival there were serious riots in the City of Multan between the Muhammadans and Hindus. Shortly afterwards, the Hindus living in certain *Mohallas* erected obstructions with the object of making gateways at the entrances to the lanes in which they lived in order, it is said, that they might prevent Muhammadans coming in and attacking them. The Secretary, Municipal Committee, reported the erection of these obstructions to the District Magistrate who, on the 13th October 1922, passed conditional orders, under section 133, Criminal Procedure Code, addressed to the residents of the *Mohallas*, where the obstruction had been made, directing them to remove them before the 1st November 1922 or to appear before him on the 15th October to take legal proceedings for the cancellation or revision of the orders. The order in each case begins as follows "it has been reported to me and I have satisfied myself by personal inspection that in the *Mohallas* * * * unlawful obstructions have been built on the public way which is open to the use of the public and that by such obstruction inconvenience is caused to the public * * *."

On the 25th October 1922 certain of the *Mohalladars*, along with *Vakils* representing the residents of the 17 *Mohallas* in regard to which orders had been issued, appeared before the District Magistrate and applied under section 135, Criminal Procedure Code, for the appointment of a Jury. Upon this the Magistrate fixed five as the number of the Jury and asked the objectors to nominate two Jurors and they nominated two accordingly. The Magistrate said that he would himself appoint the other members of the Jury on the 27th October, Counsel asked him that, if possible, the foreman and the two remaining Jurors, should be Europeans and, in accordance with their request, three Europeans were appointed on the 27th October, and the Jury was duly constituted.

KHUSHI RAM V. EMPEROR.

The Magistrate gave certain orders as regards the inspection of the spot by the Jury and, under section 138 of the Code, fixed November the 10th as the date on which they should deliver their verdict. He also revised his original provisional order and fixed the 15th November as the date before which the obstructions were to be removed. He then added the following:—"Counsel admit that the obstructions have been built by their clients without the permission of the Municipal Committee. They wish to produce evidence in this and similar cases:—

(1) that the *Mohallas* concerned are occupied by Hindus only;

(2) that the obstructions do not cause inconvenience to any one;

(3) that in particular cases, the obstructions are not in a public way, and

(4) that in particular cases they are necessary for the protection of religious places.

He went on to say that as the Municipal Committee of Multan was interested in these four issues, notice would issue to it that the proceedings were in progress and the Committee would have the opportunity of deputing a servant or representative to watch the proceedings before the Jury should it wish to do so. The Jury returned their verdict on the 9th November and, in accordance therewith, the Magistrate cancelled his order in four cases and in 13 cases made it absolute. In these 13 cases petitions for revision have been filed in this Court and we have heard Mr. Bhagat Ram Puri on behalf of the petitioners and the Assistant Legal Remembrancer for the Crown.

The first point urged by Mr. Puri on behalf of the petitioners is that, when the District Magistrate came to know that his clients put forward a claim that the property on which the obstructions were built was their private property, or that it was not a public way, it was his duty to enquire into the matter himself and that he could not leave it to a Jury. In support of this contention he refers to the case of *Dharam Mandal v. Gossain Das Mandal* (1) where it was held that "it is the duty of the Magistrate in a proceeding in respect of an obstruction to a foot-path under Chapter X of the Cri-

iminal Procedure Code, before referring the matter to the Jury to decide himself whether or not the claim is made in good faith, and whether the pathway is a public one or not, and it is only on deciding that there was no such claim that any matter can be referred to the Jury." The same view was taken in *Dularam Deb v. Baishnab Charan Deb* (2) where it was pointed out that "it is not competent to the Magistrate to leave to the Jury the decision of the question whether a pathway is a public or not and whether the claim of a private pathway set up is *bona fide* or not." I entirely agree with these authorities.

The objection of Counsel is based on the fact that the District Magistrate in his final order noted that Counsel said that they wished to produce evidence that, in particular cases, the obstructions were not on any public way and that this showed that the objectors set up a claim to the effect that the places on which the obstructions were raised were not in every case public ways.

Now, it was the duty of the persons who appeared in answer to the original order, either to show cause against the order or to apply for the appointment of a Jury under section 135, Criminal Procedure Code. When they appeared they did not attempt to show cause against the orders but immediately applied that a Jury should be appointed. Even after the Jury had been appointed, their Counsel did not specify the particular cases in which the objectors wished to show cause that the obstructions were not on a public way. It appears, moreover, from the subsequent proceedings that in only one case, that of *Mohalla Nawan Shahr*, was any claim put forward to the effect that the obstructions were on private property. In that case, as well as in three others, the District Magistrate cancelled his conditional order. In none of the cases which are before us was any claim put forward that the obstruction was on private property, but evidence was led on behalf of the objectors to the effect that the places were not thoroughfares, that they were only used by the inhabitants of the *Mohallas* or the persons visiting them on business, that the inhabitants were en-

(1) 6 Ind. Cas. 271; 14 C. W. N. 544; 11 Cr. L. J. 365.

(2) 10 C. W. N. 845; 4 Cr. L. J. 42.

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tirely Hindus and that their places of worship were included in the *Mohallas*. The minority of the Jury found in accordance with this evidence and were of opinion that, in these circumstances, no inconvenience was caused to the general public and that, therefore, no order for the removal of the obstructions should be passed. On behalf of the Crown evidence was led to prove that the places were public ways and that inconvenience was caused to the public. It seems to me that the real point before the Jury was, whether the places were public ways or not, and this was a point which the Magistrate should himself have decided. It is quite clear from the order of the District Magistrate of the 27th October 1922 that it was brought to his notice that in certain cases evidence was intended to be produced that the obstructions were not on a public way. He, therefore, should not have left it open to the Jury to enquire into any cases in which this claim was put forward. He should, in my opinion, have called upon the parties to specify the particular cases in which they intended to lead such evidence, and should then have himself disposed of the question. I notice that in his final order of the 10th November the District Magistrate says, "Practically all of them (*i. e.*, the obstructions) including those in which I have taken no action under section 133, Criminal Procedure Code, were built on the public way; and in all cases now under consideration the Municipal Committee claim that they were built on the public way." This shows that, even at the time of his final order, the District Magistrate had not reached a finding as to which obstructions were and which were not on the public way. The words "*practically all*" make this clear."

The next objection raised by Mr. Puri was that the order passed by the District Magistrate was not served on the persons against whom it was made within the meaning of section 134 of the Code. He urges that the names of the persons affected should have been given in the order and that they should have been served personally in the manner provided for the service of summonses in section 69 to 72 of the Code. The word 'person' includes any company or association or body of persons whether incorporated or not; see the definition in

section 21 of the Indian Penal Code and also in the General Clauses Act. It can, therefore, I consider, include all the male adults residents in a certain *Mohalla*. In the present case the order was served on 8 or 10 of the principal residents of each *Mohalla* and by sticking it up in conspicuous places in the *Mohallas*, and the fact that a number of persons appeared in each case and instructed Counsel to urge their objections shows that they were duly informed. It has been held that, when the order is communicated to those concerned, it is immaterial that the method in which it was served on them is not strictly in accordance with the provisions of section 134 of the Criminal Procedure Code. *Nur Jan v. Queen-Empress* (3).

The third point raised was, that the appointment of the Jury was bad because two of the Jurors were appointed on the 25th October and the remainder on the 27th. All that section 138 lays down as regards the appointment of a Jury is that the Magistrate shall forthwith appoint a Jury consisting of an uneven number of persons and so on. The word 'forthwith' must be interpreted, in my opinion, in a reasonable way. I think it merely means that the Magistrate shall appoint a Jury as soon as he reasonably can. In the present case he appointed at once the two nominees of the objectors and had to consider whom he should appoint as the remaining three members. On behalf of the objectors he was especially asked if possible to appoint three Europeans and he had to ascertain who would be willing to act. The remaining three were appointed within two days and, in my opinion, there was no unreasonable delay and the terms of the section were substantially complied with.

Mr. Puri also adds that the question whether there was an obstruction or not was not one for the Jury to decide. This question was not, however, left for the Jury at all. The District Magistrate has noted on the record that the existence of the obstructions was admitted. There is, therefore, no force in this objection.

The first objection has, however, in my opinion, force. The District Magistrate acted without jurisdiction in not deciding but leaving to the Jury the question whether the obstructions or any of them were on a public

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way, and I would, therefore, set aside his orders in all the cases before us, leaving him if so advised to take fresh proceedings.

Florde, J.—I concur.

There are two questions arising for determination in this case. The first is, whether certain orders made by the Magistrate under the special powers conferred upon him by Chapter X, section 133 to 143 of the Code of Criminal Procedure are valid; and the second is, whether, if the orders are not valid, this Court should interfere in the exercise of its discretionary jurisdiction to set these orders aside.

The orders which are impugned are dated, respectively, the 27th October and the 10th of November 1922. The first of these purports to be made under the provisions of section 138 and the second under section 139 of the Code.

The order of the 27th October, after appointing the three members of the Jury whom the Magistrate has power to appoint, and fixing dates for the Jury to inspect the various sites and consider the matters they had to determine, proceeds as follows: "Counsel admit that the obstructions have been built by their clients without the permission of the Municipal Committee. They wish to produce evidence in this and similar cases that:—

(1) the *Mohallas* concerned are occupied by Hindus only;

(2) that the obstructions do not cause inconvenience to any one;

(3) that in particular cases the obstructions are not on a public way; and

(4) that in particular cases they are necessary for the protection of religious places.

The order then concludes by stating that

"Since the Municipal Committee, Multan, is interested in the above issues notice will issue to it that these proceedings are in progress and it will be given the opportunity of deputing a servant or representative to watch the proceedings before the Jury should it wish to do so."

Now, this order is objected to on two grounds; firstly, that it leaves it to the Jury to determine whether or not some of the obstructions are in a public way; and, secondly, that it is vague and indefinite as it does not specify in what particular cases that issue is left to the Jury.

In my opinion both these objections are sound. The duty of determining whether the site of the obstructions is a public place or a public way is cast by Statute on the Magistrate in the first instance, and under no circumstances can it be left to the Jury. If the Magistrate finds, on the parties appearing before him to show cause against the conditional order, that a question of title to the *locus in quo* is involved, he must refuse to act in the particular case unless he comes to the conclusion that the claim of title is not *bona fide*. Further, unless he finds that the place or the way, as the case may be, is public, he has no power to proceed with the investigation. In the present case it is apparent on the face of the order itself that this question which goes to the root of the Magistrate's jurisdiction, has been wrongly left to the Jury.

On this ground alone the order is bad.

The same objections applied to the order of the 10th November in referring to the obstructions complained of the orders reads as follows:—"Practically all of them, including those in which I have taken no action under section 133, Criminal Procedure Code, are built on the public way; and in all cases, now under consideration the Municipal Committee claim that they are built on the public way." Here, again, it appears that even after the Jury have investigated the question as to whether or not the obstructions are on a public way, the order infers that some are not, and as in the case of the former order, it has the added defect of ambiguity, inasmuch as it does not specify which of them are and which are not so built. It has been urged by Counsel for the Crown that, even if the orders are bad, this Court should not interfere as the issue of title left to the Jury was so left at the instance of the objectors themselves. I cannot accept that view.

The Courts in India have by a series of decisions made it clear that, where questions as to the public nature or private ownership of the *locus* of an obstruction are left to a Jury, the order of the Magistrate referring the determination of such a question to the Jury is bad and should be quashed. [In the matter of the petition of Chundermath,

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Sen (4), *Matuk Dhari Tewari v. Hari Madhab Das* (5), *Nasaruddi v. Akiluddi* (6), *Dularam Deb v. Baishnab Charan Deb* (2) and *Churaman v. Emperor* (7). This has been held even in cases where the defect in the proceedings does not appear, that is, where a want or an excess of jurisdiction is apparent on the face of the proceedings themselves; or where the order of the Magistrate is itself indefinite or ambiguous, the objection to allowing an order in such a case to stand is far stronger.

For these reasons, I am of opinion that this Court has no alternative but to quash the two orders objected to.

Z. K.

Orders set aside.

- (4) 5 C. 875; 6 C. L. R. 379; 2 Ind. Dec. (N. S.) 1165.
 (5) 31 C. 979; 9 C. W. N. 72; 2 Cr. L. J. 11.
 (6) 3 C. W. N. 345.
 (7) 26 Ind. Cas. 172; 12 A. L. J. 1024; 15 Cr. L. J. 724.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 494 OF 1922.

June 26, 1922.

Present.—Mr. Justice Broadway.

BAHAWALA AND OTHERS—ACCUSED

—PETITIONERS

versus

DUNI CHAND—COMPLAINANT—

RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145—Order restoring possession, validity of.

All that a Magistrate is empowered to do under section 145 of the Criminal Procedure Code is to declare that a certain party is entitled to possession of the property in dispute. He has no jurisdiction to order restoration of possession. [p. 622, col. 1.]

Raku v. Harnaman, 40 Ind. Cas. 308; 40 P. R. 1917 Cr.; 18 Cr. L. J. 660; 28 P. W. R. 1917 Cr., *Emperor v. Rameshar*, 27 A. 300; 1 A. L. J. 619; A. W. N. (1904) 264; 1 Cr. L. J. 104, *Tulshi Ram v. Abrar Ahmad*, 30 Ind. Cas. 1002; 37 A. 654; 13 A. L. J. 932; 16 Cr. L. J. 714 and *Moore v. Monoranjan Guha*, 12 C. W. N. 696; 7 C. L. J. 547, relied upon.

At the same time, if a party is declared to be entitled to possession, and the world at large is forbidden to disturb his possession, he would be entitled to take possession and no one would have any right to interfere with his doing so. [p. 622, col. 1.]

Petition, under section 439, Criminal Procedure Code, for revision of an order

of the District Magistrate, Jhang, dated the 13th February 1922, affirming that of the Magistrate, First Class, Jhang, dated the 6th December 1921, restoring the possession of the disputed land to the complainant under section 145, Criminal Procedure Code.

Lala Ram Chand Manchanda, for the Petitioners.

Dr. G. C. Narang, for the Respondent.

JUDGMENT.—This petition for revision has arisen out of certain proceedings under section 145, Criminal Procedure Code, in connection with some agricultural land situate in village Gilawala in the District of Jhang.

The proceedings were instituted by *Bawa Duni Chand* who alleged that he had been in possession of the lands in question since 1904, and that Bahawala and others, *kamins* of the village, had forcibly taken possession of the same on the 14th March 1921.

On the 21st March 1921 the Magistrate passed the order contemplated by Section 145 (1), Criminal Procedure Code, and called on the parties to file their written statements and produce evidence.

On the 6th December 1921 the Magistrate passed the final order in the case.

He held that the complainant had been in continuous possession of the land till the 14th March 1921 when he had been forcibly dispossessed by Bahawala and his companions. He, therefore, acting under the first proviso to clause (4) of section 145, Criminal Procedure Code, treated the complainant as if he had been in possession at the date of the order calling for written statements, i. e., 21st March 1921, and then proceeded as follows:—

“Accordingly, under section 145, Criminal Procedure Code, I direct that the complainants’ possession of the disputed land be restored, and further forbid any interference with his possession till he is evicted in due course of law.”

The *kamins* filed a petition for revision in the Court of the District Magistrate which was rejected and they have now come up to this Court through Mr. Ram Chand Manchanda. For the respondent I have heard Dr. Gokal Chand Narang.

The first point raised was, that the whole of the proceedings were vitiated by the omission to give the notice to the petition-

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ers that is required by section 145 (1), Criminal Procedure Code. A reference to the record shows that on the 6th May 1921 the Magistrate recorded an order in which it is specifically set out that notice to the parties had been issued in accordance with law. I, therefore, hold that there is no force in this objection. It was then contended that the order directing that "the complainant's possession of the disputed land be restored" was bad inasmuch as the Magistrate had no power to make such an order.

In this connection, my attention was drawn to *Kaku v. Harnaman* (1), *Emperor v. Rameshar* (2), *Tulshi Ram v. Abrar Ahmad* (3) and *Moore v. Monoranjan Guha* (4). A reference to these authorities shows that they are in point and in them it is clearly laid down that, in proceedings under section 145, Criminal Procedure Code, a Magistrate has no jurisdiction to order restoration of possession.

The section (145) itself contains no provision to the effect that a party in whose favour the order is made is to be put into possession nor does this section provide any machinery by which the successful party can have his possession restored by the Court. All that the Magistrate is empowered to do is to declare that he is entitled to possession.

At the same time, if a party is declared to be entitled to possession, and the world at large is forbidden to disturb his possession, he would be entitled to take possession and no one would have any right to interfere with his doing so. It follows, therefore, that, though the order of the Magistrate in this case is technically erroneous, the ultimate result is practically the same. The order being wrong, however, must be amended, and I accordingly eliminate the words directing restoration and substitute therefor a declaration that the complainant is entitled to possession. In all other respects the order will stand.

Z. K.

Order accordingly.

(1) 40 Ind. Cas. 308; 40 P. R. 1917 Cr.; 18 Cr. L. J. 660; 28 P. W. R. 1917 Cr.

(2) 27 A. 300; 1 A. L. J. 619; A. W. N. (1904) 264; 1 Cr. L. J. 1042.

(3) 30 Ind. Cas. 1002; 27 A. 654; 13 A. L. J. 932; 16 Cr. L. J. 714.

(4) 12 C. W. N. 696; 7 C. L. J. 547.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 26 OF 1922.

March 15, 1922.

Present:—Mr. Justice Spencer and
Mr. Justice Ramesam.

CHAKRAKODI SHAMA SHASTRI—
APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 233, 234—Falsification of accounts—Each entry, whether separate offence—Joinder of more than three charges at one trial—Illegality.

The joinder of more than three charges at a single trial is fatal to the trial. [p. 623, col. 1.]

Subrahmaniam Ayyar v. King-Emperor, 25 M. 61; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 11 M. L. J. 233; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.), relied on.

Each false entry which amounts to an act of falsification constitutes a separate offence, although a number of false entries might be proved to cover one defalcation. [p. 623, col. 1.]

Queen-Empress v. Mati Lal Lahiri, 26 C. 560; 3 C. W. N. 412; 13 Ind. Dec. (N. S.) 959 and *Raman Behary Das v. Emperor*, 22 Ind. Cas. 729; 41 C. 722; 18 C. W. N. 1152; 15 Cr. L. J. 153, followed.

Where under one of three charges against an accused person in the same trial, there were two acts of defalcation covered by two false entries and the only thing to connect them together was the fact that the goods were received the same day from the same depositor:

Held, that this amounted to a joinder of really more than three charges in a single trial and was fatal to the trial and that the convictions were liable to be quashed. [p. 623, col. 1.]

Subrahmaniam Ayyar v. King-Emperor, 25 M. 61; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 11 M. L. J. 233; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.), followed.

Criminal appeal against an order of the Court of Session of the South Kanara Division, in Case No. 32b of the Calendar for 1921.

Mr. K. Y. Adiga, for the Appellant.

Mr. J. C. Adam, Public Prosecutor, for the Crown.

JUDGMENT.—We have no hesitation in finding that the conviction of the accused in this case was vitiated by the joinder of the charges for more than three offences at one trial. The third charge related to two false entries EE—12 and EE—9, and these entries were concerned with separate transactions by which the accused took out two advances of Rs. 28,700 and Rs. 1,950, respectively, on two separate deposits of areca, of which 525 maunds of old areca and 520 maunds

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of new areca were not received. These constitute, in our opinion, two separate offences, for, as was pointed out in *Queen Empress v. Mati Lal Lehiri* (1), which was followed in another decision of the same Court in *Raman Behary Das v. Emperor* (2) each false entry which amounts to an act of falsification constitutes a separate offence, although a number of false entries might be proved to cover one defalcation.

In this instance under the third charge there were two acts of defalcation covered by two false entries and the only thing to connect them together was the fact that the goods were received on the same day from the same depositor. There were, besides this third charge, two other charges. The joinder of more than three charges at a single trial is fatal to the trial as laid down in *Subrahmaniam Ayyar v. King-Emperor* (3) and the conviction is, therefore, quashed and the accused is acquitted. We do not consider that there should be re-trial of the accused on the present charges.

V. N. V.

Appeal allowed.

(1) 26 C. 560; 3 C. W. N. 412; 13 Ind. Dec. (N. S.) 959.

(2) 22 Ind. Cas. 729; 41 C. 722; 18 C. W. N. 1152; 15 Cr. L. J. 153.

(3) 25 M. 61; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 11 M. L. J. 233; 2 Weir 271; 8 Sar. P. C. J. 160 (P.C.).

LAHORE HIGH COURT.

CRIMINAL REVISION CASE NO. 156 OF 1922.
May 12, 1922.

Present:—Sir Shadi Lal, Kt., Chief Justice.
THE MUNICIPAL COMMITTEE
OF LAHORE—PETITIONER

versus

RATTAN CHAND—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 250
—"Person," meaning of—Municipal Committee,
whether can be directed to pay compensation.

The word "person" in section 250 of the Criminal Procedure Code includes not only a natural person but also a juristic person, for instance, a Municipal Committee.

A Municipal Committee is, therefore, not exempt from the operation of section 250 of the Criminal Procedure Code.

Case reported by the Sessions Judge, Lahore, with his No. 106 of 25th January 1922.

FACTS.—It is alleged that the accused (Rattan Chand) had been depositing certain articles on the foot path and the Municipal Committee of Lahore directed the prose-

cution of Rattan Chand for an offence under section 173 of Act III of 1911. The Magistrate discharged the accused and ordered the Municipal Committee to pay Rs. 15 as compensation to the accused under section 250, Criminal Procedure Code.

GROUND.—This is an application to set aside the order passed by the Magistrate, under section 250, Criminal Procedure Code, against the Municipal Committee, Lahore.

The facts are that the Municipal Committee of Lahore, directed the prosecution of a man called Rattan Chand, for an offence under section 173 of Act III of 1911. The Magistrate discharged the accused and ordered the Municipal Committee to pay Rs. 15 as compensation to the accused under section 250, Criminal Procedure Code. That section lays down that a Magistrate may direct the person upon whose complaint and information the accusation was made to pay compensation to the accused. In my opinion, a Municipal Committee cannot be described as a person and, therefore, the order of the Magistrate was illegal.

I forward the case to the High Court with the recommendation that the order be set aside.

Lala Madan Gopal, for the Petitioner.

Mr. Gullu Ram, for the Respondent.

ORDER.—The Magistrate, while acquitting the accused of an offence under section 173 of the Punjab Municipal Act (III of 1911), has directed the Municipal Committee, upon whose complaint the accusation was made, to pay Rs. 15 as compensation to the accused. The Sessions Judge is, however, of opinion that a Municipal Committee cannot be described as a "person" within the meaning of section 250, Criminal Procedure Code; and he has accordingly reported the case under section 438, Criminal Procedure Code, for the order of this Court.

The learned Sessions Judge is evidently under the impression that the expression "person" denotes only a natural person; but this is clearly a wrong view of the law. The expression includes not only a natural person but also a juristic person. Indeed, section 3 (39) of the General Clauses Act (X of 1897) makes it perfectly clear that the word "person" includes "any company

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or association or body of individuals, whether incorporated or not."

I must, therefore, hold that the Municipal Committee is not exempt from the operation of section 250 of the Criminal Procedure Code, and that the order of the Trial Court is not open to any legal objection.

Z. K.

Order accordingly.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 427 OF 1922.

(CASE REFERRED NO. 40 OF 1922.)

November 1, 1922.

Present:—Mr. Justice Wallace.

In re PUNIYA SYAMALO—ACCUSED.

Madras Local Boards Act (XIV of 1920), s. 221—Criminal Procedure Code (Act V of 1898), ss. 435, 439—Government of India Act, 1915 (5 & 6 Geo. V., C. 61), s. 107—Magistrate acting under s. 221, Local Boards Act, whether "inferior Criminal Court"—Revision—Order directing payment of fees—Fine, whether can be imposed.

A Magistrate taking action under section 221 of the Madras Local Boards Act of 1920 is an "inferior Criminal Court" within the meaning of section 435 of the Criminal Procedure Code, and an order made by him under section 221 is subject to the revisional jurisdiction of the High Court under section 439 of the Criminal Procedure Code or section 107 of the Government of India Act.

Under section 221 of the Madras Local Boards Act of 1920 the imposition of a fine in addition to directing the payment of the fees due is illegal.

Case referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by the Sessions Judge of Ganjam, at Berhampore, in his letter dated 24th April 1922.

Mr. Vaz, for the Public Prosecutor, for the Crown.

ORDER.—This is a case referred by the Sessions Judge of Ganjam. The Town Sub-Magistrate of Berhampore purporting to act under section 221 of Act XIV of 1920 (Madras Local Boards Act) not only directed a toll gate lessee to pay up fees due from him to the Ganjam District Board, but fined him Rs. 25 as well. The Sessions Judge is of opinion that the levy of fine is illegal and I quite agree with him.

The point of some difficulty raised is, whether this Court, sitting in the exercise of its powers of criminal revision, has authority to deal with such a case; in other words, whether the Magistrate is, when he takes action under section 221

of Act XIV of 1920; an inferior criminal Court within the meaning of section 435 of the Code of Criminal Procedure.

The word "Magistrate" is not defined in Act XIV of 1920, consequently, I must fall back on the definition in the Madras General Clauses Act, *viz.*, "any person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure." The word "warrant" is also not defined in Act XIV, of 1920, but I think it can have no other meaning than a warrant for the collection of a fine as if in a criminal case, such as the Magistrate would ordinarily issue under section 386 of the Code of Criminal Procedure for the collection of a fine in a criminal case. Otherwise, the Local Boards Act provides no machinery by which the "warrant" issued under section 221 is to be carried out.

Section 221, therefore, has to be read as if the Magistrate had fined the defaulter for the amount due to the Local Board and issued a warrant under section 386 of the Code of Criminal Procedure for its collection, and the collection of the fine is not by any method of execution of a civil order or decree, but by the method for the collection of a fine in a criminal case.

In this view, I think it must be inferred that the Magistrate, in acting under section 221 of the Local Boards Act, is acting as a Criminal Court, and that his orders thereunder are, therefore, subject to the revisional jurisdiction of this Court.

In imposing a fine in addition to the recovery of the fees due, the Magistrate was clearly acting beyond the jurisdiction conferred on him by section 221, Local Boards Act. If the power in this Court to set aside such an order made without jurisdiction is not conferred by section 435 of the Code of Criminal Procedure, this Court can interfere under section 107 of the Government of India Act.

I, therefore, set aside the order of the Magistrate, so far as it relates to the imposition of the fine and the sentence of imprisonment in default of payment, and direct that the fine, if paid, be refunded.

V. N. V.

Z. K.

*Order set aside;
Fine refunded.*

MAHABIR RAM v. RAMBAHADUR DUBEY.

PATNA HIGH COURT.

CIVIL REVIEW No. 358 OF 1922.

March 16, 1923.

Present:—Mr. Justice Ross.

MAHABIR RAM—PETITIONER

versus

RAMBAHADUR DUBEY AND ANOTHER—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Limitation Act (IX of 1908), s. 18—Execution of decree—Sale, application to set aside sale—Fraud—Extension of limitation.

A sale in execution may be annulled on the ground of fraud even if it is not proved that the auction-purchaser has been a party to the fraud, and it is not necessary that fraud should be alleged against him. [p. 625, col. 2.]

Bipin Bihari Bejali v. Kanti Chandra Mandal, 18 Ind. Cas. 715, followed.

In order to make limitation operate when a fraud has been committed by one who has obtained property thereby it is for him to show that the injured complainant had had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought or the application to be made within limitation. In other words, the party guilty of fraud must show that the continuing effects of the fraud have been removed. [p. 626, col. 1.]

Rahimbhoy Habibbhoy v. Charles Agnew Turner, 17 B. 341; 20 I. A. 1; 6 Sar. P. C. J. 256; 17 Ind. Jur. 40; 9 Ind. Dec. (N. S.) 222 and *Jotindra Mohun Rai Chowdhury v. Brojendra Kumar Datta Munshi*, 24 Ind. Cas. 249; 19 C.W.N. 553, followed.

Kailash Chandra Haldar v. Bissonath Pramanic, 1 C. W. N. 67, *Babu Das Narayana Singh v. Mir Muhammad Yusuf*, 61 Ind. Cas. 823; 2 P. L. T. 401; (1921) Pat. 181; 3 U. P. L. R. (Pat.) 33; 6 P. L. J. 319 and *Abubaker Sahib v. Mohidin Sahib*, 20 M. 10; 7 Ind. Dec. (N. S.) 7, *Pasumarti Payidanna v. Ganti Lakshminarasamma*, 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J. 525, referred to.

Appeal from an order of the District Judge, Muzaffarpur, dated the 18th September 1922, reversing that of the Munsif, Bettiah, dated the 27th March 1923, in Execution Case No. 705 of 1921.

Mr. A. P. Upadhyaya, for the Petitioner.

Mr. S. Dayal, for the Opposite Party.

JUDGMENT.—This is an application by the auction-purchaser at a sale in execution of a decree, against an order of the District Judge of Muzaffarpur reversing the decision of the Munsif of Bettiah and setting aside the sale.

Two points are urged in support of the application. The first is that, as there is no allegation of fraud against the auction-purchaser, the sale cannot be set aside. Reference is made to the decision in *Mohesh*

Chunder Bagchee v. Dwarka Nath Moitra (1). All that was said in that case was that, however fraudulent the conduct of the plaintiff may have been, if the purchaser is not implicated in the fraud, the validity of the sale would not be affected by the badness of the decree under which the sale took place. There is no question of the decree being vacated in the present instance. We are now concerned with the question of setting aside the sale under O. XXI, r. 90, Civil Procedure Code. Now, it is plain from the terms of that rule which empowers the Court to set aside a sale on the ground of material irregularity or fraud in publishing or conducting it, that it is not necessary that fraud should be alleged against the auction-purchaser who had no existence at the time of publishing or conducting the sale, and it will seldom be possible. There is also direct authority in the decision in *Bipin Bihari Bejali v. Kanti Chandra Mandal* (2), that a sale in execution may be annulled on the ground of fraud, even if it were not proved that the auction-purchaser had been a party to the fraud.

The second ground taken is that there is no allegation or proof that the judgment-debtor was kept out of knowledge of his right to make the application by any fraud of the decree-holder and, consequently, section 18 of the Limitation Act cannot apply, and unless section 18 does apply, the application is out of time because it was not made until the 16th December 1921, whereas the sale took place on the 15th September 1921. Now, the finding of the District Judge is, that there was a gross under-valuation in the sale-proclamation where the property, which was probably worth Rs. 1,400, was valued at Rs. 80 only. He further found that everything pointed to the conclusion that the processes were fraudulently suppressed by the landlord's servants and the judgment-debtors were kept in the dark about the sale until it was over, and that they made their application under O. XXI, r. 90, Civil Procedure Code when they came to know of the sale owing to the auction-purchaser applying for delivery of possession. The learned District Judge found that they were kept in the dark by fraud

(1) 24 W. R. 260.

(2) 18 Ind. Cas. 715.

SHIDDAPPA v. PANDURANG VASUDEV.

and so their application was not barred by limitation. In support of his argument, the learned Vakil referred to *Kailash Chandra Halder v. Bissonath Paramanic* (3), *Babu Das Narayana Singh v. Mir Muhammad Yusuf*, (4), *Abubaker Sahib v. Mohidin Saheb* (5) and *Pasumarti Payidanna v. Ganti Lakshminarasamma* (6). The principle, however, has been laid down by the Judicial Committee in *Rahimbhoy Habibbhoy v. Charles Agnew Turner* (7) and it is that, in order to make limitation operate when a fraud has been committed by one who has obtained property thereby it is for him to show that the injured complainant had had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought. It seems clear that the party guilty of fraud must show that the continuing effects of the fraud have been removed. The judgment-debtors were kept from knowledge of the sale by the fraud of the decree-holder and, consequently, must also have been kept from knowledge of their right to apply to set the sale aside so long as that fraud continued and its effect was not removed. There is direct authority on this point in *Jolindra Mohun Rai Chowdhury v. Brojendra Kumar Dalla Munshi* (8). It is true that the under-valuation would not have this effect and mere non-publication of the notices would also not have this effect; but the finding is that there was a fraudulent suppression of service, and unless the effect of that fraud is removed, the judgment-debtors were entitled to the benefit of section 18 of the Limitation Act.

In my opinion, therefore, both grounds of this application fail and it must be dismissed with costs.

Hearing fee one gold mohur.

Z. K. Rule discharged.

(3) 1 C. W. N. 67.

(4) 61 Ind. Cas. 823; 2 P. L. T. 401; (1921) Pat. 181; 3 U. P. L. (Pnt.) 33; 6 P. L. J. 319.

(5) 20 M. 10; 7 Ind. Dec. (N. S.) 7.

(6) 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J. 525.

(7) 17 B. 341; 20 I. A. 1; 6 Sar. P. C. J. 256; 17 Ind. Jur. 40; 9 Ind. Dec. (N. S.) 222.

(8) 24 Ind. Cas. 249; 19 C. W. N. 553.

BOMBAY HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 37 OF 1922.

January 25, 1923.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.

SHIDDAPPA bin MAHALINGAPPA

AND ANOTHER—DEFENDANTS

—APPELLANTS

versus

PANDURANG VASUDEV CHATE—

PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Mortgage by widow without necessity—Improvements by mortgagee—Mortgagee, whether entitled to compensation.

Where a Hindu widow mortgages property without necessity agreeing that the mortgagee should re-build a shop standing on the property which, at the time of the mortgage, was in a ruinous condition, and the mortgagee re-builds the shop, the reversioner of the widow cannot seek to obtain possession of the property without making compensation to the mortgagee, or to his successor. The mortgagee, at any rate, is entitled to remove what he has placed on the property at his own expense.

Vrijbhukandas Dwarkadas v. Dayaram Jadavji, 32 B. 32; 9 Bom. L. R. 1181, distinguished.

Kidar Nath v. Mathu Mal, 18 Ind. Cas. 946; 40 C. 555; (1913) M. W. N. 403; 13 M. L. T. 434; 127 P. L. R. 1913; 17 C. W. N. 797; 15 Bom. L. R. 467; 77 P. R. 1913; 25 M. L. J. 176 (P. C.), followed.

Second appeal against the decision of the District Judge Bijapur, in Appeal No. 55 of 1919.

Mr. A. G. Desai, for the Appellants.

Mr. G. N. Thakor with Mr. R. A. Jahagirdar, for the Respondent.

JUDGMENT.—The only question in this appeal is, whether this case is exactly similar to the case of *Vrijbhukandas Dwarkadas v. Dayaram Jadavji* (1), so that the plaintiff-reversioner could be held entitled to recover the property in the condition in which it was when the widow died. The Trial Court directed that the plaintiff should recover possession of the land on which the shop in suit stood, with liberty to defendants forthwith to commence to remove their building, the removal to be completed within one year from the date of the order.

The decision was reversed by the Appellate Judge who directed the plaintiff to recover possession of the shop as it stood. The widow, when she mortgaged the property

(1) 32 B. 32; 9 Bom. L. R. 1181.

MATHOOR GRAMAN V. MANUKURISI VARIATH LAKSHMI.

without necessity, agreed that the mortgagee should practically re-build the shop, which, at the time of the mortgage, was in a ruinous condition. It seems to us difficult to see how, under the principles of Hindu Law, or any principles of equity, the reversioner can seek to get possession of the property, with the shop standing on it, without making any compensation to the person who built the shop or to his successor. It seems to us that the facts in *Vrijbhukandas Dwarkadas v. Dayaram Jadavji* (1) are entirely different, and that the question which we have to decide here is whether, under general principles, the mortgagee should lose the benefits of the money he spent on the building with the consent of the widow, or whether the reversioners are entitled to the whole of the benefit. Clearly, if there had been a sale by the widow, which would be voidable against the reversioner, the reversioner would be bound to pay the purchaser the amount by which the value of the property had been enhanced by improvements effected by him. That was decided in *Kidar Nath v. Mathu Mal* (2). There the respondent on the death of a Hindu widow brought a suit as the next heir of her husband to set aside an alienation made by the widow in favour of the appellant. The Chief Court allowed the alienee Rs. 1,400 which represented half the expenditure by him on the property. The appellant contended that he was entitled to what he had spent. The Privy Council decided that that was not the right principle on which to assess the amount payable to the alienees as compensation, as in such cases it should always be borne in mind that the amount of the expenditure made had occasionally very little to do with the real issue, and that that issue was, to what extent had enhancement of the subject-matter been produced.

That is the issue and we cannot agree with the contention of Mr. Thakor, that the judgment of the Privy Council does

not uphold the principle that compensation to an alienee from a Hindu widow may be awarded in certain circumstances.

In the next place, we cannot see how the position of the mortgagee who improves the property with consent of the widow can be distinguished, except that the position of the mortgagee who improves the property mortgaged to him is not exactly the same as the position of a person who thinks he has got an absolute title to the property by sale, still, there is equity in favour of the mortgagee. The only question to our mind is, to what extent has that equity been established.

If the successful reversioner is not prepared to compensate either wholly or in part the mortgagee for what he has spent on the property, then we think the mortgagee is entitled to remove what he has placed on the property at his own expense. We think, therefore, that the decree of the Trial Court was the proper one to make in this case, and the decree must be restored with costs in this Court and the Court below.

W. C. A.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 687 OF 1921.

January 17, 1923.

Present.—Justice Sir William Ayling, Kt., and Mr. Justice Ramesam.

MATHOOR GRAMAN RAMA PATTAR'S SON RAMASAMI PATTAR AND OTHERS

—DEFENDANTS NOS. 3, 8 TO 10

—APPELLANTS

versus

MANUKURISI VARIATH LAKSHMI KUARASSIAR AND ANOTHER—PLAINTIFFS

NOS. 2, 3—RESPONDENTS.

Construction of document—Grant—Grantee to hold on condition of conducting Vazhipadu—Tenure, whether resumable—Burden of proof—Res judicata—Incidental observations.

Where under the terms of a grant, the grantee was to hold and enjoy the properties for ever conducting "Vazhipadu to the deity," i.e., offering of rice of which the greater part returns to the donor:

(2) 18 Ind. Cas. 946; 40 C. 555; (1913) M. W. N. 403; 13 M. L. T. 434; 127 P. L. R. 1913; 17 C. W. N. 797; 15 Bom. L. R. 467; 77 P. R. 1913; 25 M. L. J. 176; 234 P. W. R. 1913. (P. C.)

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Held, that the obligation to make the show of an offering was a nominal and a purely moral one and the words of the grant were too vague to connote a condition on breach of which the lands could be resumed and the grant was, therefore, not a service-grant liable to be resumed.

The burden of proving a resumable tenure is on the grantor.

Lakhamgavda v. Keshav Annaji 28 B. 305; 6 Bom. L. R. 364, distinguished.

Observations in a judgment in a suit in which the nature of the tenure of certain lands arose only incidentally and the real issue was, whether a prior decree was properly obtained, are not *res judicata* in a subsequent suit regarding the nature of the tenure of the lands.

Second appeal against decree of the Court of the Subordinate Judge, South Malabar, at Palghat, in Appeal Suit No. 35 of 1920 (Appeal Suit No. 282 of 1920, District Court, South Malabar) preferred against decree of the Court of the Principal District Munsif, Palghat, in Original Suit No. 207 of 1916.

Messrs. T. R. Ramachandra Iyer and C.S. Swaminathan, for the Appellants.

Messrs. C. V. Anantakrishna Iyer and C. Unikanda Menon, for the Respondents.

JUDGMENT.

Ramesam, J.—The suit was brought to recover certain lands, known as Kunnathupadam lands on the ground that they belong in *jenm* to the Kurichimalai Deva-swom represented by the first plaintiff; that they were granted to the first defendant on condition of rendering *Kazhagam* service in the temple; that he has ceased to render *Kazhagam* service and hence the lands are liable to be resumed; that the first defendant's right in the lands was sold in execution of a decree (Original Suit No. 25 of 1915) and purchased by the second and third defendants, and that the first defendant though called upon to surrender the lands failed to do so.

The defendants plead that the lands were not held on condition of rendering *Kazhagam* service and were not resumable.

I will now refer to the previous litigations bearing on the tenure under which the suit-lands were held. In 1851 the predecessor-in-title of the first plaintiff sued the predecessor-in-title of the first defendant for possession of the same lands on practically the same allegations; but the suit was compromised, Exhibit B. was the petition of compromise in which it was stated that "the lands and *paramba* involved

in the above suit had been given away long time back as offering (*Vazhipaddu*) and as *Uruliyilvadakam* for the Kurichimala Thevar (deity) to the Kurichimala Variyam of the first and third to sixth defendants who are the *Karaima Kazhagam* holders of the temple." It then proceeds to state that first plaintiff executed a deed of consent "to the effect that the said properties may be held and enjoyed on *Saswatham* right after conducting the offerings (*Vazhipadu*) in future." The deed referred to in this petition is Exhibit A, the operative words in which are, "you are to hold the said properties for ever as *Swastham* as in the past and to enjoy the same conducting *Vazhipadu* to the deity." In my opinion the tenure on which the suit-lands are held depends on a construction of Exhibit A.

In Original Suit No. 501 of 1890, the present first defendant and other members of his *tarwad* obtained a decree against the then *karnavan* of the plaintiff's *tarwad* for wages for *Kazhagam* service and Original Suit No. 152 of 1892 was filed by the junior members of the plaintiff's *tarwad* for declaring that as the defendants held the present suit-lands as wages for *Kazhagam* service, the decree in Original Suit No. 501 of 1890 was improperly obtained. It was found that the present suit-lands were not held as wages for *Kazhagam* service but for utilising the income for the *nivadyam* in the temple. The Courts below, relying on the latter part of this finding and considering that *nivadyam* is a kind of *Kazhagam* held that the suit-land is held on condition of performing *Kazhagam* service and decreed the plaintiff's suit as the first defendants has ceased to perform the services.

In the first place, it is clear that as the real issue in Original Suit No. 152 of 1892 was whether the decree in Original Suit No. 501 of 1890 was properly obtained and the nature of the tenure of the suit-lands arose only incidentally, therefore, the decree in Original Suit No. 152 of 1892 is not *res judicata* against the plaintiff on the question whether the suit-lands were held for *Kazhagam* service or not. Still less is it *res judicata* against defendants on the question whether they were held for any other service. The proper view is thus not to regard the observations in the judgment of Original Suit No. 152 of 1892

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as. finally deciding anything regarding the tenure of the suit lands.

One point is obvious from the history of the suit-lands as set forth above, viz., that whatever the defendant had to do in connection with the suit-lands was certainly not *Kazhagam*. From 1851 onwards, the defendants always denied that the lands had anything to do with *Kazhagam* service and they always succeeded in this plea. It is significant that neither Exhibit A, or B connects the lands with *Kazhagam*. Having regard to the terms of Exhibit A (1):—"you are to enjoy the same conducting *Vazhipadu* to the deity" and to the meaning of the term *Vazhipadu* in Guntart's Dictionary—"Offering of rice and of which the greater part returns to the donor." It seems to me that the grant was not at all a service-grant. The obligation to make the show of an offering being a nominal obligation seems to be a merely moral one. The burden of proving a resumable tenure is on the grantor: [*Lakhamgavda v. Keshav Annaji* (1) and the words in Exhibit A (1) are too vague to connote a condition, on breach of which the lands could be resumed. On a construction of Exhibit A (1) the third issue ought to be found against the plaintiff. The second appeal must be allowed, and plaintiff's suit dismissed with costs of appellants throughout.

Ayling, J.—I agree.

V. N. V.

Appeal allowed.

(1) 28 B. 305; 6 Bom. L. R. 364.

PATNA HIGH COURT.

CIVIL REVISION NO. 361 OF 1922.

March 7, 1923.

Present:—Mr. Justice Das and

Mr. Justice Kulwant Sahay.

RAMESHWARDHARI SINGH AND
ANOTHER—DEFENDANTS—PETITIONERS

versus

SADHU SARAN SINGH AND ANOTHER

—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 151,
152, O. VII, r. 11(c), O. IX, r. 9, O. XX, r. 3,

O. XLVII, r. 1—Failure of plaintiff to pay deficit Court-fees—Rejection of plaintiff—Review—Restoration—Inherent power of Court to set aside order.

An order rejecting a plaintiff under O. VII, r. 11 (c) of the Civil Procedure Code operates as a decree, and once the order is perfected there is absolutely no power in the Court under its inherent jurisdiction either to alter or to add to that order save as provided by section 152 of the Code or on review. [p. 630, col. 2.]

Application from an order of the Subordinate Judge, Shahabad, dated the 28th October 1922.

Messrs. Sultan Ahmad, S. M. Mullick and Jalgobind Pd. Sinha, for the Petitioners.

Messrs P. K. Sen and P. Dayal, for the Opposite Party.

JUDGMENT.

Das, J.—This application is directed against an order passed by the learned Subordinate Judge of Shahabad, dated the 28th October 1922.

The petitioners were the defendants in a suit filed against them by the opposite party in the Court below. On the 16th of March 1922 the Court came to the conclusion that the Court-fees paid by the plaintiffs upon the plaint were insufficient and the Court directed the plaintiffs to pay the deficit Court-fees on or before the 19th April 1922. On the 19th April 1922 the plaintiffs were unable to comply with the order of the learned Subordinate Judge and they asked for time and the Court gave them time till the 20th of May only. On the 20th of May they again applied for time and the Court gave them time till the 22nd of June. On the 22nd of June the plaintiffs made another application for further time to enable them to pay the deficit Court-fees. The Court declined to accede to their application and rejected their plaint under the provision of O. V I, r. 11 (c) of the Civil Procedure Code. Thereafter, the opposite party presented an application under O. IX, r. 9 and section 151 of the Code for restoration of the suit.

It was contended before the Court by the petitioners that the only remedy of the plaintiffs was to apply under O. XLVII, r. 1 of the Civil Procedure Code and that neither O. IX, r. 9, nor section 151 gave any power to the Court to restore the suit after it had rejected the plaint and had signed the decree. The

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learned Subordinate Judge conceded that an application under O. IX, r. 9 was not maintainable. He also thought that the plaintiffs could not apply under O. XLVII, r. 1 of the Code. The reason that he gives for this opinion may be stated in the words of the learned Subordinate Judge. It is as follows :

"It is clear from the language of the order of dismissal that the plaint was rejected under the provision of O. VII, r. 11 (c) though it is not clearly stated there. There is no special provision in the Code for an aggrieved party to get an order made under that rule to be considered and reviewed."

Having rejected the contention of the petitioners that the only remedy of the plaintiffs was to apply under O. XLVII, r. 1 of the Code, the learned Subordinate Judge proceeded to consider whether he could give the plaintiffs any relief under section 151 of the Code. He came to the conclusion that there was power in the Court to restore the suit under section 151 of the Code and that, in the circumstances, he should exercise that power. He accordingly ordered that upon the plaintiffs depositing the deficit Court-fees and paying Rs. 100 as costs to the defendants, the suit would be restored.

In my opinion, there was no power in the learned Subordinate Judge to restore the suit under section 151 of the Code. The order rejecting the plaint under O. VII, r. 11 (c) of the Code operated as a decree, and O. XX, r. 3 provides "that a judgment once signed shall not afterwards be altered or added to save as provided by section 152 or on review." There can be no doubt, in my opinion, that once an order of the Court is perfected, there is absolutely no power in that Court under its inherent jurisdiction either to alter or add to that order, save as provided by section 151 or on review. The order passed by the learned Subordinate Judge must accordingly be set aside.

It is, however, contended by Mr. P. K. Sen on behalf of the opposite party that in coming to the conclusion that an application under O. XLVII, r. 1 of the Code was not maintainable, the learned Subordinate Judge declined the jurisdiction which was vested in him by law.

Mr. Sultan Ahmed on behalf of the opposite party contends before us that, in point of fact, there was no application under O. XLVII, r. 1, before the Court and that, therefore, we are at liberty to disregard the view of the learned Subordinate Judge expressed on this point. There is, in my opinion, no doubt that the learned Subordinate Judge had power to review its order rejecting the petition under O. VII, r. 11 (c). I do not say whether, in the circumstances of the case, the learned Subordinate Judge would have been right in reviewing the order. That point is not before us and it is not right that we should express our opinion on it; but all that we do say is this, that there was complete power in the Court under O. XLVII, r. 1 of the Code to review the order passed by it in rejecting the plaint under O. VII, r. 11 (c) of the Civil Procedure Code. It is quite true that there was no application on behalf of the opposite party asking the Court to deal with the application as an application under O. XLVII, r. 1 of the Code; but the Court having taken the view that it had no jurisdiction whatever to review its own order in rejecting the plaint, it was plainly impossible for the opposite party to ask the Court to deal with that application as an application for review.

In the circumstances, I think, that the opposite party should have an opportunity to ask the Court to deal with his application as an application for review under O. XLVII, r. 1 of the Code.

We set aside the order of the learned Subordinate Judge and direct that, upon the opposite party paying the proper Court-fees upon his application as an application for review, the learned Subordinate Judge will proceed to deal with the application of the opposite party as an application for review.

The petitioners are entitled to the costs of this application, hearing fee three gold *mchurs*.

The learned Subordinate Judge will proceed to deal with this application within a month from the time he receives the record from this Court. If within that time the Court fees are not paid by the opposite party upon the application considered as an application for review, his application will

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stand dismissed. If, within the time allowed, the Court-fees are paid, the learned Subordinate Judge will proceed to dispose of the application without any further adjournment.

The record will be sent down forthwith.

Kulwant Sahay, J.—I agree.

Z. K.

Case remanded.

BOMBAY HIGH COURT.

APPEAL FROM APPELLATE DECREE

NO. 121 OF 1922.

January 30, 1923.

Present.—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

BHAU ABAJI DESHPANDE—

PLAINTIFF—APPELLANT

versus

HARI RAMCHANDRA PATKI

AND ANOTHER—DEFENDANTS

—RESPONDENTS.

Hindu Law—Adoption—Invalid adoption—Subsequent adoption into another family.

An adoption must either be effectual for all purposes, or a nullity. An invalid adoption is no obstacle to the person who was taken in adoption from being validly adopted into another family.

Second appeal against the decision of the Assistant Judge, Belgaum, in Appeal No. 235 of 1920.

Mr. H. C. Coyajee (with him Mr. P. B. Shingne), for the Appellant.

Mr. Bhandarkar (with him Mr. A. G. Desai), for the Respondents.

JUDGMENT.—The plaintiff sued for possession of certain property on the basis of a sale-deed from the daughters of one Krishnaji, dated 14th March 1919. There was an agreement that Rs. 2,000 should be paid after the vendee had recovered possession, and that fact alone leads one to think that the parties to the sale-deed were aware that there was some defect in the title. Krishnaji was the last male-holder of the property. He died leaving a widow, Radhabai, who adopted the first defendant on the 20th May 1913. The second defendant was a vendee from the first defendant.

Obviously, if the adoption was good, the plaintiff would have no rights against the first defendant. But the plaintiff contended that the first defendant had no title as the adopted son of Krishnaji, because he had been previously adopted by one Ramchandra Waman Patki. The *factum* of that adoption was proved. It was also proved, however, that the first defendant was the sister's son of Ramchandra. The parties being Deshastha Brahmins, *prima facie* the adoption of a sister's son would be invalid. No attempt was made to show that in the community to which the parties belonged, a custom had been established to permit the adoption of a sister's son. That being the case, the fact that the first defendant had gone through the ceremony of adoption purporting to result in his passing into the family of Ramchandra, must be considered as a nullity, and would not operate as a defect against his being validly adopted by Radhabai into the family of Krishnaji.

The question whether an invalid adoption confers any rights in the adoptive family is considered by Mr. Mayne in his 9th Edition of Hindu Law, paragraph 176, and the following paragraphs, and after discussing the cases the conclusion arrived at in paragraph 179 that the view taken by the Madras High Court, that an adoption must either be effectual for all purposes, or a nullity, has the merit of being practical and intelligible while doing substantial justice to all parties. We think, therefore, that there was no obstacle in the way of the first defendant being adopted by Radhabai, and it follows that Krishnaji's daughters then had no title to sell the property to the plaintiff. The appeal fails and must be dismissed with costs.

W. C. A.

Appeal dismissed.

SOUTH INDIAN INDUSTRIALS LD. V. ALAMELU AMMAL.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL NO. 58 OF 1921.

January 24, 1923.

Present:—Sir Walter Schwabe, Kt.,
Chief Justice, and Mr. Justice Wallace.
SOUTH INDIAN INDUSTRIALS,
LIMITED, MADRAS—DEFENDANTS—

APPELLANTS

versus

ALAMELU AMMAL—PLAINTIFF—

RESPONDENT.

Negligence—Duty of person carrying on dangerous operation—Damages, suit for—Volenti non fit injuria, applicability of—Fatal Accidents Act (XIII of 1855), s. 1—Damages, ascertainment of.

If persons choose to carry on dangerous operations, it is their duty, not only to the public but also to their servants to take adequate precautions that those operations shall not cause injury to any person. They ought to exercise ordinary care, caution and skill to prevent an accident happening. The mere fact that an accident has happened is strong evidence, in a case of this kind, that the ordinary care, caution and skill required for preventing the happening of an accident have not been exercised. [p. 633, col. 2.]

A mere warning to persons working in the neighbourhood does not amount to taking sufficient precautions. [p. 633, col. 2.]

For a defence based on the maxim *volenti non fit injuria* to succeed it is necessary to prove that the person injured knew of the danger, appreciated it and voluntarily took the risk. [p. 633, col. 1.]

A man cannot be said to have voluntarily undertaken a risk the extent of which he does not appreciate. [p. 633, col. 1.]

Under section 1 of the Fatal Accidents Act, the person suing for compensation is not entitled to claim anything on account of the pain or suffering caused by the death, but only for the financial loss sustained by the death. [p. 633, col. 1.]

The proper way of assessing damages in such a case is to form some estimate of what the value of the continued life of the deceased would have been to the plaintiff and how long it was probable that it would continue. [p. 633, col. 1.]

The fact that the accident was an extraordinary or an unfortunate one is entirely irrelevant so far as the amount of damages to be awarded is concerned. [p. 633, col. 1.]

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 123 of 1921.

Messrs. T. Richmond, V. Rajagopalachariar and K. P. Raman Menon, for the Appellants.

Mr. E. Doraiswami Aiyar, for the Respondent.

JUDGMENT.

Schwabe, C. J.—This is a quite hopeless appeal. The facts are that the defendants, for the purposes of their own business, used a method of breaking up cast-iron which consisted of dropping a heavy weight on a piece of iron resting on a bed of iron with the intention that these pieces should be broken into smaller pieces. The weight was dropped from a height of 35 feet with the inevitable result that pieces of iron flew about. It is common ground that they habitually flew to distances of four or five yards from the pit. If persons choose to carry on dangerous operations of that kind, it is their duty not only to the public but to their servants to take adequate precautions that those pieces shall not cause injury. They ought to exercise ordinary care, caution, and skill to prevent that. The mere fact that an accident has happened is strong evidence in a case of that kind that they had not taken the ordinary care, caution, and skill required for preventing the happening of the event. They knew that these pieces were being thrown out of the pit. They put up a screen which was obviously so inadequate that, as I have said, pieces were habitually thrown out of the pit. They issued warnings to persons near, appreciating full well that they were carrying on a dangerous operation. They did not trouble themselves to issue warnings to persons at a distance, but chose to allow their workmen at a distance, to go on working at the risk of being hit. It is suggested that human foresight and skill could not have discovered that pieces of iron would go to a distance of some 70 to 90 feet, at which the deceased was standing at the time of the accident. I am not prepared to accept that view. Scientific knowledge has surely by this time reached the length of being able to tell with some accuracy what the effect of dropping a weight of a certain amount from a height of 35 feet upon pieces of iron will be and to what distance pieces of iron will or may be sent. I am quite satisfied that the learned Judge was right in holding that sufficient care was not taken and that, therefore, the defendants were guilty of negligence.

It has been suggested by the defendant's Engineer and Manager of the Factory that no further precautions have been taken

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since the accident. I hope that this evidence is not true, because that such a thing should have happened as happened in this case and that they should continue the operation without taking further precaution against the recurrence of such accident is, to my mind, negligence of the grossest kind.

The defence is put forward that the deceased voluntarily undertook the risk of this happening to him. That is the defence which is expressed in the maxim *volenti non fit injuria* but, for this to succeed, it is necessary for the other party to prove that the person injured knew of the danger, appreciated it, and voluntarily took risk. There is no evidence of any of these three things. The suggestion is, that he had some knowledge of the danger because another man working in the same place spoke to the fact that a short time before pieces of iron had flown from north to south as far as the place at which that man was standing. That he appreciated the risk of pieces striking him is impossible to find in view of the fact that the skilled European Manager swore that he himself did not appreciate that there was any risk. Of course, a man cannot voluntarily undertake a risk the extent of which he does not appreciate.

This appeal will accordingly be dismissed.

There is a cross-appeal against the amount of damages awarded. Under the Fatal Accidents Act, the widow or the person suing is entitled to compensation for the financial loss sustained by the death. She is not entitled to anything for pain or suffering or anything of the kind, but purely for the financial loss sustained. The learned Judge has awarded somewhere about one year's wages. He says that, in coming to that conclusion, he has taken into consideration that the accident was rather an extraordinary one, a consideration which, in my judgment, was wholly irrelevant. What he had to consider was the financial loss. Once he found that the defendants were liable, the question was how much they were liable for and not whether it was unfortunate for him that he was struck, but only what was the financial loss the plaintiff has sustained. The proper way of arriving at that is to form some estimate of what the value of the continued life of the deceased would have been to the plaintiff and how long it was probable that it would continue. I

think that one year's wages is ridiculous in the absence of any evidence that the man was of ill-health or that his earning life was likely to be no more than a year. Giving the best consideration that I can to the facts of this case I think, taking about Rs. 13 as the monthly wages and somewhere about three years as the right period, we can arrive at the correct figure if we increase the damages awarded by the lower Court to Rs. 500 and I accordingly fix the damages at Rs. 500.

The cross-appeal will therefore, be allowed with costs on Rs. 500 the amount awarded; and the appeal will be dismissed with costs.

Wallace, J.—I agree. When it is admitted by D. W. No. 1, that even with the existing fence of three feet, iron pieces were at times flying over the fence to a distance of 12 or 15 feet from the pit, it is clear that it was within the knowledge and the experience of the defendant Company that a fence three feet high was not an adequate protection. In these circumstances, had the Company taken "reasonable precaution" it would have raised the fence so as to prevent this intermittent scattering of iron pieces to a distance of 12 or 15 feet at least. A mere warning to those working in the neighbourhood is not sufficient precaution, as the defendant Company itself recognised when it put up a fence to the height of three feet. The defendant Company has, therefore, failed to take reasonable precaution to avert even the danger of which it was admittedly aware, and not having adopted such reasonable precaution, it cannot be absolved from the charge of negligence and default, or escape the legal consequences thereof.

As to the contention based on the maxim *volenti non fit injuria*, when the defendant Company itself pleads that it did not anticipate and could not have anticipated pieces flying over a distance of 90 feet, I do not see how they can plead that their deceased workman could possibly have anticipated it for himself, and thus the essential ingredient of that defence is lacking. As to the contention that deceased must have known that ordinary care and caution were being exercised, and yet continued working, that defence also fails, as, in my view, such ordinary care was not exercised.

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I agree with the Chief Justice as to the amount of damages proposed by him, and with his order dismissing the appeal.

Z. K.

V. N. V.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 936 AND 937
OF 1921.

July 21, 1922.

Present:—Mr. Justice Coutts and
Mr. Justice Das.

Babu TRILOKE PRASAD SINGH—
APPELLANT

versus

Lala UMANAND LAL AND OTHERS—
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. I, r. 9—
Non-joinder—Land entered as ghair mazrua am—
Suit for title—General public whether necessary
parties—Batwara khasra, evidential value of.*

Where the plaintiff claims that the land entered in the Survey *khatain* as *ghair mazrua am* appertains to his ancestral holding, it is not necessary to make the general public parties to the suit, as the decree will be good as against the parties to the suit and will not affect the general public.

A *khasra* prepared in an old *batwara* proceeding is admissible in evidence. It is evidence for what it may be worth, and where an entry in the *khasra* is in favour of the tenants, it is very good evidence and evidence on which the Court is entitled to rely.

Ajodhya Prasad Singh Kumar v. Kamal Narain Singh, 38 Ind. Cas. 491, relied on.

Appeal.

Mr. R. T. N. Sahay, for the Appellant.

Mr. Kailashpati, for the Respondents.

JUDGMENT.

Coutts, J.—The plaintiffs in the two suits out of which these appeals arise are tenants in *Mauza* Dajipur of which the defendants are the *maliks*. The land in dispute has been entered in the Survey *khatain* as *ghair mazrua am*. The plaintiffs claimed that it appertained to their ancestral holding consisting of some 34 *bighas* which are said to be covered by plots Nos. 88 and 89 in an old *batwara* proceeding and they alleged that the land has been always in their possession. They, therefore, prayed for a declaration of their title to the disputed land as appertaining

to their *ratyati* and for recovery of possession. The suit was contested by the defendant No. 2 who alleged that the land was the exclusive land of the *maliks* which had been settled with tenants under various *pattas* and *kabuliyats*. The suits were dismissed in the Court of first instance, but on appeal the suits have been decreed. The defendant No. 2 has appealed to this Court.

The first point urged in appeal is, that the land having been recorded in the Record of Rights as *ghair mazrua am* the suits cannot proceed, the general public not being made parties. This is obviously an unsustainable contention, because the decree will be good as against the parties to the suit and will not affect the general public.

The second point urged is, that the lower Appellate Court has relied to a great extent in coming to its decision on the *khasra* which was prepared in the old *batwara* proceeding and it is contended that this is inadmissible in evidence. There are various authorities that the *batwara khasra* is admissible in evidence and I need only refer to a decision of this Court in *Ajodhya Prasad Singh Kumar v. Kamal Narain Singh* (1) in which it was held that such a *batwara khasra* was admissible in evidence. This was a decision of a Judge of this Court sitting alone whose decision on this finding was upheld in Letters Patent Appeal. The *batwara khasra* is evidence for what it may be worth and in a case such as the present case where the entry in the *khasra* is in favour of the tenants it is, in my opinion, very good evidence and evidence on which the Court was entitled to rely.

The last point urged is, that a partition decree (Exhibit E) which was filed on behalf of the defendant has not been considered by the lower Appellate Court. I find however, from the judgment of the learned Additional Subordinate Judge that he has considered this document and, although he has not discussed it at length, he has certainly considered it.

In the result, I see no reason to interfere with the decision of the lower Appellate Court and I would dismiss these appeals with costs.

(1) 38 Ind. Cas. 491.

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There will be only one set of costs.

Das, J.—I agree.

Appeals dismissed.

N. K.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL NO. 27 OF 1921.

December 7, 1922.

Present:—Mr. Justice Coutts-Trotter and
Mr. Justice Ramesam.

AMMAKANNU AMMAL, AND OTHERS—
DEFENDANTS NOS. 4 TO 6—APPELLANTS
versus

NARAYANASWAMI MUDALIAR AND
OTHERS—PLAINTIFF NO. 1 AND

DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

*Adverse possession—Exclusive possession—
Title acquired by prescription—Suit for possession;
whether maintainable.*

Where a stranger is in adverse possession of a house, the true owner cannot keep his rights in the house alive against the accrual of prescription by the fact that, occasionally, he goes and stays in the house as a guest for a few days. [p. 636, col. 1.]

A person who has completed the statutory period of prescription and thus acquired title to property is entitled to eject any person with no title who seeks to retain possession of the premises. [p. 636, col. 2.]

Tichborne v. Weir, (1893) 67 L.T. 735; 4 R. 26, distinguished.

Appeal against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 153 of 1920.

Mr. K. S. Jayarama Iyer, for the Appellants.

Messrs. Mahomed Ibrahim Sahib, G. Sivarama Krishniar and S. V. Narayana Iyer, for the Respondents.

JUDGMENT.—In this case the plaintiffs founded their title in their pleading upon an adoption of one Toolasi Naicken by Thathappa Naicken, Toolasi Naicken being the person from whom the plaintiffs derived their title through the first three defendants. The learned Judge, in fact, decided in favour of the plaintiffs not on the adoption, the existence of which he disbelieved, but on a supposed title by prescription acquired by Toolasi Naicken for the benefit of the joint family of which he was a member with survivorship to his sons, the first three

defendants. No issue is raised as to that, and indeed, we think it is very doubtful whether he really clearly found that, because he does not clearly say that Toolasi Naicken acquired it for any interest wider than his own. However, an issue will be framed, 'Whether the joint family of which Toolasi Naicken was a member acquired title to the property in suit by prescription.'

Finding should be submitted in two months, and seven days will be allowed for filing objections. Fresh evidence may be taken.

In compliance with the order contained in the above judgment, the City Civil Judge, Madras, submitted the following

FINDING.—This suit has been remanded for a finding on the issue, "Whether the joint family of which Toolasi Naicken was a member acquired title to the property in suit by prescription," and the parties were declared to be at liberty to adduce fresh evidence.

I have no hesitation in coming to the conclusion that the joint family of which Tholasingam Naicken was a member has been in continuous and exclusive possession of the house from the date (25 years ago) on which Kullammall was given in marriage to some one in Royapuram and that they have acquired by prescription a title adverse to the said Kullammall. The one and only piece of evidence on which the defendants are able to rely, that she (5th defendant) took away limes from the suit-house, is ambiguous. It does not appear that she did so as owner but she might just as well have been presented with them when she was going away to her own house in Royapuram.

I find, therefore, that the joint family of which Tholasingam Naicken was a member has acquired and completed its title for the property in suit by prescription.

This Appeal and Memorandum of Objections coming on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—The finding which we have called for in this case has been returned and the learned Judge finds that the joint family, of which

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Tholasingam was a member, acquired a title to the property in suit by prescription. That finding of fact is challenged on the ground that though this old lady had married and gone away to Royapuram and never again resided in the property in the ordinary sense, she is to be held to have kept alive her rights in it against the accrual of prescription by the fact that, occasionally, she came and stayed a few days as a guest. That seems to be so, but that will not operate to make the possession of the family of defendants Nos. 1 to 3 less exclusive so as not to extinguish the rights of the old lady in the property. This contention does not require discussion.

It is next argued that the suit is not maintainable because at the time it was brought the plaintiffs were not in possession of the property and that no stranger, even after the completion of the prescription, can sue anybody for possession, because she had not got an iota of title at all as he is merely a man who has prescribed against the title of the true owner and who is left with nothing, unless by mere brute force he can succeed in holding the property against anybody who tries to come up. To my mind this is an absolutely untenable argument and is based on what to my mind is a complete misunderstanding of the decision of the Court of Appeal in the case of *Tichborne v. Weir* (1). There a tenant had a lease and somebody, a stranger, came and stood for thirty years in the shoes of the tenant and paid rent to the landlord. It was sought at the end of a very long period to enforce against the person in occupation of the premises by the landlord the performance of a covenant to repair, and the argument on which it was sought to base that contention was this: the Statute in effect transferred the estate of the person prescribed against to the lands of the person in occupation. Their Lordships observed that it was an incorrect interpretation of the law and that what the Statute did was not to transfer the title of the person prescribed against with all its burdens to the person in occupation but to extinguish the whole title and to create, not by transfer but by an act of creation, a new title in the

person who completed the prescribed statutory term. That being so, that case has no application to the present circumstances and we must hold that the person who has completed the statutory prescription is entitled to eject any person with no title who seeks to retain possession of the premises.

The result is, that the appeal fails and is dismissed with costs of the first respondent.

V. N. V.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION

No. 198 OF 1922.

January 23, 1923.

Present.—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Crump.
THE BROACH CITY MUNICIPALITY—
ORIGINAL OPONENT—APPLICANT
versus

GULAM RASUL HAJI BANUBHAI—
ORIGINAL APPLICANT—OPONENT.

Bombay District Municipal Act (III of 1901); s. 160 (3), order under, by District Court—Execution; made of.

Where a District Court passes an order under section 160 (3) of the Bombay District Municipal Act, that order can be executed as a decree. It is not necessary for the successful party to make an application to the Court to pass a decree in accordance with the order or decision.

Application praying for the reversal of an order passed by the District Judge, Broach, in *Darkhast* No. 3 of 1921.

Mr. R. J. Thakor, for the Applicant.
Mr. H. V. Divatia, for the Opponent.

JUDGMENT.—The only question in this application made on behalf of the Broach City Municipality is, whether an order made or a decision given by the District Court under section 160 (3) of the District Municipal Act (Bombay Act III of 1901) can be executed, or whether it is necessary to make an application to the Court to pass a decree in accordance with the order or decision. It would certainly be very remarkable, when a summary method has been provided for by

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the Legislature for determining disputes arising for money, compensation or damages which are directed to be paid by the Act that it should be necessary in order for the successful party to obtain relief to file a suit when the District Court has come to a definite conclusion on the merits. The District Court in cases in which the compensation is claimed in respect of land, should follow, as far as may be, the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court. Under the Land Acquisition Act, in the case of a reference, the Court proceeds to hear the parties, and to determine the value of the land, and to make an award. Clearly, that award could be executed as a decree. It follows that where a District Court makes an order under section 160 (3), it must be treated for the purpose of execution in the same way as an award made in a reference under section 18 of the Land Acquisition Act, 1894.

We have been referred to the decision in *Chunital Virchand v. Ahmedabad Municipality* (1), but that, if anything, is against the present applicant's contention. It was decided there that no appeal lies from the decision of the District Court under section 160 (3) of the Bombay District Municipal Act, 1901. Once we find that the decision of the Court under that section is considered as an order, though it may not be a decree, it must follow that there is some way for the parties entitled to the benefit of the order to get satisfaction without having to file another suit. Again, it is clear from section 160, proviso (b), that the Court has full power to give and apportion the costs of all proceedings in any manner it thinks fit. According to the applicant's contention, although the Court had full power to apportion costs, it had no power to issue execution in order that a successful party might get his costs given to him already by the Court.

In my opinion, therefore, there can be no doubt that the decision of the lower Court was right and that the Rule should be discharged with costs.

W. C. A.

Rule discharged.

(1) 12 Ind. Cas. 540; 36 B. 471 13 Bom. L. R. 958.

PATNA HIGH COURT.

SECOND: CIVIL APPEAL NO. 578 OF 1920.

July 21, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

Shaikh SAJJAD HUSAIN AND OTHERS

—DEFENDANTS—APPELLANTS

versus

SAKAI RAI AND OTHERS—PLAINTIFFS

AND AVTOR RAI—DEFENDANT—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 4 (3), provision of, whether mandatory—Guardian, appointment of—Consent.

It is not competent to a Court to appoint a guardian without his express consent; where it does so appoint, it acts without jurisdiction. [p. 638, col. 1.]

Krishna Chandra Mandal v. Jogendra Narain Roy, 27 Ind. Cas. 139; 19 C. W. N. 537; 20 C. L. J. 469, *Mohan Krishna Dar v. Har Prasad*, 40 Ind. Cas. 2, *Annada Prasad v. Upendra Nath Dey*, 65 Ind. Cas. 18; 34 C. L. J. 293; 26 C. W. N. 781, relied on. *Chhatter Singh v. Tej Singh*, 59 Ind. Cas. 671; 18 A. L. J. 956; 2 U. P. L. R. (A.) 384; 43 A. 104, dissented from.

The provision of O. XXXII, r. 4 (3) of the Civil Procedure Code, in respect of consent, is mandatory and there is nothing in the law to suggest that unless it is established that the minor is prejudiced, he cannot get relief. [p. 638, col. 2.]

Appeal.

Mr. B. N. Mitter, for the Appellants.

Mr. Sambhu Saran, for the Respondents.

JUDGMENT.

Coutts, J.—The facts of the case are shortly as follows: Defendants Nos. 1 and 2 are *maliks* of the *patti* in which the land in suit lies. Defendant No. 1 and the mother of defendant No. 2 brought a suit for arrears of rent of this land against defendant No. 5, plaintiff No. 4, and his brother Gajadhar Rai, *raiyats* of the holding. They obtained a decree and in execution of the decree they purchased the holding, subsequently parting with some of their interest to the other defendants. The plaintiffs Nos. 1, to 3 were not parties to the rent-suit and their case is that they were necessary parties as they were co-sharers in the holding. The case of the plaintiff No. 4 is that, although the decree was against him, he was a minor at the time of the suit and was not properly represented. The plaintiffs accordingly brought this suit for a declaration that they were entitled to the land in suit. The defendants contended that the plaintiffs Nos. 1 to 3 had no interest in the holding and that the plaintiff No. 4 was properly

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represented by his mother who had been appointed his guardian *ad litem* by the Court.

The Court of first instance found that the plaintiffs Nos. 1 to 3 had no interest in the holding and that the plaintiff No. 4 was properly represented. The suit was accordingly dismissed. The plaintiffs appealed and on appeal the decision of the Court of first instance has been upheld in so far as the plaintiffs Nos. 1 to 3 are concerned but so far as the plaintiff No. 4 is concerned it has been held that he was not properly represented and that the suit, in so far as his half share in the holding is concerned, must succeed. The defendants have appealed to this Court.

The only question in appeal is, whether in fact the plaintiff No. 4 was properly represented by his mother in the rent-suit. It appears that the Court appointed plaintiff No. 4's mother as his guardian; notices were issued on her, but her consent was not taken and she did not appear in the suit which was decreed *ex parte* as against the plaintiff No. 4. The learned Subordinate Judge has held, on the authority of *Krishna Chandra Mandal v. Jogendra Narain Roy* (1), that it was not competent to the Court to appoint the mother of plaintiff No. 4 as his guardian without her express consent, that the appointment was without jurisdiction and that the minor was not represented. I am in agreement with this view. It is the view which has been expressed in this Court in the case of *Mohan Krishna Dar v. Har Prasad* (2); it is the view which has been uniformly adopted in Calcutta, *vide Annada Prasad v. Upendra Nath Dey* (3) and it is undoubtedly, in my opinion, the correct view of the law. We have been referred by the learned Vakil for the appellants to certain decisions of the Privy Council and of this and other High Courts in India in which it has been held that, although no appointment of a guardian has actually been made by the Court, yet if the mother appears and effectively represents her minor son a formal order for her

appointment is not necessary. These, however, are entirely different cases. In the present case the minor was not only not effectively represented but was not represented at all. We have also been referred to certain decisions of the Allahabad High Court in which it has been held that, where an appointment has been made without consent and where a decree has been passed *ex parte*, unless it has been shown that the minor's interests have been prejudiced by the irregularity the minor has no right to set aside the proceedings: *Chhatter Singh v. Tej Singh* (4). With all respect to the learned Judges of the Allahabad High Court who decided this case and other cases relied on in this decision, I am unable to accept the view. The provision of O. XXXII, r. 4 (3) in respect of consent is mandatory and I can find nothing in the law to suggest that, unless it is established that the minor is prejudiced, he cannot get relief.

This case has, in my opinion, been rightly decided and I would dismiss the appeal with costs.

Das, J.—I agree.

N.K.

Appeal dismissed.

(4) 59 Ind. Cas. 671; 18 A. L. J. 956; 2 U. P. L. R. (A) 384; 43 A. 104.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 131 OF 1922.

November 21, 1922.

Present:—Mr. Justice Ramesam.

A. RARICHAN—DEFENDANT

NO. 2—PETITIONER

versus

ELAMBILAKAD VAZHAYIL DAMAYANTI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage—Sub-mortgage—Redemption of mortgage, effect of—Decree between stranger and sub-mortgagor—Sub-mortgagee, whether bound.

A sub-mortgagee, after redemption of the mortgage, has no further right against the mortgaged property and his remedy, if any, is against the sub-mortgagor, but he can pursue his rights against any property in the hands of the sub-mortgagor into which the security was converted. [p. 639, col. 2.]

(1) 27 Ind. Cas. 139; 19 C. W. N. 537; 20 C. L. J. 469.

(2) 40 Ind. Cas. 2.

(3) 65 Ind. Cas. 18; 34 C. L. J. 293; 26 C. W. N. 781.

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A sub-mortgagee can, as against a stranger, subrogate himself only to such rights as his sub-mortgagor can have as against the stranger and is bound by any decree between his sub-mortgagor and the stranger and cannot, except on the ground of fraud or collusion, get rid of it merely by showing the decree was erroneous. [p. 640, col. 1.]

Gosto Behary Pyne v. Shib Nath Dutt, 20 C. 241; 10 Ind. Dec. (N. S.). 163, distinguished.

Singaravelu Udayan v. Ramayer, 13 M. L. J. 306, *Poosarla Chinna-swamy v. Kattamoori Venkataramakrishnayya*, 37 Ind. Cas. 778; 4 L. W. 502; (1917) M. W. N. 111, *Venkatarama Iyer v. Esumsa Rowthen*, 5 Ind. Cas. 92; 33 M. 429; 7 M. L. T. 143; 20 M. L. J. 330, referred to.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Principal District Munsif, Calicut, in Small Cause Suit No. 248 of 1921, dated the 29th September 1921.

Mr. K. P. Ramakrishna Iyer, for the Petitioner.

Mr. K. Kuttikrishna Menon, for the Respondent.

JUDGMENT.—The facts of the Small Cause suit out of which this revision petition arises may be briefly stated as follows :—

Certain properties were mortgaged jointly to Chandan (1st defendant) and Bapputti (now represented by the 3rd defendant). Chandan sub-mortgaged his interest to Damayanti (plaintiff) and Bapputti, his interest to Rarichan the (2nd defendant). The *Jenmi* (Ayyappan) brought a suit to redeem the mortgage in Original Suit No. 145 of 1916. In that suit Dayamanti was not a party; but Rarichan was impleaded as 4th defendant and claimed compensation for a shop on the footing that it was in the portion sub-mortgaged to him by Bapputti, and in appeal this question was decided in his favour. Appeal Suit No. 138 of 1917 (of the Temporary Subordinate Judge of Palghat).

Damayanti filed the present suit on the ground that the shop was in the portion sub-mortgaged to her and not in the portion sub-mortgaged to Rarichan; that Original Suit No. 145 of 1916 was wrongly decided on account of the collusion and fraud of Chandan and Rarichan, that the amount of compensation ought to have been awarded to Chandan, and that she is now entitled to it as his sub-mortgagee. The District Munsif found there was no

collusion but also found that the shop was in the portion belonging to the 1st defendant and gave plaintiff a decree. The 2nd defendant (Rarichan) filed this revision petition.

Before me it is contended by the petitioner (1) that after the decree in Original Suit No. 145 of 1916, the rights of the sub-mortgagee were extinguished; (2) even if they were not, the plaintiff's remedy is against the 1st defendant.

In support of the first proposition, the petitioner relied on in *Singaravelu Udayan v. Ramayer* (1) and *Poosarla Chinna-swamy v. Kattamoori Venkataramakrishnayya* (2). The former decision was dissented from in *Venkatarama Iyer v. Esumsa Rowthen* (3) which followed *Gosto Behary Pyne v. Shib Nath Dutt* (4). As to the latter case, all that was meant by it is that a sub-mortgagee after redemption of the mortgage has no further right against the mortgaged property and his remedy, if any, is against the sub-mortgagor. It is clear from *Gosto Behary Pyne v. Shib Nath Dutt* (4), that the sub-mortgagee can still pursue his rights against any property in the hands of the sub-mortgagor into which the security was converted.

But, does it follow from this that the plaintiff is entitled to a decree against the 2nd defendant on the ground that he obtained the compensation which ought to have been paid to the 1st defendant? There is no privity of any kind between plaintiff and 2nd defendant. It is true that the findings in Original Suit No. 145 of 1916 do not bind plaintiff. But the decree therein binds 1st defendant. While it may be open to the plaintiff to show against Chandan that the findings in Original Suit No. 145 of 1916 are erroneous and that he got in redemption a much smaller amount than he was entitled to, (assuming that it serves any useful purpose). I do not think she can earmark the compensation in the hands of 2nd defendant as money still belonging to 1st defendant and

(1) 13 M. L. J. 306.

(2) 37 Ind. Cas. 778; 4 L. W. 502; (1917) M. W. N. 111.

(3) 5 Ind. Cas. 92; 33 M. 429; 7 M. L. T. 143; 20 M. L. J. 330.

(4) 20 C. 241; 10 Ind. Dec. (N. S.) 163.

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still available to plaintiff as security for her sub-mortgage, by reason of such error. The facts in *Gosto Behary Pyne v. Shib Nath Dut* (4) are distinguishable. There the money decree-holders of the *patnidars* drew out the sale-proceeds in execution of their decrees against the *patnidars* to whom they were considered to belong, apart from the decrees. In the present case, it cannot be said that the compensation originally belonged to the 1st defendant and that the 2nd defendant drew the money on account of some decree or other right he was seeking to enforce. It was held, as between the 1st and 2nd defendants, that the amount did not belong to the 1st defendant and this decision is binding on the 1st defendant. Except on the ground of fraud or collusion which the District Munsif has found against, the plaintiff cannot regard the amount in the hands of the 2nd defendant as money belonging to the 1st defendant so as to be available as security for her sub-mortgage. The plaintiff as sub-mortgagee can, as against a stranger, subrogate herself only to such rights as her sub-mortgagor can have as against the stranger and is bound by the decree between her sub-mortgagor and the stranger and cannot get rid of it by showing it was erroneous.

The petition is allowed and plaintiff's suit is dismissed with costs throughout, so far as 2nd defendant is concerned. The plaintiff will have a decree for the amount sued for against the 1st defendant with costs in the First Court.

V. N. V.

*Petition allowed.
Suit dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2283 OF 1920.

August 23, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

Maharaja Bahadur SIR PRODYOT KUMAR TAGORE, KT.—PLAINTIFF—APPELLANT
versus

UMESH CHANDRA SAHA AND OTHERS
DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 20—Settled raiyat who is—Condition to be fulfilled.

Where a person is alleged to be a settled *raiya*t within the meaning of section 20 of the Bengal Tenancy Act, it must be proved that he continuously held as a *raiya*t land situated in the village, although the land need not be identical throughout the period of 12 years. The holding of land is to be continuous and, further, it is to be in the character of a *raiya*t. [p. 642, col. 1.]

But though the land must be held as a *raiya*t, this does not necessarily mean that the land should have been actually cultivated, because land may be held by a *raiya*t as his homestead under section 182 of the Bengal Tenancy Act. It is, however, not sufficient for a *raiya*t that the character of land is such as would justify its use as a homestead, it must be established that the land is used by the *raiya*t as his homestead. [p. 642, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Fourth Court, Mymensingh, dated the 21st June 1920, affirming that decree of the Munsif, Jamalpore, dated the 3rd May 1919.

Babu B. Chakravarty, with him Babus Ram Charan Mitter, Mukund Nath Roy and Parmanand Lahiri, for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for declaration that an entry in the Record of Rights is incorrect and that the holding is governed by the provisions of the Transfer of Property Act. One Srikanta executed a *kabuliyat* in 1295 engaging to pay a consolidated rent for several plots of land in Dewangunge and other villages. The lease was for 10 years. The question is, whether an occupancy right under the Bengal Tenancy Act can be created by contract, estoppel or otherwise except by fulfilment of the conditions laid down in the Act. In the *kha. tan* the two plots of lands in suit were recorded as occupancy holdings. The Munsif found that there was no evidence to show that the lands were cultivated

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Both Courts have dismissed the suit. The defendants are the sons of Srikanta. They have sublet a portion of the shop premises to a medical practitioner and to another shopkeeper. These two have also been impleaded as defendants. I submit the Bengal Tenancy Act does not apply. The Munsif, though finding that the case must be determined on the basis of the *kabuliyat*, holds that we are estopped from challenging the correctness of the entry inasmuch as it was made in our presence. The defence was that the expressions *khod fasl* and *chukaini* mean permanent tenancies having special incidents. They themselves admit that they are shopkeepers. They nowhere said that they are cultivators. The finding is that they never cultivated. The Courts below held that the lands being *fasal* must have been agricultural lands at the inception of the lease. I submit that view is clearly wrong. The tenancy was for 10 years. After the expiry the tenant held over. All the lands in the bazar have been treated as *chandina* or *hut* lands. Only these lands have been treated as occupancy holding because we raised no objection at the time of Settlement.

Babu Birendra Kumar De, for the Respondents.—The view of the learned Judge is correct. The purpose for which the *kabuliyat* was given was for cultivating the lands. Some of the lands were in possession of Ramkumar Saha. He left. Then this settlement was made with Sreekanta.

[MOOKERJEE, J.—Was Sreekanta a settled *raiyyat*?]

He was an agricultural tenant in respect of plot No. 937 and the lands contiguous to it from 1291. The possession of plots Nos. 926 and 927 began in 1295. Section 5 (2) of the Bengal Tenancy Act does not contemplate an actual cultivator. Land may be held by a *raiyyat* as his homestead, see section 182 of the Bengal Tenancy Act.

Mr. B. Chakravarty, replied in brief.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration that three entries in a Record of Rights finally published are erroneous and for correction thereof. The three parcels in dispute are those numbered 926, 927 and 937. The defendants are recorded in the Record of

Rights as settled *raiyyats* in respect of those lands. The case for the plaintiff is, that the lands are not agricultural and, consequently, the status of settled *raiyyats* could not be acquired in respect of such lands. The Courts below have dismissed the suit, though it is difficult to gather from the judgment the precise facts in relation to each of these parcels.

It is not disputed that on 27th March 1889, the predecessor-in-interest of the plaintiff granted a lease for 10 years to Srikanta Saha, the father of the first two defendants. The parcels now in dispute were included in the lease. The real question in controversy is, whether Srikanta Saha was a settled *raiyyat* at the time in respect of one or other of the three parcels, and, if not, whether he or his successors-in-interest have subsequently acquired the status of such a *raiyyat*. We have been informed that before the grant of this lease plots Nos. 926 and 927 were in the occupation of one Ram Kumar Saha. He left the village and these two plots were included in the lease granted to Srikanta Saha. We have further been told that Srikanta Saha was in occupation of plot No. 937 from 1884. These are the statements which have been made before us on behalf of the respondent. But they are not admitted by the plaintiff.

It is plain that no question arises as to the applicability of section 19 of the Bengal Tenancy Act because there is no suggestion that a right of occupancy had been acquired by the defendants before the Bengal Tenancy Act came into force. The status of the defendants must, consequently, be determined with reference to the provisions of sections 20 and 21 of the Bengal Tenancy Act.

Section 20, sub-section (1), provides as follows: "Every person who, for a period of 12 years, whether wholly or partly before or after the commencement of this Act, has continuously held as a *raiyyat* land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled *raiyyat* of that village." Sub-section (2) provides that a person shall be deemed for the purposes of the section, to have continuously held land in a village

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notwithstanding that the particular land held by him has been different at different times. Section 21 provides that every person who is a settled *raiyat* of a village within the meaning of section 21 shall have a right of occupancy in all land for the time being held by him as a *raiyat* in that village. The term 'village' has a technical meaning which is explained in section 3, clause (10) of the Bengal Tenancy Act.

In view of these provisions, it is clear that if Srikanta Saha is alleged to have been a settled *raiyat* it must be proved that he continuously held, as a *raiyat*, land situated in the village, although the land need not be identical throughout the period of 12 years. The Courts below have not found whether Srikanta fulfilled this condition. It is to be observed that the holding of land is to be continuous and, further, that the holding is to be in the character of a *raiyat*. This becomes obvious when we turn to the definition of the term '*raiyat*' given in section 5, clause (2). '*Raiyat*' means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also the successors-in-interest of persons who have acquired such a right. The question consequently arises whether plot No. 937 was held by Srikanta Saha as a *raiyat* for a term of 12 years, or, whether, independently of plot No. 937, Srikanta held other lands in the village as a *raiyat*, for the prescribed period. If, by such continuous holding of land in the village as *raiyat*, Srikanta Saha acquired the status of a settled *raiyat*, he might acquire a right of occupancy in respect of plots Nos. 926 and 927, provided he held these parcels as a *raiyat*. We observe that the defendants have been recorded, not as occupancy *raiyat*, but as settled *raiya*s; in other words, it must be shown, in order that the record may be maintained, that Srikanta Saha or his sons had acquired that status in respect of each of the plots Nos. 926, 927 and 937. But, though the land must be held as a *raiyat*, this does not necessarily mean that the land should have been actually cultivated, because land may be held by a *raiyat* as his homestead under section 182. It must be

remembered, however, that section 182 is not applicable unless the land is held as homestead; in other words, as pointed out by this Court in *Dina Nath Nag v. Sashi Mohan Dey* (1), it is not sufficient for a *raiyat* that the character of land is such as would justify its use as a homestead, it must be established that the land is used by the *raiyat* as his homestead. These are very material elements in the determination of the controversy between the parties, and the facts found by the Courts below do not enable us to hold that the defendants have the status of a settled *raiyat* in respect of one or more of the disputed parcels.

The result is, that this appeal is allowed; the decree of the lower Appellate Court set aside and the case remitted to the Court of first instance to be re-tried. Each party will be at liberty to adduce fresh evidence as to the character and antecedent history of each of these parcels. Evidence will also be admissible to prove the status of Srikanta Saha. The case will be re-tried, however, on the footing that the tenancy originated with the lease of the 27th March 1889 and the user of land by other persons prior to that date can have no bearing upon the nature of the tenancy created by the document.

As the true bearing of the case does not appear to have been appreciated by either of the parties in the Courts below, we direct that the parties do bear their own costs in this Court and the lower Appellate Court. The costs in the Court of the first instance before and after remand will be in the discretion of the Court.

B.N.

Appeal allowed.

[(1) 31 Ind. Cas. 16; 20 C. W. N. 550; 22 C. L. J. 219.

GOPAL, MISSER V. PARTAP MANDAL.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 170
OF 1920.

March 8, 1923.

Present:—Mr. Justice Das and Mr. Justice
Kulwant Sahay.

GOPAL, MISSER AND OTHERS

—DEFENDANTS—APPELLANTS

versus

PARTAP MANDAL—PLAINTIFF

AND PHEKAN SINGH AND

OTHERS—DEFENDANTS—RESPONDENTS.

*Construction of document—Property, transfer of,
Conflict between two descriptions—Principles
applicable.*

Where, in a deed of transfer, the premises conveyed are sufficiently described, as by giving the particular name of the close or otherwise, an erroneous additional description will be rejected as a 'false demonstration', but if there is not this certainty in the first description, as if it is expressed in general terms, and a particular description is added, the latter controls the former and limits the generality of the earlier description. [p. 645, col. 1.]

The test is that, if the first description is sufficient in itself to identify the land which is conveyed, then, if there is a conflict between the first description and the second description, the second description ought to be rejected as a false description; but if the first description is not sufficient by itself to identify the lands intended to be conveyed then the second description ought to be read as restricting the operation of the grant. [p. 645, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Purneah, dated the 16th June 1920.

Messrs. S. M. Mullick, A. Kailaspati and L. K. Jha, for the Appellants.

Messrs. S. P. Varma, Rai T. B. N. Sahai and Rai Guru Saran Prasad, for the Respondents.

JUDGMENT.

Das, J.—One Phekan Singh, who has been cited as defendant No. 12 in this action, held a *raiya* holding of 244 *bighas* on a rental of Rs. 41-12-0. The landlord instituted a rent-suit against Phekan Singh and recovered a decree as against him. In execution of that decree he caused the holding to be sold and it was, as a matter of fact, sold to defendant No. 15 for Rs. 500. On the 13th of December 1912, so it is alleged by the plaintiffs defendant No. 15 obtained delivery of possession. The plaintiffs' case is that defendant No. 15 was their *benamidar*, and that they obtained possession of Phekan Singh's holding on the 13th of December 1912, and was

dispossessed by defendants Nos. 1 to 13 acting in collusion with each other in April 1916. The suit, out of which the appeal arises was thereupon instituted by the plaintiffs for recovery of possession of the disputed lands, which are specified in schedules A and B, and for mesne profits. The defendants Nos. 1 to 11 claimed to be in possession of 30 *bighas* of land set out in schedule A under a conveyance executed in their favour by Phekan Singh. Defendant No. 13, it appears, has taken a conveyance of schedule No. A lands from defendants Nos. 1 to 11. Their conveyance is dated the 5th of January 1918. Defendant No. 12 is the original tenant, Phekan Singh, and he claims title to 15 *bighas* of land set out in schedule B by virtue of a compromise with the plaintiffs in a certain criminal proceeding. The defendants filed separate written statements in which they denied that they acted in collusion with each other. Defendants Nos. 1 to 11 disclaim all interests in schedule B lands, and defendant No. 12 disclaims all interests in Schedule A lands.

The learned Subordinate Judge in his judgment has recorded a finding to the effect that the defendants did not act in collusion with each other. He has also disbelieved the case of the plaintiffs that they obtained possession of the disputed lands on the 13th of December 1912, and that they were dispossessed in April 1916. According to the learned Subordinate Judge the plaintiffs never at any time obtained possession of the disputed lands although in his view they are undoubtedly entitled to possession thereof. In the result he has given the plaintiffs a decree for possession of schedule A lands and for mesne profits as against defendants Nos. 1 to 11, and against defendant No. 13. In regard to schedule B lands he has come to the conclusion that the case of the defendant No. 12 is substantially correct. Accordingly, he declined to give the plaintiffs any decree for possession in respect of schedule B lands.

Defendants Nos. 1 to 11 have appealed to this Court and the plaintiffs have presented a cross-objection as against the finding of the learned Subordinate Judge that the plaintiffs have failed to establish their case in regard to schedule B lands

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as against defendant No. 12. Mr. Sushil Madhab Mullick on behalf of the appellants takes the point that, in the circumstances to be at once mentioned, the plaintiffs' suit was not maintainable, and that it should have been dismissed by the learned Subordinate Judge.

I have already said that the ostensible auction-purchaser was defendant No. 15. The case of the plaintiffs is that defendant No. 15 was their *benamidar*, and that the purchase was made by them, although in the name of defendant No. 15. In this view the plaintiffs cited the auction-purchaser as a defendant in the action. Defendant No. 15, however, filed a written statement in which he claimed a beneficial interest in the property purchased. In other words, he wholly denied the claim of the plaintiffs that in the matter of the auction-purchase he acted as the *benamidar* for the plaintiffs. Now, this was the position up to the 31st of May 1920. On that date the plaintiffs presented a petition to the Court asking the Court to dismiss defendant No. 15 from the action. Thereupon, the Court directed that the name of defendant No. 15 should be struck off from the record of the suit. The contention of Mr. Sushil Madhab Mullick is, that the suit could not proceed in the absence of defendant No. 15. He says that it is not right that he should be subjected to another action at the instance of defendant No. 15, and that it is only right and proper that his liability, if any, should be determined in the presence both of the plaintiffs and of the defendant No. 15. In my opinion, the objection is one that should have been taken in the Court below. It does not appear from the order sheet or the judgment of the learned Subordinate Judge that it was ever contended before the Court below by the plaintiffs that the consequence of dismissing defendant No. 15 from the record of the suit was that the suit could not proceed. Had the defendants taken this point in the Court below it would have been open to the plaintiffs to bring defendant No. 15 again on the record. That objection was not taken, and it is quite impossible for us in this Court to entertain an argument as to non-joinder of parties. Mr. Sushil Madhab Mullick explains to us that his point is not that the suit should be dismissed;

but that his liability should be determined in the presence of defendant No. 15. But as, for the reasons to be presently stated, we have come to the conclusion that the defendants Nos. 1 to 11 are not liable for mesne profits, it is wholly unnecessary to examine the contention of Mr. Sushil Madhab Mullick.

It is next urged by Mr. Mullick that the sale-certificate which is the document of title of the plaintiffs has not given the plaintiffs any title to schedule A lands. The argument is founded upon the evidence of one of the plaintiffs, to be found at page 21 of the paper-book. Pratab Mandal, one of the plaintiffs, giving evidence in the suit said as follows: "The entire *jote* of Phekan is in 7 *days*. Only 3 big *days* are in the sale-certificate but are in my possession. Those 4 *days*. The other four *days* are not in the sale-certificate; are 40 to 50 *bighas* in area. I took delivery of possession according to the sale-certificate. At the time of auction-sale I did not know that there were 4 other *days* besides the 3 *days* that were to be sold. It was at the time of taking delivery of possession I came to know of the other 4 *days*." Now this evidence establishes that he took delivery of possession of the entire area, namely, 244 *bighas*; but that the sale-certificate mentioned only 3 *days*, and it does not mention the other 4 *days* which are undoubtedly included within this block of 244 *bighas*.

In order to succeed, Mr. Mullick must establish that the sale-certificate has not given the plaintiffs any title to schedule A lands. In my opinion, the contention is one which cannot for a moment be upheld. The argument must be based, if at all, upon the sale-certificate itself. In other words, we must decide, upon the construction of the sale-certificate, whether the Court conveyed schedule A lands to the plaintiffs. The sale-certificate declares the title of the purchaser to the land specified at the foot of the certificate. It is necessary then to see what are the lands so specified. If Mr. Sushil Madhab Mullick is right in his contention, that the lands specified did not include the disputed lands then, of course, it will be impossible to hold that the plaintiffs have any title to the dis-

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puted lands. The specified lands are described in these words:—"Inventory of 244 bigas 10 kathas *jote* lands at an annual rental of Rs. 41-12-0 besides cess, together with trees and clumps, houses, and bamboo (clumps) standing on the same, situate in Mauza Shankerpur, Parganah, Haraut, Thana and Sub-Registry Office Araria. The decree-holder is the 16 annas proprietor. The lands have not been subject to Survey operations." If the sale-certificate ended here, the argument which has in fact been advanced before us could not for a moment be entertained by this Court; but then there are these words which follow and the whole argument is based upon a description which, in my opinion, is a subsidiary description and a false description. The words are these:—

	Kitas.	North.	South.	East.	West.
1.		Chaman Miser.	Ajab Mandal.	Sukan Gope.	Samda Ghat.
2.		Gopal Miser.	Padu Singh.	Samda-dhar.	Lachadhar.
3.		Govt. lands.	Hiyalal Miser.	Rupan Mandal.	Samda-dhar.

The question then is, was the land sold by the area which is to be found in the document, or, was it sold by the boundaries mentioned in the document. The question is essentially a question of fact; parcel or no parcel that is how it has been described in the cases on the point. Now the rule is this:—

"When the premises is sufficiently described, as by giving the particular name of close, or otherwise, an erroneous additional description will be rejected as a 'false demonstration'; but if there is not this certainty in the first description as if it is expressed in general terms and a particular description is added, the latter controls the former and limits the generality of the earlier description." There is undoubtedly a conflict between the two descriptions, and the question which we have to consider is, whether the words constituting the second description should be rejected as a false description, or whether they should be read as words of restriction. The test, in my opinion, is this: if the first description is sufficient in itself to identify the land which is conveyed, then, if there is a conflict between the first description and

the second description, the second description ought to be rejected as a false description; but if the first description is not sufficient by itself to identify the lands intended to be sold, then the second description ought to be read as restricting the operation of the grant. The question then is this: is the first description sufficient in itself to identify the lands in dispute? In my opinion, there can be no doubt that the words are quite sufficient to identify the disputed land. Not only is the area given but the annual rental is given which is Rs. 41-12-0. The description is quite sufficient itself to identify the entire block of land which was held by Phekan Singh and for which he paid a rent of Rs. 41-12-0. That being so, the second description must be rejected as a false description.

It follows, therefore, from this finding that the plaintiffs are entitled to recover possession of schedule A lands. The next question is, whether the defendants or any of them are liable for mesne profits. Now, on this point the learned Subordinate Judge has come to the conclusion that the plaintiffs' case as to possession and dispossession is wholly untrue. There is no evidence on the record that the defendants or any of them at any time before the summons was served on them were or was aware of the fact that Phekan Singh's holding had been purchased by the plaintiffs in execution of a rent-decree obtained against Phekan Singh. The defendants Nos. 1 to 11 had admittedly a good title to schedule A lands by their purchase. That being so, it was necessary for the plaintiffs to give them notice of their purchase before they could make the defendants liable for mesne profits. Now, the defendants Nos. 1 to 11 sold the schedule A lands to defendant No. 13 long before the suit was actually instituted. In my opinion defendants Nos. 1 to 11 are not liable for mesne profits.

Defendant No. 13 contends that the question as between him and defendants Nos. 1 to 11 should be left open. I am unable to agree with this contention. Defendant No. 13 was in actual occupation of the land when summons was served upon him. He should have delivered possession of the disputed land to the plaintiffs forthwith.

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From the time he received summons in the suit he became a wrong doer. That being so, he is liable for mesne profits from the date when summons was actually served upon him. We accordingly modify the decree passed by the Court below. The plaintiffs are entitled to a decree for possession as against defendants Nos. 1 to 11 and defendant No. 13. They are also entitled to a decree for mesne profits in respect of schedule A lands from defendant No. 13 from the date of the service of summons upon defendant No. 13 up to the date when defendant No. 13 makes over quiet and peaceful possession of the lands to the plaintiffs. There will be no order as to costs in this Court.

There is a cross-objection by the plaintiffs against the finding of the learned Subordinate Judge in respect of schedule B lands. In my opinion the cross-objection should not be entertained. The plaintiffs and defendant No. 12 are all in the category of respondents, and it is unusual for one respondent to maintain cross-objection as against another respondent. It appears that the plaintiffs were out of time and they could not possibly have filed an appeal as against defendant No. 12. They, therefore, adopted this device to get rid of the question of limitation. That being so, we will not consider the cross-objection of the plaintiffs which must be refused.

Kulwant Sahay, J.—I agree.

Z. K. Cross-objection dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 419 OF 1920.
July 25, 1922.

Present.—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir Thomas Richardson, Kt.

KISHORI MOHAN PAL—PLAINTIFF—
APPELLANT
versus

PROVASH CHANDRA MONDAL, AND
OTHERS—DEFENDANTS—RESPONDENTS.

Partition decree, execution of—Delay in furnishing stamped paper—Limitation, operation of—Limitation Act (IX of 1908), Sch. I, Art. 182.

Although a decree in a partition suit is not formally drawn up until paper bearing the stamp prescribed by Art. 45 of Sch. I to the Stamp Act is supplied to the Court, limitation for the execution of such a decree runs, under Art. 182 of Sch. I to the Limitation Act, from the date of the decree, i.e., the date on which the judgment is pronounced, and not from the date on which the Court receives the requisite stamped papers. [p. 647, col. 2.]

Appeal against the order of the Subordinate Judge, First Court, of 24 Pargannas, dated the 28th of September 1920.

Babu Mahendranath Roy, (with him Babu Savat Chandra Mookerjee), for the Appellant.—The plaintiff applied for the execution of the decree made in a suit for partition. The learned Subordinate Judge was in error in holding that the period of limitation was to be counted from the date on which the Court received the necessary stamped paper. But the wording of Art. 182 of the Limitation Act is clear and plain. It says, "three years from the date of the decree and the date of the decree is undoubtedly the 24th of March 1914 and the decree bears that date." The application for execution was made on the 21st July 1920. The judgment was pronounced on the 25th March and that was the date of the decree, *vide* Order XX, r. 7, Civil Procedure Code.

Golam Gaffar Mandal v. Goljan Bibi (1), *Bhajan Behari Shaha v. Girish Chandra Shaha* (2).

Babu Jatindra Nath Lahiri, for some of the Respondents.—I submit that the decision in *Jotindra Mohan Tagore v. Bejoy Chand Mahatap* (3), cited by the learned Subordinate Judge has been correctly relied on and so the application for execution is not barred as is contended by the other side. It does not matter that the decree is dated the 25th March 1914, as the Commissioner's report and the map which forms part of the decree are dated the 27th June 1914. Moreover, the decree in the present case was signed by the learned Judge on the 2nd January 1920 as no stamped paper was supplied till then. A decree for partition cannot be finally drawn up until the proper stamped

(1) 25 C. 109; 13 Ind. Dec. (N. S.) 75.

(2) 19 Ind. Cas. 410; 17 C. W. N. 959.

(3) 32 C. 483.

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paper is supplied. So limitation is to run from the 2nd January 1920. The cases cited by my learned friend do not touch the point in the present case.

Babu M. N. Roy, for the other Respondents, agreed with the contention of Babu J. N. Lahiri.

Babu Mahendranath Roy, replied briefly.

JUDGMENT.

Richardson, J.—This is an appeal by the plaintiff arising out of an application for the execution of the decree made in a suit for partition. The respondents who have appeared are four of the defendants in the suit. They are described in the application as judgment-creditors while the plaintiff and the remaining defendants are described as judgment-debtors. The decree bears date the 25th March 1914. The application was made on the 21st July 1920, more than six years later. The only question is, whether execution is barred by limitation. No previous application for execution having been made, the period of limitation provided by Art. 182 of the Limitation Act is three years from the date of the decree. The words are plain and unambiguous and *prima facie* this application is out of time.

Under the Stamp Act of 1899 a decree for partition is chargeable with duty to the amount prescribed by Art. 45 of Schedule I of the Act and the expense of providing the proper stamp is to be borne by the parties to the decree in such proportions as the Court directs. The result is, that a decree for partition is not formally drawn up until paper bearing the proper stamp is supplied to the Court. The decree is then engrossed on the stamp paper and signed by the Judge.

In the present case the decree was signed by the Judge on the 2nd January 1920, no stamped paper having been furnished till on or shortly before that date.

In the judgment appealed from the learned Subordinate Judge has held that in the case of a decree for partition limitation runs from the date on which the Court receives the requisite stamped paper. He has given no reason or authority for this view other than the decision of this Court in the case of *Jotindra Mohan Tagore v. Bejoy Chandar Mahatap* (3).

It is not necessary to say whether one agrees or does not agree with that decision. The question discussed is not the question which arises in the present case. The learned Judges were not there construing Art. 182 of the Limitation Act.

In this Court the learned Vakil for the respondents has said all that could be said for his clients. He has in particular called our attention to the fact that, although the decree is dated the 25th March 1914, it is expressed to be "passed in terms of the Commissioner's report dated the 27th June 1914 which and the map filed along with it do form parts of the decree." The 25th March 1914 is, nevertheless, the correct date of the decree because that is the day on which the judgment was pronounced (O. XX, r. 7, Civil Procedure Code). The report of the Commissioner appointed to make the partition had already been received, by the judgment the report was adopted subject to certain variations and, in connection with those variations, certain directions of a ministerial character were given to the Commissioner which the Commissioner had merely to obey. The order-sheet shows that the Commissioner submitted a report on the 27th June 1914. That report has not been placed before us. But I have no doubt that it did no more than state that the Commissioner had done what he was directed to do by the judgment of the 25th March 1914. That judgment was the final judgment in the suit and it was so regarded, by the Subordinate Judge who delivered it. The decree is in accordance therewith. The directions in the judgment were sufficient to indicate how the decree should be framed, and there was no need of any further judgment.

The delay in signing the decree was due not to any fault of the Court or to any cause beyond the control of the parties but solely to the delay of the parties in supplying the requisite stamped paper. Any party desiring to have the decree executed might have furnished the stamped paper at any time leaving the expense of providing it to be adjusted by the Court in connection with the costs of the execution.

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The circumstances disclose no ground for saying that limitation did not run from the date of the decree as provided by Art. 182 of the Limitation Act, and if authority be needed, reference may be made to *Gulam Gaffar Mandal v. Goljan Bibi* (1) and *Bhajan Behari Shaha v. Girish Chandra Shaha* (2).

I may add that much time and labour would be saved if the Court would resist such attempts as the present to go behind the plain words of a positive enactment.

In my opinion the appeal succeeds and the application for execution must be dismissed.

In the circumstances, we make no order as to the costs of this Court or of the Court below.

Sanderson, C. J.—I agree.

W. C. A.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 55
OF 1920.

February 9, 1923.

Present:—Mr. Justice Das and Mr. Justice
Kulwant Sahay.

Babu CHATRAPAT PRATAP BAHADUR SAHI—PLAINTIFF—APPELLANT
versus

C. G. LEES—DEFENDANT NO. 1 AND
Musammat RAM MURAT KUER—

Pro forma DEFENDANT—RESPONDENTS.

Adverse possession—Ejectment suit—Burden of proof—Suit arising out of order in proceedings under s. 145, Criminal Procedure Code—Necessary parties—Thakbast map, value of.

In an action for ejectment it is incumbent on the plaintiff not only to prove his title but also that he has been in possession within twelve years of the date of the suit. [p. 649, col. 2.]

In a suit for possession arising out of an order made under section 145 of the Criminal Procedure Code, the plaintiff has a cause of action only against the person whose possession has been confirmed by the order and is not bound to implead as parties to the suit any other person who might have a claim to the property in dispute. [p. 649, col. 2.]

The object of the *Thakbast* Survey which preceded the Revenue Survey, was to ascertain the position of boundaries and areas of estates and villages, it was no part of the duty of the Revenue

officers conducting the *thakbast* operations to record prescriptive rights. [p. 650, col. 1.]

Thakbast maps, therefore, are good evidence of possession at the time they were made, but they are no evidence of title acquired by prescription or adverse possession. [p. 650, col. 1.]

Salcowri Ghosh Mondal v. Secretary of State for India in Council, 22 C. 252 at pp. 257, 258; 11 Ind. Dec. (N. S.) 170, relied upon.

Appeal from a decision of the Subordinate Judge, Second Court, Muzaffarpur, dated the 26th November 1919.

Messrs. S. N. Rai and Sultan Ahmad, for the Appellant.

Messrs. P. Kennedy, S. K. Mitra and S. C. Mitra, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—*Mauza* Majharia Shaikh in Tappa Khadda, District Champaran, originally belonged to the Bettiah Raj and it was granted by the Raj as a rent-free tenure to the predecessors of the plaintiffs more than 60 years ago and it is now owned by the plaintiffs and they are in possession thereof. Within the said *Mauza* there is a lake which has been surveyed in the last Cadastral Survey and bears *Khasra* Nos. 1446, 1448, 3233 and 1446-3275, to 1446-3298. Out of these survey plots, plots Nos. 1446, 1448 and 3233 measuring about 163.48 acres are under water and the parties claim *jalkar* rights therein. Survey Nos. 1446-3275 to 1446-3298, measuring about 2.33 acres, are culturable lands. The defendant is the Manager of the Lalsaraya Factory and *Mauza* Lalsaraya and several other *Mauzas* are held by the Factory under a *mokarrari* grant, dated the 3rd November 1888, under the Bettiah Raj and in the *mokarrari* deed the *jalkar* right in Tappa Khadda is expressly excluded from the grant. The plaintiffs allege that they have been in peaceful possession of the *jalkar* bearing Survey Nos. 1446, 1448 and 3233, but during the last Revisional Survey the plaintiffs came to know that the defendant had settled Survey Nos. 1446-3275 to 1446-3298 with several tenants and wrongfully appropriated the rental in respect thereof on the allegation that the said lands appertain to *Mauza* Jawakatia covered by their *mokarrari*, but ultimately those plots were recorded in the Record of Rights as appertaining to the plaintiffs' *Mauza* Majharia Shaikh and the tenants with whom

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the lands had been settled abandoned the same, and the lands are now in the *khas* possession of the plaintiffs. As regards the *jalkar* 1446-1448, and 3233, there was a proceeding under section 145 of the Code of Criminal Procedure between the defendant and the servants of the plaintiffs wherein the Magistrate found the defendant to be in possession and the plaintiffs allege that they have been dispossessed from these *jalkar* plots by reason of this order under section 145 of the Code of Criminal Procedure. The plaintiffs brought the present action on the 21st October 1918 praying for adjudication of their title to plots Nos. 1446, 1448 and 3233 and for recovery of possession thereof with mesne profits and for the recovery of Rs. 117-9-0 being the amount of rent alleged to have been realised by the defendant and appropriated by him on account of the rent of plots Nos. 1446-3275 to 1446-3298. The defendant raised various pleas and contended *inter alia* that the plaintiff did not disclose any cause of action as against him, as he was merely the Manager of the Factory; that the disputed *jalkar* was in possession of the Factory for more than 70 years, and that the plaintiffs were never in possession thereof and he denied the plaintiffs' title to possession and their right to recover mesne profits and damages. The learned Subordinate Judge has found that the *jalkar* plots Nos. 1446, 1448 and 3233 are situated within and appertain to *Mauza* Majhariah, but that the plaintiffs have failed to prove possession within 12 years of plots Nos. 1446 and 1448, and that the defendant has proved adverse possession for more than 12 years. He has, therefore, dismissed the plaintiffs' suit as regards those two plots. As regards plot No. 3233, he has found that the plaintiffs have proved their possession within 12 years and has made a decree in their favour in respect of this plot. As regards the claim for damages for plots Nos. 1446-3275 to 1446-3298 the learned Subordinate Judge has dismissed the plaintiffs' claim and the learned Counsel for the plaintiffs does not press his claim as regards the damages in this appeal. There were two plaintiffs in the suit, but the present appeal has been filed only by the plaintiff No. 2, and the plaintiff No. 1 who is a ward of the Court of Wards, has been made respondent in the

appeal. The only point pressed in the appeal is as regards the plaintiffs' right to plots 1446 and 1448.

The first point which arises for decision in this appeal is as to whether the suit is maintainable as against the defendant in the case as he is merely the Manager of the Lalsaraya Factory, the proprietors whereof have not been made defendants. Mr. Kennedy for the respondent argues that the action being in ejectment and the defendant being merely a Manager of the Factory, the suit is not maintainable without the proprietors of the Factory being made parties. To my mind there is no substance in this objection. The cause of action alleged in the plaint is the dispossession by the defendant on account of the proceeding under section 145 of the Code of Criminal Procedure. In that proceeding Mr. Lees, the defendant, was declared to be in possession and the plaintiffs have got a cause of action against the person who has actually dispossessed them. Moreover, the suit cannot be defeated on account of non-joinder of the proprietors of the Factory. If it be shown that they are not properly represented in the present action by the Manager, the defendant No. 1, they might not be bound by this decree, but that is no reason for dismissing the suit.

The main question, however, for decision in the appeal is as regards the title of the plaintiffs to the *Jalkar*. The learned Subordinate Judge has found that the *Jalkar* appertains to *Mauza* Majharia Shaikh and it is apparent on a reference to the *Thukbust* Map of 1845 and the Revenue Survey Map of 1846 that the disputed *Jalkar* is situated within the ambit of *Mauza* Majharia. The plaintiffs would, therefore, be *prima facie* entitled to possession of this *Jalkar* unless they have lost their title by being out of possession for more than twelve years. The learned Government Advocate for the appellant argues that the title being in the plaintiffs, the *onus* was on the defendant to prove adverse possession for more than twelve years but the action being in ejectment it is incumbent upon the plaintiffs not only to prove their title but also that they have been in possession within twelve years of the date of the suit. The question of *onus*, however, is not of any importance in the present case inasmuch as both sides

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have produced evidence and the Court is entitled to come to a finding upon the evidence as a whole as to whether the plaintiffs or the defendant have been in possession within the statutory period. As regards the evidence of possession, the plaintiffs rely on the Survey Map of 1846, which shows the western portion of the *Jalkar* to be in Majharia. They also rely on the Khatian of 1895, Ex. 20, which shows the disputed *Jalkar* in the possession of Dhanukdhari Singh and others, ancestors of the plaintiffs, in *Mauza* Majharia Shaikh through their tenant Teka Kamkar. They also rely on *Jamabandi* papers, Exhibits 1 to 12, for the years 1904 to 1913 which show settlements made by the 8-annas proprietors of village Majharia and realization of rents for the *Jalkar*. In addition to this, they have produced oral evidence to prove the fact of their possession and they argue that the evidence on the record proves their possession from the years 1846 down to 1913. As against this, the defendants rely on the *Thakbust* Map, Exhibit A. A. of the year 1845 wherein there is an entry as regards the disputed *Jalkar* to the following effect: "River Mun *Jalkar* appertains to *Mauza* Sundaria and land belongs to this *Mauza*." (The translation in the printed paper-book to the effect that the land belongs to the "said *Mauza*" is clearly a mistake for "this *Mauza*", the word in the original being *haza* which means 'this' and not 'said'). Now the defendant's case is that the *Jalkar* in dispute, although situated within the ambit of *Mauza* Majharia Shaikh, is a part of a continuous *Jalkar* which is known as *Jalkar* Sinduria and which belongs to the Factory and reliance is placed upon the *Thakbust* Map to show that in the year 1845 the *Jalkar* in dispute was found to be a part of the Sundaria *Jalkar* although lying on the lands of Majharia. No doubt, these *Thak* Maps are good evidence of possession at the time they were made, but they are no evidence of title acquired by prescription or adverse possession. The object of the *Thakbust* Survey, which preceded the Revenue Survey, was to ascertain the position of boundaries and area of estates and villages and it was no part of the duty of the Revenue Officers conducting the *Thakbust* operations to record prescriptive rights. (See notes on

the old Revenue Surveys of Bengal, Bihar, Orissa and Assam by Captain F. C. Hirst, and the remarks of their Lordships of the Privy Council in the case of *Satcowri Ghosh Mondal v. Secretary of State for India in Council* (1). The value of the entry in the *Thakbust* Map is further very much diminished by the Revenue Survey Map which was prepared the next year 1846, wherein this *Jalkar* is shown as belonging to *Mauza* Majharia and not to *Mauza* Sundaria. In fact, the Survey Map of 1846 clearly shows that the eastern portion of the lake was included in Lalsaraya, and if the western portion which is now in dispute was also outside Majharia and included in Sundaria, the said western portion would also have been shown in the same way as the eastern portion. Therefore, the entry in the *Thak* Map is not of much help to the defendant in the present case. The defendant was produced *bandobasti* papers, Exhibits A to A4 and B to F8, from the year 1906 onwards to show that the Factory used to settle *Jalkars* with tenants, but in those papers there is nothing to identify the *Jalkars* settled, with the plots in dispute now. We only find a mention of Sundaria or Senwaria *Jalkar* and the *Bandobasti* papers by themselves are not sufficient to prove the defendant's possession of the *Jalkar* now in dispute. The same remarks apply to the cash books showing realization of rents in respect of the Senwari *Jalkar*. The defendant has also produced *kabuliats* Exhibit E series, the earliest of which is dated the 13th September, 1914. These *kabuliats* show settlements by the factory of a large number of *Jalkar* Mahals, one of which is in Majharia Shaikh, but as I have already remarked they do not go far enough to establish adverse possession for more than twelve years. The defendant has also examined several witnesses to prove the fact of his possession. His witness No. 3, Jang Bahadur Singh, says that he took settlement of the disputed *Jalkar* from the Factory in 1306, 1307, and 1308, and his witness No. 4 Lalkshman Mallah, claims to have taken settlement of the same *Jalkar* from the Factory from 1301 to 1309 *Fasli*. This period overlaps with the lease of the

(1) 22 C. 252 at pp. 257, 258; 11 Ind. Dec. (N. S.) 170.

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witness No. 3, Jang Bahadur Singh, and the evidence of these witnesses who speak of having taken settlements of the *Jalkar* from the Factory is, to my mind, not reliable. The learned Subordinate Judge has, however, placed reliance on the evidence of Mr. Reid and Mr. Finzel, who were Managers of the Factory before the present defendant Mr. Lees. As regards the evidence of Mr. Reid, he was Manager of the Factory from 1901 to 1910. He speaks of the possession of the Factory over the *Jalkar* and *Narkat* in the lake by the side of the Factory. It does not appear from his evidence that he was referring to the *Jalkar* now in dispute. He was examined on Commission and interrogatories put to him and the answers given by him do not, in my opinion, establish the possession of the defendant over the identical *Jalkar* now in dispute. There are admittedly other *Jalkars* in possession of the Factory and they are close to the Factory. Therefore, his evidence is not sufficient to establish adverse possession of the defendant. As regards Mr. Finzel, he was Manager from March to September 1911. He no doubt says, that he knows the *Jalkar* in suit and that he made settlement of this *Jalkar* with certain persons, but in cross-examination he says that he has no idea of the boundaries of the disputed *Jalkar* or lake and in a vast sheet of water extending over several miles this sort of evidence is not sufficient to prove adverse possession over the disputed land. As regards Mr. Lees, he says in his evidence that he knows the *Jalkar* in dispute and that it is in the possession of the Factory. He, however, became Manager in September 1911 and he cannot speak of previous possession from his own knowledge. He gives reason for his opinion that the Factory is in possession of this *Jalkar* from a long time because the Thakbust Map of 1845 includes the *Jalkar* in Mahal Sonbaria. Another reason that he assigns is that in February 1897, he went to the *Jalkar* in dispute in the company of Mr. McLeod on a pigsticking excursion. Mr. McLeod set the reeds on fire and on asking who was going to pay the damages, Mr. McLeod said, that the whole of it belonged to him. Now this statement of Mr. Lees is, to my mind, not legal evidence as regards the possession of the Factory over the disputed *Jalkar* in

the year 1897. This is the whole of the evidence on the record and in my opinion it is not sufficient to prove adverse possession of the defendant over the *Jalkar* in dispute. The only documentary evidence in support of the defendant is the Thakbust Map of 1845 and Mr. Lees in his evidence admits that he has got no other document to show that the Sonbaria *Jalkar* includes the disputed *Jalkar*. I think that the plaintiffs have succeeded in proving their possession within twelve years and they are entitled to a decree for possession of this disputed *Jalkar* 1446 and 1448 also.

I would, therefore, set aside the decree of the Court below as regards these two *Jalkars* and decree the suit in respect thereof with costs. The plaintiffs will be entitled to mesne profits in respect of these *Jalkars* the amounts whereof will be ascertained by the Court below.

Das, J.—I agree.

Z. K.

Decree set aside.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1449 OF 1920.

June 14, 1922.

Present :—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

GONESH RAM AND OTHERS—PLAIN-
TIFFS—APPELLANTS

versus

GANPAT RAI AND OTHERS—DEFENDANTS
—RESPONDENTS.

Pleadings—Specific performance of contract, suit for—Pleading and proof, variance between, effect of—Part performance.

The plaintiff in a suit for specific performance of an alleged contract embodied in a certain document cannot, after the case made by him in the plaint has completely broken down, be permitted to abandon the case made in the plaint and to invite the Court to examine whether a completed agreement may or may not be spelt out of correspondence antecedent to the document. The Court would not, in a case of this description, permit the plaintiffs to depart from the case made in the plaint, as the Court discourages, as a rule, variance between pleading and proof. The test applied in such cases is, whether, if the variance were permitted in favour of the plaintiff, the defendant would not be taken by surprise and be prejudiced thereby. This rule is applied with-

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special strictness in cases of specific performance of contracts. But where there has been a part performance the Court may struggle with apparently conflicting evidence rather than dismiss the suit. [p. 653, col. 2.]

Appeal against the decree of the District Judge, Dinajpur and Darjeeling, dated the 23rd of February 1920, affirming the decree of the Subordinate Judge, Darjeeling, dated the 25th August 1919.

Babus *Dwarkanath Chakrabutty* (with him Babu *Kali Kinkar Chakrabutty*, for the Appellants.—This was a suit for the specific performance of a contract for the sale of a house. There was a completed contract made on the 26th September 1917. My difficulty is that there are concurrent findings of the lower Courts against me. But I invite your Lordships to look at the antecedent correspondence between the parties which leave no room to doubt that there was a completed contract the specific performance of which can be sought.

Babu *Ramchandra Majumdar*, (with him Babu *Mohesh Chandra Banerjee* for Babu *Rama Prosad Mukherjee* and Babu *Mritunjoy Chatterjee*,) for the Respondents.—I object to my friend's inviting your Lordships to go beyond the plaint and the pleadings and look into the antecedent correspondence. The Court should not permit the plaintiffs to depart from the case made in the plaint.

Babu *D. N. Chackerbutty*, replied in brief.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for specific performance of a contract of sale of a house. The plaintiffs came into Court on the allegation that a completed contract for sale was made on the 26th September 1917 by a person named Sidhi Gopal Misser, who acted for the first defendant and had authority to enter into a valid agreement on his behalf for the sale of the house and the land. The first defendant repudiated the allegations of the plaintiffs while the second and third defendants claimed the protection accorded to *bona fide* purchasers for value without notice. In the Trial Court the plaintiffs produced a document which was marked Exhibit I and purported to embody the agreement which the plaintiffs sought to enforce specifically. The Court held an elaborate

investigation and came to the conclusion that this document, which purported to be an agreement to sell and was alleged to have been written by Sidhi Gopal Misser on the 26th September 1917, was not in existence at the date of the institution of the suit, and, further, that it had been manufactured collusively during the progress of the trial. On this finding, the Subordinate Judge declined to make a decree for specific performance. He further stated that, in any event, as the plaintiffs had not sought equitable relief with clean hands, he must decline to exercise in their favour the discretion vested in him by section 22 of the Specific Relief Act. Upon appeal, the District Judge affirmed the findings of the Court of first instance as to the document mentioned and the authority of Sidhi Gopal Misser to complete the contract. The District Judge held that Sidhi Gopal was not authorised to complete the contract and that he did not do so in fact. On the invitation of the plaintiffs, however, the District Judge considered the antecedent correspondence between the parties and came to the conclusion that only negotiations had taken place, which had not matured into a completed contract. In this view the District Judge affirmed the decree made by the Trial Court.

On the present appeal, the finding of the Courts below as to Exhibit I has not been questioned; but we have been invited to examine the correspondence which preceded the execution of that document and to hold that they disclose a completed contract between the parties. The respondents have taken exception to the adoption of this course. We are of opinion that we should not accept the invitation of the appellants to examine the correspondence with a view to determine whether they do or do not disclose a concluded agreement between the parties antecedent to the exhibit already mentioned.

The plaintiffs came into Court on the allegation that the negotiation culminated in a contract on the 26th September 1917 and that such contract was made by Sidhi Gopal Misser on behalf of the first defendant. No doubt, the document was not annexed to the plaint. But it was produced at the trial and was made the foundation of the

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case for the plaintiffs. That case has completely broken down. The plaintiffs cannot, in such circumstances, be permitted to abandon the case they made in the plaint and to invite the Court to examine whether a completed agreement may or may not be spelt out of the antecedent correspondence. The Court would not in a case of this description, permit the plaintiffs to depart from the case made in the plaint, as the Court discourages, as a rule, variance between pleading and proof. The test applied in such cases is, whether if the variance were permitted in favour of the plaintiffs, defendants would be taken by surprise and be prejudiced thereby. *Jalim Singh v. Chooner Lal* (1), *Nabadwipendra Mcookerjee v. Madhu Sudan Mandal* (2), *Sital Das v. Partap Chunder Sarma* (3), *Satish Kantha Roy v. Satis Chandra* (4), *Ishan Chandra Dhupi v. Nishi Chandra Dhupi* (5), *Hira Lal v. Gribala Debi* (6), *Haji Umar Abdul Rahiman v. Gustadji Muncherji Cooper* (7), *Motabhooy Mulla Essabhoy v. Mulji Haridas* (8). This rule is applied with special strictness in cases of specific performance of contracts. *Hawkins v. Maliby* (9) one contract was alleged and another was proved, with the result that the bill was dismissed. No doubt where there has been a part performance the Court may struggle with apparently conflicting evidence rather than dismiss the suit. This appears to have been the view adopted by Lord Cottenham in *Mundy v. Jolliffe* (10). In the case before us, there is no question of part performance. On the other hand, the findings of the Courts below make it abundantly clear that the

conduct of the plaintiffs has been throughout of such a character as to disentitle them to assistance from the Court.

The result is, that the decree made by the District Judge is affirmed and this appeal dismissed with costs.

B. N.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO.

301 OF 1921.

March 9, 1923.

Present:—Mr. Justice Ross.

JHINGUR OJHA AND OTHERS—

DEFENDANTS—APPELLANTS

versus

MEGHNATH PANDEY—

PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 116—Transfer of non-transferable interest—Covenants of title and quiet enjoyment, breach of—Suit to recover consideration, maintainability of—Limitation.

Plaintiff sued to recover possession of a certain share in a *jajmanka brit* sold to him by the defendant by a registered deed, or, in the alternative, for the recovery of the amount paid by him as consideration for the sale. It was found that the *jajmanka brit* was not saleable:

Held, (1) that the contract, although ineffective to transfer the *jajmanka brit* to the plaintiff owing to the unsaleable nature of the property, was not an illegal contract in the sense of being contrary to law or morals, and that, therefore, the claim for the recovery of the amount paid as consideration for the sale was maintainable; [p. 654, col. 2.]

Scott v. Brown, (1892) 2 Q. B. 724; 61 L. J. Q. B. 738; 4 R. 42; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213; *Gedge v. Royal Exchange Assurance Association*, (1900) 2 Q. B. 214; 69 L. J. Q. B. 506; 82 L. T. 463; 9 Asp. M. C. 57; 5 Com. Cas. 229; 16 T. L. R. 344; *Hira Pandey v. Bachu Pandey*, 35 Ind. Cas. 345; 1 P. L. J. 381; 2 P. L. W. 390; *Sukh Lal v. Bishambhar*, 37 Ind. Cas. 661; 39 A. 196; 15 A. L. J. 41, referred to.

(2) that there having been a breach of the covenants of title and quiet enjoyment, the suit was governed by Article 116 of Schedule I to the Limitation Act, limitation having commenced to run either from the date when the plaintiff was dispossessed or from the date when the Court held that the *jajmanka brit* was not saleable. [p. 654, col. 2.]

Bassu Kuar v. Dhum Singh 11 A. 47; 15 A. 211; 5 Sar P. C. J. 260; 12 Ind. Jur. 450; 6 Ind. Dec. (N. S.) 458, relied upon.

(1) 11 Ind. Cas. 540; 15 C. W. N. 882.

(2) 16 Ind. Cas. 741; 18 C. W. N. 473.

(3) 3 Ind. Cas. 408; 11 C. L. J. 2.

(4) 55 Ind. Cas. 689; 30 C. L. J. 475; 24 C. W. N. 662.

(5) 41 Ind. Cas. 378; 29 C. L. J. 1; 22 C. W. N. 853.

(6) 34 Ind. Cas. 444; 23 C. L. J. 429.

(7) 34 Ind. Cas. 268; 20 C. W. N. 297; 3 L. W. 308; (1916) 1 M. W. N. 137; 30 M. L. J. 444 (P. C.)

(8) 29 Ind. Cas. 223; 42 I. A. 103; 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 Bom. L. R. 460; 2 L. W. 524; (1915) M. W. N. 522; 39 B. 399 (P. C.)

(9) (1868) 3 Ch. App. 188; 37 L. J. Ch. 58; 17 L. T. 397; 16 W. R. 269.

(10) (1839) 5 My. & Cr. 167; 9 L. J. Ch. 95; 3 Jur. 1045; 48 R. R. 262; 41 E. R. 334.

JHINGUR OJHA v. MEGHNATH PANDEY.

Javerbhai Jorabhai v. Gordhan Narsi, 28 Ind. Cas. 442; 39 B. 358; 17 Bom. L. R. 259, *Bai Diwali v. Umedbhai Bhulabhai Patel*, 36 Ind. Cas. 564; 40 B. 614; 18 Bom. L. R. 773, distinguished.

Appeal from a decision of the Subordinate Judge, Patna, dated the 15th September 1920, confirming that of the Munsif, First Court, Patna, dated 31st July 1919.

Mr. Rai T. N. Sahay, for the Appellants.
Messrs. S. Dayal and Brij Kishore Prasad, for the Respondent.

JUDGMENT.—This is an appeal by the defendants against the decree of the Subordinate Judge of Patna, affirming the decision of the Munsif in a suit brought by the plaintiff for recovery of possession of a 2-annas 3-pies share in a *jajmanka brit* sold to him by a registered deed on the 27th of February 1914 by the defendant Jhingu Ojha, or, in the alternative, for recovery of Rs. 400, the consideration for the sale.

The Courts below have held that the *jajmanka brit* was not saleable, and consequently the plaintiff could not be given possession but they have given him a decree for Rs. 400 with interest.

Two grounds are urged in second appeal; the first is that when an illegal act has been performed by the parties and one has advanced money to the other on an illegal consideration, he cannot recover it. The second ground is, that the suit is barred by limitation.

In support of the first ground, reference was made to Halsbury's Laws of England, Volume VII, p. 390 where it is said that "if the illegality of a transaction is brought to the notice of the Court and the person invoking the aid of the Court is himself implicated in the illegality, the Court will not assist him." The decisions in *Scott v. Brown* (1) and *Gedge v. Royal Exchange Assurance Association* (2) were referred to. Now these were both cases of illegal contracts, and the nature of the cases to which the rule applies has been described in the passage in Halsbury referred to above. The text-writer speaks of contracts which are expressly prohibited by Statute, con-

tracts that are illegal at Common Law as involving the commission of a crime or tort, and contracts which are unlawful as being contrary to public policy; contracts which are not actually unlawful but merely void, either by Statute, such as gaming and wagering contracts or on grounds of public policy, such as contracts in general restraint of trade.

It is quite clear that in the present case the contract is not of this nature. It may not have been effective to transfer the *jajmanka brit* because of the unsaleable nature of the property, but it is not an illegal contract in the sense of being contrary to law or morals.

There is nothing in the decision in *Hira Pandey v. Bachu Pandey* (3) to support any such contention, while in *Sukh Lal v. Bishambhar* (4), it was held that there is nothing in law to prevent a *Maha Brahmin* mortgaging his rights to offerings receivable by him in his professional capacity. I am not concerned with the effect of the transfer but merely with the nature of the act. It seems to me impossible to hold that such a transfer is an illegal contract involving the consequence that no rights can be claimed under it of any kind.

With regard to limitation, the argument is that as the consideration has wholly failed, this is a suit for money had and received for the use of the plaintiff and, therefore, it is governed by Art. 62 of the Limitation Act, and consequently time would begin to run from the date of the contract and the suit was barred on the 11th September 1918 when it was brought.

Two decisions were referred to in support of this argument, *Javerbhai Jorabhai v. Gordhan Narsi* (5) and *Bai Diwali v. Umedbhai Bhulabhai Patel* (6). These were both cases of mortgages which were illegal under the provisions of the Bhagdari Act, and consequently it was held that the consideration for the mortgage failed *ab initio* and the suit must be governed by Art. 62. But as I have already held the

(3) 35 Ind. Cas. 345; 1 P. L. J. 381; 2 P. L. W. 390.

(4) 37 Ind. Cas. 661; 39 A. 196; 15 A. L. J. 41.

(5) 28 Ind. Cas. 442; 39 B. 358; 17 Bom. L. R. 259.

(6) 36 Ind. Cas. 564; 40 B. 614; 18 Bom. L. R. 773.

(1) (1892) 2 Q. B. 724; 61 L. J. Q. B. 738; 4 R. 42; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213.

(2) (1900) 2 Q. B. 214; 69 L. J. Q. B. 506; 82 L. T. 463; 9 Asp. M. C. 57; 5 Com. Cas. 229; 16 T. L. R. 344.

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present contract was not barred by any Statute, and it cannot be said that the consideration wholly failed. The plaintiff having entered into possession of the *jajmanka brit* and remained in possession until he was dispossessed on the 30th August 1918 by his vendor's son, time would begin to run either from that date or from the date on which it was held by the Court that the property had not passed by the sale [*Bassu Kuar v. Dhum Singh* (7)]. There is a distinct stipulation in the conveyance that if there was any defect in title, the vendee would be competent to realise the consideration-money with damages. This was a registered instrument and as there was a breach, both of the covenant for title and of the implied covenant for quiet enjoyment, the plaintiff was entitled to bring his suit within six years of the breach. In my opinion the suit was within time and this appeal must fail.

In the last place, it was urged that the question of the liability of the sons of Jhingu Ojha who have been substituted for their father, now deceased, in the present appeal, as between them in their personal capacities and the decree-holder should be left open to be gone into in execution. That question, in my opinion, does not arise. The present appellants have been substituted for their father and they are bound by the result of the appeal.

The appeal is dismissed with costs.

Z. K.

Appeal dismissed.

(7) 11 A. 47; 15 I. A. 211; 5 Sar. P. C. J. 260; 12 Ind. Jur. 450; 6 Ind. Dec. (N. S.) 458.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO.
1241 OF 1920.

July 24, 1922.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Chotzner.

SYAM LALL NASUA—PLAINTIFF—
APPELLANT

versus

BRINDABAN CHANDRA AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Landlord and tenant—Rent suit, dismissal of—
Relation of landlord and tenant not established—
Subsequent suit for ejectment—Res judicata.*

Where in a rent-suit by a landlord against an alleged tenant the latter sets up a title in himself, and the Court dismisses the suit, holding the relation of landlord and tenant to be not established, the decision is conclusive on one point and one point alone, namely, that the defendant was not the tenant of the plaintiff during the years for which rent was claimed. The decision cannot operate as *res judicata* on the question of title in a subsequent suit to eject the defendant as a trespasser.

Mrigendra Nath Saha v. Krishna, Chandra Saha,
61 Ind. Cas. 201; 33 C. L. J. 334, followed.

Appeal against the decree of the Additional District Judge, Tipperah, dated the 9th of February 1920, reversing that of the Munsif, Third Court, at Comilla, dated the 27th of February 1919.

Babu Ramdayal De, for the Appellant:—My client brought this suit for the purpose of ejecting the defendants who he says are mere trespassers and as such cannot be allowed to stay on his lands. The Court of Appeal below has reversed the judgment of the first Court which was in my favour on the ground that my suit is barred by the operation of the principle of *res judicata* inasmuch as a previous suit which was brought by my client against these defendants failed. My contention is that the learned Appellate Court below is wrong in applying the principle of *res judicata* to this case. That was a judgment in a suit for rent, and this is a suit in ejectment. It is inconceivable how *res judicata* comes in. What is the precise effect of the decision in the rent-suit in respect of the dispute in the present case? My learned friend cannot say that this matter or the questions at issue in this case were directly and substantially in issue in the previous rent suit and that they were finally

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decided so as to preclude this suit from being instituted. The matters in issue in the former case were whether the defendants were tenants for a certain period under the plaintiff and, if so, whether they were in arrears or not. But in the present suit the plaintiff seeks to eject the defendants on the ground that they have absolutely no title to the land and are, therefore, trespassers. The matters in issue in these two suits are entirely different. I submit that the Appellate Court below has proceeded on wrong lines in thinking that the title of the plaintiff has been lost by adverse possession by the defendants whom I regard as trespassers. Cites *Mirgendra Nath Saba v. Krishna Chandra Saba* (1).

Babu Jotindra Mohan Ghosh, for the Respondent was not called upon.

JUDGMENT.—This is an appeal by the plaintiff in a suit for ejectment. The case for the plaintiff is, that he sued the defendants for arrears of rent in 1915 on the allegation that they held the disputed land under him as his tenants. In that litigation, the defendants pleaded that they were not tenants under the plaintiffs and set up a title in themselves. The Court, thereupon, framed an issue in the following terms: "Is there any relationship of landlord and tenant between the parties." The Trial Court came to the conclusion upon the evidence that the plaintiff had failed to prove the relationship of landlord and tenant between the parties and in this view dismissed the suit for rent on the 22nd March 1915. On the 21st May 1918 the plaintiff instituted the present suit to eject the defendants on the allegation that they were trespassers. The Court of first instance decreed the suit. Upon appeal the District Judge has reversed the decision. It was argued in the Courts below that the decision in the rent-suit operated as *res judicata*. There can be no room for doubt that the decision does not operate as *res judicata*, but the parties are not agreed as to the precise effect of the decision in respect of the controversy in this litigation. The judgment of this Court in *Mirgendra v. Krishna* (1) shows that the decision in the

rent-suit is conclusive upon one point and one point alone, namely, that the defendants were not the tenants of the plaintiff during the years for which rent was then claimed; that is, from 13th April 1910 to 12th April 1913. No other questions were essentially in dispute at that stage, and they cannot rightly be regarded as matters directly and substantially in issue in the suit and finally decided therein. The effect of the decree in that suit upon this litigation then is, that the defendants must be deemed not to have been the tenants of the plaintiff since the 13th April 1910. The present suit, as we have stated, was instituted on the 21st May 1918 and the plaintiff must consequently prove that he was in possession of the disputed land within 12 years antecedent to that date. Accordingly, in view of the decision in the rent suit, he is to prove his possession after the 21st May 1906 and before the 13th April 1910. He might have been in possession during this period in one of two ways, namely, either by direct occupation or by possession through tenants. He has not established that he was directly in possession during this period; nor has he proved that the defendants during this period held as tenants under him. The defendants, on the other hand, have established that they have been in occupation for more than 40 years before the commencement of the present litigation. In such circumstances, the possession of the defendants must be taken to have been adverse to the plaintiff. The District Judge has consequently held rightly that the title of the plaintiff, if any, has been extinguished by adverse possession and that the suit must be dismissed with costs.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

N. H.

Appeal dismissed.

ADELAIDE CHRISTIANA LISH v. DAVID LISH.

PATNA HIGH COURT.

MATRIMONIAL SUIT NO. 3 OF 1922.

January 30, 1923.

Present:—Justice Sir John Bucknill, Kt.

ADELAIDE CHRISTIANA LISH—

PLAINTIFF

versus

DAVID LISH AND OTHERS—DEFENDANTS.

Letters Patent (Patna), cl. 27—Divorce Act (IV of 1869), ss. 4, 7—“Matters matrimonial,” meaning of—Suit for declaration of validity of marriage, maintainability of—Jurisdiction of High Court.

The expression “matters matrimonial” used in clause 27 of the Letters Patent of the Patna High Court is identical with that used in section 4 of the Divorce Act, and the meaning to be attached to it in the Act and the Letters Patent must be consonant and identical. [p. 658, col. 2.]

The jurisdiction of the High Court in matters matrimonial, therefore, is only such jurisdiction as is comprised within the provisions of the Divorce Act. [p. 658, col. 2.]

Gasper v. Gonsalves, 13 B. L. R. 109, referred to.

The High Court has, therefore, no jurisdiction to entertain a suit for a mere declaration that plaintiff's marriage with the defendant is lawful and valid. [p. 658, col. 2.]

Section 7 of the Divorce Act merely indicates the principles upon which the Court shall generally act and in no way enlarges the scope of the jurisdiction conferred upon the Court as defined in those sections of the Act where jurisdiction is expressly categorized. [p. 658, col. 2.]

Matrimonial suit.

Mr. Yunus, for the Plaintiff.

Mr. Baikuntha Nath Mitter, for the Defendants.

JUDGMENT.—This was a suit purporting to be a matrimonial suit entered as No. 3 of 1922 brought by one Adelaide Christiana Lish asking that this Court might be pleased to declare that her marriage with one Charles Lish on the 10th July 1916 was “a perfectly valid and lawful marriage;” she does not ask for any other relief except the usual formal alternative prayer that the Court might be pleased to grant such other relief as it might think fit and proper. Now, it is not here necessary for me to dilate upon the circumstances in connection with which this litigation was commenced. It is, I think, sufficient to state that they appear to be unusual; the plaintiff having, apparently, first married one Thomas Lish in 1868, then one Horace John Wilson in 1894 and, finally, Charles Lish in 1916. This

Charles Lish was, it is said, a brother of her first husband. All these gentlemen are deceased, having died respectively in 1890, 1902, and 1917. The question which has, of course, at once arisen is as to whether a suit of this kind can be brought in this Court. Now, the learned Counsel for the plaintiff has argued with much ingenuity that, by virtue of clause 27 of the Letters Patent constituting this High Court of Judicature (*i.e.*, that of Patna) which were dated 9th February 1916, it would appear that a suit of this nature can be instituted in this High Court. This clause of the Letters Patent runs as follows:—

“And We do further ordain that the High Court of Judicature at Patna shall have jurisdiction, within the Province of Bihar and Orissa, in matters *matrimonial* between Our subjects professing the Christian religion: Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Letters Patent within the said Province, which is lawfully possessed of that jurisdiction.”

Now, it is obvious that the first point which has to be considered is as to what is meant by the phrase “matters matrimonial” and, I think, it is possible that if these words were to be construed in their widest conceivable meaning, it may be that they might cover jurisdiction over a suit asking for a declaration that a marriage was valid. The learned Counsel refers here to what may be termed the *matrimonial matters* within the jurisdiction of the Probate, Divorce and Admiralty Division of the High Court of Justice in England. That Court under its jurisdiction (which that Division inherited from the Court of Divorce and Matrimonial Causes) was entitled to pronounce decrees in connection, amongst other matters, with the dissolution of marriage, the nullity of marriage and the establishment of the legitimacy and the validity of marriages. The learned Counsel for the plaintiff suggests that when the first Supreme Courts were established in India (namely in Calcutta) they possessed a similarly unrestricted jurisdiction in connection with matrimonial questions and under which there could have been rightly entertained a suit for a declaration that a particular marriage

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was legal and valid. He points out that by clause 35 of the Letters Patent of 1865, under which the High Court of Judicature at Fort William in Bengal was re-established (which, whilst revoking previous Letters Patent of the year 1862, continue that High Court), it was declared that the High Court of Judicature at Fort William in Bengal should have jurisdiction within the Bengal Division of the Presidency of Fort William "in matters matrimonial between Our subjects professing the Christian religion." The learned Counsel urged that at that date it was probable that there existed in that High Court an unrestricted matrimonial jurisdiction and that at that date a suit, such as the present one brought in this Court, could have been there entertained. However that may be, the Indian Divorce Act (IV of 1869) clearly altered the position as to jurisdiction so far as High Courts established prior to the date of the enactment are concerned. This Act, which came into operation on the 1st April of 1869, declared in its preamble that it was expedient to amend the law relating to the divorce of persons professing the Christian religion and to confer upon certain Courts jurisdiction in *matters matrimonial* and it proceeds later to define the nature of those matters which are to be regarded as matrimonial and in respect of which Courts are to have jurisdiction. In clause 4 it is laid down as follows:—

"The jurisdiction now exercised by the High Courts in respect of divorce *a mensa et toro*, and in all other causes, suits and *matters matrimonial*, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise except so far as relates to the granting of marriage licenses, which may be granted as if this Act had not been passed."

It is not contended here (indeed, it is a matter of common ground) that there is nothing in the Indian Divorce Act which definitely contemplates that a suit asking for a declaration of validity of a marriage comes within its purview. My attention has, however, been tentatively drawn to section 7 of the Act which reads thus :

"Subject to the provision contained in this Act the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts,

are, as, nearly as may be, conformable to the principles and rules on which the Court for divorce and matrimonial causes in England for the time being acts and gives relief."

This section, however, to my mind merely indicates the principles upon which the Courts shall generally act and in no way enlarges the scope of the jurisdiction as defined in those sections of the Act where jurisdiction is expressly categorized. It is, I gather, admitted that had the Letters Patent establishing the Patna High Court been promulgated in the year 1868, there could have been no doubt whatever that its jurisdiction (whatever it may have been before) would have been delimited by this section 4 of the Indian Divorce Act: but it is suggested that as the Letters Patent establishing this Court only came into effect in 1916, the words "*matters matrimonial*" as used in clause 27, may be construed as contemplating a larger jurisdiction than that to which at any rate, High Courts existing prior to the Indian Divorce Act of 1869 were by that Act restricted. I have very little hesitation in coming to the conclusion that they cannot. In my view, although it is possible to read into the phrase "*matters matrimonial*" a very broad meaning, yet, when we find that that expression is identical with that used in the Indian Divorce Act, it is not unreasonable to suppose that the meaning in both the Act and the Letters Patent should be properly construed as consonant and identical. For this reason, therefore, I think, that the jurisdiction of this High Court in *matters matrimonial* is only such jurisdiction as is comprised within the provisions of the Indian Divorce Act. The consequence of this view is that, in my opinion, this suit cannot be instituted in this Court.

The only case bearing upon the matter to which my attention has been drawn is that of *Gaspar v. Gonsalves* (1) decided by Pontifex, J., in 1874 and I see that it is referred to in certain text-books relating to the Law of Divorce in India as an authority. The suit in that case was for a declaratory decree that the plaintiff was a *feme sole* and not the wife of the defendant, and for an injunction that he might be restrained from asserting that she was his wife and

(1) 13 B. L. R. 109.

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from attempting to enforce as against her any right as her husband. The circumstances were certainly curious and it appears that the suit was undefended, nobody representing the reputed husband. The learned Judge seems, with some diffidence, to have come to the conclusion that it was not competent under the provisions of the Indian Divorce Act of 1869 for an individual to ask the High Court for a decree that her or his marriage was invalid on such grounds as were in that case sought to be put forward but only on the grounds directly prescribed in the Indian Divorce Act itself. I should add that the grounds in the case in question were, substantially, that the wedding ceremony had not been properly carried out, that no Civil Officer had been present at the marriage and that no notices thereof had been given in accordance with the requirements of the French Law as it existed at the Settlement of Chandernagore in which the marriage was solemnised.

A second question was raised as to which, however, I do not think that it is perhaps strictly necessary that I should express any definite opinion but which I do not like to leave entirely unmentioned in view of the fact that it was actually argued. It was at first suggested that it was not possible for a suit to be brought at all for a bare declaration of the validity of a marriage without an application for some consequential relief. The point, however, has really disappeared as a result of the argument and it is not now contended that, in view of the provisions of section 42 of the Specific Relief Act, such suit is not maintainable before an appropriate tribunal even though the only matter in respect of which relief is asked is simply that a certain marriage may be declared as having been legally and validly contracted.

The result, therefore, in this case will be that the plaint will be returned for the purpose of presentation before the appropriate Court.

The defendant who has appeared, namely, David Lish, the first defendant, is entitled to his costs.

Z. K.

*Jurisdiction declined.***BOMBAY HIGH COURT.**

FIRST CIVIL APPEAL NO. 51 OF 1921.

FIRST CIVIL APPEAL NO. 93 OF 1921.

January 8, 1923.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

VITHAL, YESHWANT GAVDE—

DEFENDANT NO. 2—APPELLANT

versus

SHIVAPPA MALLAPPA HOSMANI

AND OTHERS—PLAINTIFFS AND DEFENDANT

NO. 1—RESPONDENTS.

Hindu Law—Joint family—Mortgage of joint property by manager—Necessity—Burden of proof.

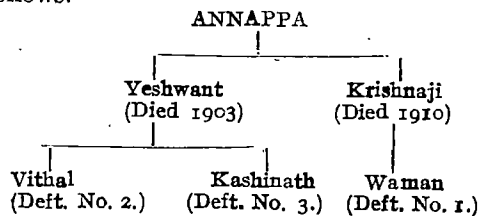
Where the manager of a joint Hindu family mortgages joint estate, it is incumbent on the parties supporting the mortgage to prove that the money raised on the mortgage was required for family purposes; and where the mortgage is for carrying on a family business, it is not sufficient for the mortgagee to prove by evidence that the mortgagor was carrying on such business. He must show that the money was required for such business. [p. 661, col. 1.]

Appeal against the decision of the First Class Sub-Judge at Belgaum, in Suit No. 195 of 1918.

Mr. H. C. Coyajee, Counsel (with him Mr. D. R. Manerikar), for the Appellant.

Mr. Nilknath Atmaram, for Respondents Nos. 1 to 3.

JUDGMENT.—The plaintiff sued to recover on a simple registered mortgage-bond Rs. 9,400 principal and Rs. 9,400 as interest, with costs and future interests at 12 per cent. The original mortgagor was one Krishnappa Annappa. The pedigree of the family is as follows:—



When the mortgage was executed Kashi Nath, the son of Yeshwant, the brother of Krishnaji, was separated from the family. The members who remained joint were Krishnaji, his son Waman and Vithal, the brother of Kashinath. A decree was passed in favour of the plaintiffs for Rs. 18,800, with costs and future interest at 12 per cent. per annum on Rs. 9,400 from the suit

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date till the expiry of six months from the date of the decree and at 6 per cent. thereafter until satisfaction. On failure to so pay, the mortgaged property, excepting the interests of defendant No. 3, if any, in it, or a sufficient portion of it, was to be sold towards satisfaction of the mortgage. The personal remedy was held to be time-barred. The principal issue in the case was whether the mortgage was executed for a joint family necessity. The Judge found that issue in the affirmative. The 2nd defendant Vithal has appealed. In 1909, Krishnaji was the sole adult member of the family. He carried on an iron shop and a grocery shop, which undoubtedly were businesses belonging to the family. From 1906 to 1909 Krishnaji had also carried on an oil shop. But that was a new business, and so the other members of the family would not be liable for any debts which were due by that shop. In 1909 Krishnaji entered into a partnership with some other persons to deal in mirabolams, and there can be no doubt that that could not be treated as a family business, and that Krishnaji would be liable for any debts which were incurred for that business.

The law regarding mortgages of joint family property made by the manager of a joint family governed by the Mitakshara, who is not the father of the other members, is laid down in *Anant Ram v. Collector of Etah* (1), a decision of the Privy Council. Such a mortgage, it was held, could only be justified so far as it was wanted for the joint family purposes. If the necessity could not be established by direct evidence, it might be assumed, if it could be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof was on the person who claimed the benefit of the mortgage. It was further held that if the mortgage-debt was not incurred for necessity, not even the mortgagor's own interest could be sold in enforcement of such a mortgage.

In the suit mortgage-deed with regard to the amount taken from the mortgagee

it was stated as follows:—"The amount of rupees taken from you by us for our needs arising out of some pecuniary difficulties, i.e., for the necessity of the business of the shop belonging to the family of Krishnaji Annappa Gavde and the said minors is as follows: "Rs. 2,000 Krishnaji Annappa Gavde, one of us had taken from you on 11th January of 1909 by passing in writing a promissory-note Rs. 2,000 in cash and Rs. 7,400 have been received from you now."

That statement in the mortgage-bond would not be binding on the second defendant, nor would it avoid the necessity of the mortgagee proving that the mortgage-money was required for joint family purposes. There is no evidence whatever that at the time when the mortgage was executed either the iron shop or the grocery shop was in need of funds. There is no evidence that the mortgagee took any steps to ascertain whether or not the money was required for the family business, and, therefore, it is difficult to see how the mortgagee has satisfied the burden of proof which lay upon him. But reliance was placed on the decision in *Raghunathji Tarachand v. Bank of Bombay* (2). The plaintiff in that case filed a suit on certain promissory-notes signed by the only adult male member of a joint Hindu firm carrying on an ancestral trade, and it was held that the minor defendant's share in the firm was liable. Mr. Justice Chandavarkar at page 81* said: "Assuming that the minor is governed by the principles of Hindu law, what is the Hindu Law on the subject? Where a minor is a co-partner in a joint family, his share in the family property is liable for debts contracted by his managing co-parcener for any family purpose or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the term *family purpose* or *purposes incidental to it*, must here give way to the expression *trading purpose* or *purposes incidental to it*, having regard to the nature and objects of the family business. The calculating of a negotiable instrument is in the case of a joint family trading as a firm, necessary for its existence

(1) 44 Ind. Cas. 290; 20 Bom. L. R. 524; 34 M. L. J. 291; 7 L. W. 323; 4 P. L. W. 226; 16 A. L. J. 245; 23 M. L. J. 228; 22 C. W. N. 484; 27 C. L. J. 363; 49 A. 171; (1918) M. W. N. 449 (P. C.).

(2) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.

* Page of 34 B.—[Ed.]

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and its purposes. It is a necessary incident of the carrying on of the trade. Without it the firm could not gain credit in the market and prosper."

With the greatest respect, I should say that assertion was far too wide. Although in the case of some joint family firms the circulating of a negotiable instrument may be a necessary incident of the business, it still must be shown that it is a necessary incident of the business carried on by the Hindu joint family whose members the plaintiff seeks to make liable. I think it is most probable that from the evidence which was before the learned Judge, it did appear that in that family it was incidental to its business to circulate negotiable instruments. But I do not think that the argument holds good that an exception can be grafted to the rule laid down by the Privy Council. When the manager of a joint Hindu family mortgages joint estate, it must still be incumbent on the parties supporting the mortgage to prove that the money raised on the mortgage was required for family purposes. No doubt, if the family is carrying on a trading business, it would be very much easier to prove that the money was required for the purposes of that trade, and so for family purposes, than if the family were mere agriculturists. But it is not a necessary inference that, because Krishnaji was carrying on two shops dealing in iron and groceries, and because he raised moneys by mortgaging family property, that the money was necessarily required for the purposes of the joint family business. There is no direct evidence as to what was the capital involved in the iron and grocery shops in 1909, but there is also no evidence whatever that they were in need of so much money as was raised by Krishnaji on the said mortgage. On the other hand, it has been proved that Krishnaji in 1909 was entering upon an entirely new venture with several outside partners which required, as the accounts show, considerable capital. It was suggested that before 1909 Krishnaji had been dealing in mirabolams. That suggestion is based on a statement made in the plaint in the suit filed by Kashinath, the 3rd defendant, for partition, in which he claimed a share in the mirabolam business. That by itself would not be evidence that, as a matter of fact, Krishnaji was carry-

ing on mirabolam business as a part of the family trade. Even if he was doing so, it would not be an ancestral business any more than the oil shop was. It seems to me, therefore, that the onus which lay on the mortgagee to prove that Krishnaji was entitled to mortgage in his favour joint family estate for family purposes has not been satisfied. The Judge says at page 7: "I fully believe that the suit-debt was borrowed by Krishnaji for joint family necessity, *i.e.*, trade necessity as stated in suit-bond. It is not shown that Krishnaji had no necessity to borrow at the time of the suit-bond. Krishnaji was a man of business and I do not hence disbelieve the statement in suit-bond about the amount being taken for family trade necessity." I have endeavoured to show that the learned Judge has not appreciated, even if he considered, the decision of the Privy Council, which shows that it is not sufficient for a mortgagee to prove by evidence that the mortgagor was carrying on a family business. He must show that the money was required for that business. It follows that the appeal must be allowed, and that the interest of the second defendant in the suit property must be excepted from the sale.

The third defendant Kashinath was made a party to the suit and, although the suit was dismissed against him, he was ordered to pay his own costs. In his Appeal No. 93 of 1921, it has been argued for the respondents that no appeal lies on the question of costs. In this particular case we think a principle is involved. But, apart from the question whether any principle is involved, since the second defendant has appealed, the whole decree of the lower Court is before us, and we can make any alteration we think fit in it. The principle involved is due to the rule that costs follow the event, and that the successful party is entitled to get his costs, unless it has been shown that there is some very good reason why he should bear his own costs. This has not been done. The plaintiffs, therefore, will have to pay the costs of the second and third defendants in the Court below and of their respective appeals.

W. C. A.

Appeal allowed.

MAHADEO SARAN v. DHARAMNATH SAHAY.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 882 OF 1921.

March 16, 1923.

Present :—Mr. Justice Kulwant Sahay.

Babu MAHADEO SARAN—APPELLANT

versus

DHARAMNATH SAHAY—RESPONDENT.

Landlord and tenant—Suit to eject transferee of tenant—Transferability—Burden of proof—Transfer of Property Act (IV of 1882), s. 108 (j).

In a suit by the landlord to eject a transferee from a tenant from homestead land, the burden is, in the first instance, on the plaintiff to prove that the tenancy was created before the Transfer of Property Act was passed, before the *onus* can be thrown upon the defendant to prove the custom of transferability. In the absence of such proof the case must be governed by section 108 (j) of the Transfer of Property Act. [p. 663, col. 1.]

Appeal from a decision of the Officiating Subordinate Judge, Saran, dated the 28th January 1921, reversing a decision of the Munsif, First Court, Chapra, dated the 23rd May 1917.

Mr. S. C. Mitra, for the Appellant.

Mr. Siveswar Dyal, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in an action in ejectment. The plaintiff is the landlord of village Kanar. One Ram Prosad Lal had a homestead land in the village which he conveyed to the defendants Nos. 1 and 2 in the year 1909. The plaintiff's case is that the holding was not transferable and the defendants Nos. 1 and 2 by their purchase acquired no valid title and he brought the present action for *khas* possession of the land. The plaintiff further alleged that Ram Prosad Lal had abandoned this homestead land sometime in the year 1905 or 1906 and had left the village and had gone away to some place in Bengal and that, therefore, in the year 1909, when the conveyance to the defendants Nos. 1 and 2 was executed, he had no right to sell the land and, therefore, the defendants Nos. 1 and 2 acquired no interest by their purchase. The First Court found that Ram Prosad had abandoned the holding before the conveyance of 1909 and, therefore, defendants Nos. 1 and 2 acquired no interest by their purchase and he decreed the suit for *khas* possession. There was an appeal to the District Judge by the defendants which was heard by the Subordinate Judge of Saran and the appeal

was allowed and the suit was dismissed.

There was a second appeal to this Court which came up before Mr. Justice Sultan Ahmad and his Lordship set aside the judgment of the Court of Appeal below and remanded the case to be heard by the District Judge or by some other officer to whom he may transfer it for fresh hearing. After remand the appeal has been heard by the Officiating Subordinate Judge and he has set aside the decree of the Munsif and dismissed the suit. The plaintiff now appeals.

The learned Subordinate Judge has found upon the evidence that the alleged abandonment by Ram Prosad in the year 1905 or 1906 or at any time prior to the conveyance of 1909 has not been proved. This is a finding based on evidence and is conclusive in second appeal. But the learned Counsel for the appellant argues that, assuming that the conveyance to the defendants Nos. 1 and 2 was genuine and that Ram Prosad had the right to sell in the year 1909, still it was for the defendants to prove that the holding was transferable and as they failed to prove it, they acquired no title by their purchase. This argument is based on the assumption that the holding was created before the Transfer of Property Act was passed. The learned Subordinate Judge on this point has found that there is no evidence on the record that the tenancy of Ram Prosad was created before the passing of the Transfer of Property Act. The only evidence on the record was that the disputed land was part of Basgit, which existed before the passing of the Bengal Tenancy Act, and he held that the plaintiff must prove that the particular tenant was created before the passing of the Transfer of Property Act before the *onus* could be shifted on the defendant to prove the custom of transferability. The learned Counsel for the appellant argues that the Subordinate Judge was wrong in throwing the *onus* upon the plaintiff. His case is that the plaintiff, being the admitted landlord and the action having been brought in ejectment, it was for the defendants to prove the custom of transferability. He relies on the case of *Ambica Prasad Singh v. Baldev Lal* (1). What was held in that case

(1) 36 Ind. Cas. 126; 1 P. L. J. 253; 20 C. W. N. 1113; 2 P. L. W. 417.

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was that, when a landlord sues a person on the allegation that he is a trespasser and that person sets up a transfer from a tenant, it is for the defendant to prove both the tenancy and the validity of the transfer and that, in the absence of evidence to the contrary, homestead land comprised in a tenancy created before the Transfer of Property Act, 1882, was passed, must be presumed to be non-transferable. It appears that in that case it was admitted that the holding was created before the Transfer of Property Act. There was no dispute as regards the time when the holding came into existence and it being admitted that the holding was created before the Transfer of Property Act, the onus certainly lay on the defendants to prove the custom of transferability before he could succeed. In the present case the defendants deny the fact that the present holding came into existence before the Transfer of Property Act and, therefore, it was for the plaintiff to prove that the tenancy came into existence before the Transfer of Property Act.

Mr. Siveswar Dyal for the respondents relies on the case of *Mohendra Lal Sinha v. Krishna Kumari Debi* (2) as an authority for the proposition that it is for the plaintiff to prove that the tenancy was created before the Transfer of Property Act, was passed before the onus could be thrown upon the defendant to prove the custom of transferability. Although the question of onus was not discussed in this case, their Lordships proceeded on the assumption that it was for the plaintiff to prove, in the first instance, that the tenancy was created before the Transfer of Property Act.

In my opinion, the learned Subordinate Judge was right in holding that it was for the plaintiff in the first instance to prove that the tenancy was created before the Transfer of Property Act. This not being proved, the case must be governed by the provisions of section 108 (j) of the Transfer of Property Act and the holding was certainly transferable.

In this view of the case, the appeal must be dismissed with costs.

Z. K.

Appeal dismissed.

(2) 46 Ind. Cas. 656.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS.
2108 TO 2113 OF 1920.

August 7, 1922.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Chotzner.

DINA NATH PAL, AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

Raja SATI PRASAD GARGA BAHADUR AND OTHERS—DEFENDANTS—

RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 3 (5), 50—"Rent" in section 50, if restricted to money rent—Rent payable partly in cash and partly in kind—Presumption, whether applicable—Statutes, interpretation of—Reference to history of Statute, if permissible.

In section 50 of the Bengal Tenancy Act, the term 'rent' cannot be restricted to 'money rent'. It bears the meaning attributed to it in section 3, clause (5) of the Act. [p. 668, col. 1.]

The substantive rule formulated in section 50 (1) and the presumption embodied in section 50 (2) of the Bengal Tenancy Act do not become inapplicable because a tenure-holder or *raiyat* holds at a rent payable partly in cash and partly in kind, or entirely in kind. [p. 664, col. 2.]

Although light may be thrown on the scope of a Statute by looking at what Parliament was doing contemporaneously and at the history of the Statute yet even when words in a Statute are so ambiguous that they may be construed in more than one sense, regard may not be had to the Bill by which it was introduced. [p. 666, col. 2.]

(Case-law considered.)

Reference is not permissible to the Report of a Select Committee in aid of the interpretation of a statutory provision. [p. 666, col. 1.]

Appeals against the decrees of the Special Judge, Midnapore, dated the 5th February 1920, affirming those of the Revenue Officer, Midnapore, dated the 22nd April 1918.

Babus Mahendra Nath Ray and Peary Mohan Chatterjee, for the Appellants.

Dr. Dwarkanath Mitter and Babu Probodh Chandra Chatterjee, for the Respondents.

JUDGMENT.—These six appeals have arisen out of as many suits, instituted by tenants, under section 106 of the Bengal Tenancy Act, against their landlords, for the decision of disputes regarding entries which had been made in a finally published Record of Rights. The plaintiffs had been recorded as settled *raiyyats* under the defendants; they claimed that they were *raiyyats* at fixed rents. In support of their contention, they produced rent receipts which showed that each of them had held at a

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uniform rent for over 20 years. In each case, however, the rent consisted partly of cash and partly of the money value of a fixed quantity of paddy. To take one illustration: in the case of one tenancy, the amount of rent as shown in the rent receipts was Rs. 20-1a-12gds-2k; this amount is made up of Rs. 18-13a-18gds-2k as cash rent and Rs. 1-3as-14gds as the money value of two *kuris* 3 *mans* 1 *khupi* of paddy. These two items are shown separately in the receipts up to the year 1902, and, thereafter, the consolidated sum alone is shown as cash rent. Similar observations apply to each of the other cases. In these circumstances, the Revenue Officer who tried the suits in the Court of first instance held that section 50 of the Bengal Tenancy Act was not applicable. In his opinion the term 'rent' in that section did not include rent in kind. The result was that the suits were dismissed. On appeal, the Special Judge adopted the same construction of section 50 and confirmed the decision of the Revenue Officer. In this Court, the tenants have urged that section 50 has not been correctly interpreted by the Courts below.

Section 50 of the Bengal Tenancy Act provides as follows:—

"50 (1). Where a tenure-holder or *raiyat* and his predecessors-in-interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be increased except on the ground of an alteration in the area of the tenure or holding.

"(2). If it is proved in any suit or other proceeding under this Act that either a tenure-holder or *raiyat* and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement."

This section must be read along with section 3 (5) which provides that, unless there is something repugnant in the subject or context, rent means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account

of the use or occupation of the land held by the tenant. This definition is in no way repugnant to the subject or context of section 50, and the term 'rent' in that section may well be replaced by its equivalent as given in section 3 (5). This leads inevitably to the conclusion that the substantive rule formulated in section 50 (1) and the presumption embodied in section 50 (2) do not become inapplicable because a tenure-holder or *raiyat* holds at a rent payable partly in cash and partly in kind or entirely in kind.

A determined effort was successfully made in the Courts below on behalf of the landlords—and the attempt has been resolutely repeated here—to place a restricted construction on section 50, by reference to the report of the Select Committee of the Legislative Council of the Governor-General which considered the draft of the Bengal Tenancy Bill at the final stage. It is well-known that there was, at one time, some divergence of judicial opinion on the question, whether a produce rent, which, though varying annually with the varying amount of the yearly produce was yet fixed as to the proportion it was to bear to such produce, was a fixed rent for the purposes of sections 4 and 16 of Act X of 1859 and sections 4 and 17 of Act VIII of 1869 B. C. The question was answered in the affirmative in a long series of decisions; *Thakooranee Dossee v. Bisheshur Mookerjee* (1); *Miterjeet Singh v. Toondun Singh* (2); *Ram Dyal Singh v. Luchmee Narain* (3); *Jutto Moar v. Basmuttee Koer* (4); *Hanuman Parshad v. Kaulesar Pandey* (5). The contrary opinion, however, was maintained in *Mahomed Yacoob Hossein v. Wahed Ali* (6) and *Thakoor Pershad v. Nowab Syud Mahomed Baker* (7). But the decision in *Yacoob Hossain v. Wahed Ali* (6) was disapproved in *Miterjeet Singh v. Toondun Singh* (2) and in *Ram Dyal Singh v. Luchmee Narain* (3); Jackson J., when pressed with the decisions in *Yacoob Hossain v. Wahed Ali* (6) and

(1) 3 W. R. Act X. Rul. 29.

(2) 12 W. R. 14; 3 B. L. R. App. 88.

(3) 14 W. R. 388; 6 B. L. R. App. 25.

(4) 15 W. R. 479.

(5) 1 A. 301; 1 Ind. Dec. (N. S.) 119.

(6) 4 W. R. Act X Rul. 23; 1 Ind. Jur. (N. S.) 29.

(7) 8 W. R. 170.

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Thakoor Pershad v. Nowab Syud Mahomed Baker (7) described in graphic terms the injustice of the rule favoured therein: "I confess I would have considerable difficulty in assenting to the rulings in these cases; because, if the rulings are correct, the Legislature must have intended that *raiyyats* who have held land upon one principle, that is to say, upon one fixed ratio of division of the produce of their land with the landlord, from the time of the Permanent Settlement, would be entitled to no protection whatever, but would after these 80 or 90 years be subject to a suit for enhancement or for commutation of their rent at such money rates as the landlord might be enabled to prove. I cannot believe that the Legislature could have intended any such injustice to *raiyyats* in those parts of the country where the *bhaolee* system is prevalent, as it is in many parts of Behar. In those parts of the country, there being no such thing as a rate of rent in money, *raiyyats* holding from the time of the Permanent Settlement would have no protection whatever, unless the Legislature meant to include under the words rate of rent the mode or principle of *bhaolee* payment. But it is not necessary for us to determine the case upon this point; if it had been so, I should have been inclined to propose a reference to a Full Bench."

There can thus be no doubt that there was a marked preponderance of judicial opinion in favour of the view that *raiyyats* who paid their rent in kind, partially, or entirely, were not disentitled to the benefit of the statutory presumption corresponding to the rule now embodied in section 50 of the Bengal Tenancy Act.

But the respondents have invited our attention to the fact that while legislation, which ultimately culminated in the present Bengal Tenancy Act, was in hand, an attempt made to insert the following clause, so as to give effect to the view adopted in the majority of judicial opinions, was abandoned:

"When a *raiyyat* has paid as rent a fixed share or the value of the fixed share of the produce of the land, the rent or rate of rent shall not be deemed to have been changed within the meaning of this section, merely by reason of the amount paid having varied from year to year, or by reason of the rent

having been commuted, with the consent of both the *raiyyat* and his landlord, to a fixed money rent." (Digest of the Law of Landlord and Tenant prepared by C. D. Field, section 38; Bill prepared by the Rent Commission, 1880, section 16, Exp. 1; Bill submitted by the Bengal Government, 1881, section 15, Exp. 1; Bill as introduced in the Legislative Council, 1883, section 16; Bill as amended by the Select Committee of the Legislative Council, 1884, section 64 (3).)

This provision was omitted at the final stage, as appears from the following passage from the Report of the Select Committee:

"We have omitted from the section, which enacts the well-known presumption arising from holding at a rent unchanged for twenty years, the sub-section which made the presumption applicable to produce rents, as opinions generally were opposed to it." *Gazette of India*, dated 21st February 1885, Part V, page 64).

We shall presently consider whether reference is premissible to the Report of a Select Committee in aid of the interpretation of a statutory provision. But, even if we assume for a moment that such reference is legitimate, it is plainly of no assistance in the present case. The omission of the clause left the Bill as it was, and that Bill, it cannot be overlooked, contain a comprehensive definition of the term 'rent'. Act X of 1859 did not contain a definition of the term 'rent', and this opened up, as is well known, various opportunities for controversies of a recondite character. The Legislature remedied this defect by the insertion of a definition of the term 'rent', in section 3 (5) of the Bengal Tenancy Act—a definition which, as Sir Arthur Wilson observed in *Jotindra Mohan Tagore v. Jyao Kumari* (8), "seem to express very clearly the meaning of the word 'rent' as it would be understood without any statutory definition." We need not speculate whether the members of the Select Committee fully realised the effect of this definition on the other provisions of the Bill they had then under consideration. But this much is clear that if they intended to alter the current of judicial opinion under the old Law, they unquestionably failed to

(8) 33 C. 140 at p. 149; 3 C. L. J. 7; 10 C. W. N. 201; 1 M. L. T. 8; 33 L. A. 30 (P. C.).

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achieve their purpose by the mere omission of the clause we have mentioned. The result might have been different, if the term 'rent' in section 50 had been replaced by the phrase 'money rent' which makes its appearance in sections 28, 29, 30, 53 and 61. We may add that the decision of Jenkins, C.J., in *Baneswar Mukherji v. Umesh Chandra Chakrabarti* (9), which was mentioned in the course of argument, does not assist us in the solution of the question raised before us. That case turned upon the construction of a document then before the Court though, no doubt, it implies the opinion that rent payable partly in money and partly in kind cannot be regarded as fixed in amount. It may further be pointed out that the actual decision in that case has not been accepted in later decisions, which will be found reviewed in *Nilmadhab Mahapatra v. Keshab Lal* (10), *Asutosh Mukhopadhyaya v. Haran Chandra Mukherji* (11); *Gurudas Sen v. Gobinda Chandra Sinha* (12); *Basiruddi Chowdhuri v. Afsarannessa Bibi* (13).

We are, however, of opinion that reference is not permissible to the Report of the Select Committee. The Judicial Committee ruled in *Administrator-General of Bengal v. Premlal Mullick* (14), which reversed the decision of this Court in *Administrator-General of Bengal v. Prem Lal Mullick* (15), that reference is not permissible to the proceedings of the Legislature which result in the provisions of an Act as legitimate aids to its construction, and Lord Watson observed that the same reasons which exclude their consideration when the clauses of an Act of the British Legislature are under construction, are equally cogent in the case of an Indian Statute. In that case, reference had been made by Petheram, C. J., and Prinsep, J., to the Report of a Select Committee when the Bill, which subsequently became the Administrator-General's Act, was before the Legislative Council; Trevelyan, J., had, on the other hand, hesitated to adopt such a course, even though

there was precedent in its favour in the Full Bench decision in *Queen-Empress v. Kartick Chunder Das* (16). The Judicial Committee cannot be deemed to have departed from the rule enunciated by them in *Administrator-General of Bengal v. Premlal Mullick* (14), merely because they did not again express their disapproval of a similar method of interpretation adopted by a Full Bench of the Allahabad High Court in the case of *In the matter of Parbati Charan Chatterji* (17). Lord Watson and Sir Richard Couch were members of the Board on each occasion, and there is no indication that the Judicial Committee had, in the course of a few months, altered their opinion on the subject.

As regards the principles which, as indicated by Lord Watson in *Administrator-General of Bengal v. Premlal Mullick* (14), (at page 118*), exclude the consideration of proceedings of the Legislature when the clauses of an Act of the British Legislature are under construction, it may be taken as well-settled that, although light may be thrown on the scope of a Statute by looking at what Parliament was doing contemporaneously and at the history of the Statute: *Hawkins v. Gathercole* (18); yet even when words in a Statute are so ambiguous that they may be construed in more than one sense, regard may not be had to the Bill by which it was introduced. *Herron v. Rathmines Commissioners* (19), nor to what has been said in Parliament: *Miller v. Taylor* (20), *South Eastern Railway Co. v. Ry. Commissioners* (21), *Rex v. West Riding of Yorkshire County Council* (22); or elsewhere: *Martin v. Hemming* (23); *Ewart v. Williams* (24). The

(16) 14 C. 721; 7 Ind. Dec. (N. S.) 478 (F. B.).

(17) 22 I. A. 193; 17 A. 498; 6 Sar. P. C. J. 635; 8 Ind. Dec. (N. S.) 644. (P. C.).

(18) (1855) 6 De G. M. & G. 1 at p. 22; 106 R. R. 1; 24 L. J. Ch. 332; 1 Jur. (N. S.) 481; 3 W. R. 194; 3 Eq. Rep. 348; 43 E. R. 1129.

(19) (1892) A. C. 498; 67 L. T. 658.

(20) (1769) 4 Burr. 2303; 98 E. R. 201.

(21) (1881) 50 L. J. Q. B. 201; 6 Q. B. D. 586; 44 L. T. 203; 45 J. P. 388.

(22) (1906) 2 K. B. 676 at p. 716; 75 L. J. K. B. 933.

(23) (1854) 10 Ex. 478; 102 R. R. 686; 24 L. J. Ex. 3; 18 Jur. 1002; 3 W. R. 29; 156 E. R. 526.

(24) (1854) 3 Drew. 21; 61 E. R. 808 affirmed on appeal (1855) 7 De G. M. & G. 68; 109 R. R. 321; 44 E. R. 27.

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(9) 7 Ind. Cas. 875; 37 C. 626.
(10) 40 Ind. Cas. 819; 26 C.L. J. 94.
(11) 53 Ind. Cas. 382; 30 C. L. J. 41; 23 C. W. N. 1021; 47 C. 133.

(12) 54 Ind. Cas. 914; 24 C. W. N. 85.

(13) 40 Ind. Cas. 833; 21 C. W. N. 860.

(14) 22 I. A. 107; 22 C. 788; 6 Sar. P. C. J. 603; 11 Ind. Dec. (N. S.) 522 (P. C.).

(15) 21 C. 732; 10 Ind. Dec. (N. S.) 1118.

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view has been consistently maintained that the Court cannot look at the history of a clause or of the introduction of a proviso: *Barbat v. Allen* (25); *R. v. Capel* (26); nor at debates in Parliament, *R. v. Whittaker* (27); *Gorham v. Bishop of Exeter* (28) nor at amendments and alterations made in Committees: *Donegall v. Layard* (29); *Attorney-General v. Sillem* (30); In *Marquis of Donegall v. Layard* (29) at page 472*, Lord Campbell observed:

"I must lament that his (Smith, M. R., Ireland) zeal to do justice has led him into enquiries respecting this Act of Parliament which could not legitimately assist him in construing it, and which I think unfortunately induced him to change the sound construction which he had twice before put upon it. Surely, the fifth section ought to receive the same construction, whether it was first introduced in the House of Commons or in the House of Lords, and whether it was introduced in the Committee or on the third reading, and whether it was or was not altered after it was introduced. Nor could the rejection of the clauses moved by Lord Beaumont on behalf of the Marquis of Donegall in any way affect the construction of the clauses which were allowed to form part of the Act when it became law."

In *Attorney-General v. Sillem* (30), Pollock, C.B., said: "No Court can construe any Statute, and least of all a criminal Statute, by what Counsel are pleased to suggest were alterations made in Committee by a member of Parliament, who was 'no friend to the Bill', even though the Journals of the House should give some sanction to the proposition. This is not one of the modes

of discovering the meaning of an Act of Parliament recommended by Plowden or sanctioned by Lord Coke or Blackstone."

Reference may also be made to the decision of the Supreme Court of the United States in *In re Trans-Missouri Freight Association* (31), of the Supreme Court of Canada in *Gosselin v. R.* (32) and of the High Court of Australia in *Sydney Municipal Council v. Commonwealth* (33). We may also usefully recall the observations of Lord Halsbury in *Hilder v. Dexter* (34).

"I have more than once had occasion to say that, in construing a Statute, I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which, in fact, has been employed. At the time he drafted the Statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards, just because what was in his mind was what was intended, though, perhaps, it was not done."

We must further remember that, as pointed out by Farwell, L. J., in *Rex v. West Riding of Yorkshire County Council* (22), we have only to deal with the construction of the Act as printed and published, that is the final word of the Legislature as a whole, and the antecedent debates and subsequent statements of opinion or belief are not admissible. But they would be quite untrustworthy in any case. In the case of an Act dealing with a controversial subject, ambiguous phrases are often used designedly, each side hoping to have thereby expressed its own view, and the belief of each that it has succeeded is more often due to the wish than to any effort of reason. The generality of public understanding is quite incapable of proof and is beside the mark, unless as an appeal to timidity. The principles of construction applicable to Acts of Parliament are well

(25) (1852) 7 Ex. 609 at p. 616; 21 L. J. Ex. 155; 16 Jur. 339; 155 E. R. 1092.

(26) (1840) 12 A. & E. 382 at p. 411; 54 R. R. 580; 4 P. & D. 87; 2 L. J. (N. S.) M. C. 65; 4 Jur. (N. S.) 886; 113 E. R. 857.

(27) (1848) 2 C. & K. 636 at p. 640.

(28) (1850) 5 Ex. 630 at p. 667; 82 R. R. 797; 19 L. J. Ex. 376; 14 Jur. 876; 155 E. R. 276.

(29) (1860) 8 H. L. C. 460 at pp. 465, 472; 473 125 R. R. 239; 11 E. R. 508.

(30) (1863) 2 H. & C. 431 at pp. 521, 522 133 R. R. 731; 33 L. J. Ex. 93; 10 Jur. (N. S.) 262 9 L. T. (N. S.) 261; 12 W. R. 237; 159 E. R. 178 affirmed on appeal (1864) 10 H. L. C. 704; 10 Jur. (N. S.) 446; 10 L. T. (N. S.) 434; 4 N. R. 29; 12 W. R. 641; 133 R. R. 382; 11 E. R. 1200.

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(31) (1896) 166 U. S. 290; 41 Law. Ed. 1007.

(32) (1903) 33 Canada S. C. 255 at p. 264.

(33) (1904) 1 Com. L. R. 208 at p. 213.

(34) (1902) A. C. 474 at p. 476; 71 L. J. Ch. 781; 87 L. T. 311; 51 W. R. 225; 7 Com. Cas. 258; 9 Manson 378; 18 T. L. R. 800.

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settled; they will be found stated in *Stradling v. Morgan* (35), which received the approval of Turner, L. J., in *Hawkins v. Gathercole* (18), of Lord Halsbury in *Eastman Photographic Materials Co. v. Comptroller General of Patents, Designs and Trade Marks* (36), and were quoted with approval by the Full Bench in *Nilmani Kar v. Sati Prasad Garga Bahadur* (37); they certainly do not admit of any such considerations. We hold accordingly that reference could not be made to the Report of the Select Committee, and that even if reference were permissible, the contention of the landlords would not be advanced thereby.

Our conclusion is that in section 50, the term 'rent' cannot be restricted to 'money-rent' and that it bears the meaning attributed to it in section 3, clause (5). The result is that these appeals are allowed and the suits decreed with costs in all the Courts. The hearing fee in this Court will be assessed at one gold mohur in each appeal.

B. N. & N. H.

Appeals allowed: Suits decreed.

(35) (1858) 1 Plowden 199 at p. 204; 75 E. R. 305.

(36) (1898) A. C. 571 at p. 575; 67 L. J. Ch. 628; 79 L. T. 195; 47 W. R. 152; 15 R. P. C. 476; 14 T. L. R. 527.

(37) 61 Ind. Cas. 82; 48 C. 556; 32 C. L. J. 302; 25 C. W. N. 230 (F.B.).

PATNA HIGH COURT.

CIVIL REVISION, NO. 288 OF 1922.

February 5, 1923.

Present.—Mr. Justice Ross.

RAM NARAIN AND OTHERS—PETITIONERS
versus

RAMDHAN SINGH AND OTHERS—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. IX, r. 9—Dismissal for default—Inherent power to restore.

A Court has inherent power to restore a suit dismissed for default.

Bolasisrai Laxminarayan v. Cursondas Damodardas, 53 Ind. Cas. 252; 44 B. 82; 21 Bom. L. R. 952; *Somayya v. Subbamma*, 26 M. 599 and *Lalla Prasad v. Ram Karan*, 14 Ind. Cas. 187; 34 A. 426; 9 A. L. J. 666; relied on.

Where a suit has been dismissed in the absence of both parties there is no prejudice to the opposite party if it is restored, and the Court ought to exercise its inherent power in such a case especially if the claim is a substantial claim and would become barred by time if the suit is not restored.

Appeal from an order of the First Munsif, Patna, dated the 8th July 1922.

Mr. K. P. Jaiswal for Mr. Sundar Lal, for the Petitioners.

Messrs. B. K. Sinha and H. P. Sinha, for the Respondents.

JUDGMENT.—This is an application for revision of an order passed by the First Munsif of Patna refusing to restore the petitioners' suit which was dismissed in the absence of both the parties. The ground on which the restoration was sought was that the plaintiff's *karpardaz* had gone to another Court to get back some account-books to be filed in the present suit; and, as he failed to get them, he went to get a petition for extension of time written and by the time this was done he found that the case was dismissed. The Munsif thought this story improbable, but is not decisive on the point. He thinks, however, that the *karpardaz* ought to have looked after the case in the first hour and then ought to have gone to take back the account-books and that there was no jurisdiction for his conduct in not looking after the case till 8 A. M. Now the Munsif, although he did not find that there was sufficient cause for the plaintiff's non-appearance which would have required him to restore the suit, does not appear to have considered, whether this was not a case in which to exercise his inherent powers. That there is such a power in the Court has been repeatedly held. See *Bilasisrai Laxminarayan v. Cursondas Damodardas* (1), *Somayya v. Subbamma* (2) and *Lalla Prasad v. Ram Karan* (3). The power, in my opinion, ought certainly to have been exercised in this case for the simple reason that the claim was a substantial claim and would be barred by limitation, if the suit was not restored. The duty of the Court was to do justice between the parties and as the suit had been dismissed

(1) 53 Ind. Cas. 252; 44 B. 82; 21 Bom. L. R. 952.

(2) 26 M. 599.

(3) 14 Ind. Cas. 187; 34 A. 426; 9 A. L. J. 666.

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in the absence of both, there was no prejudice to the opposite party if it was restored. I set aside the order of the Munsif and the decree dismissing the suit and restore the suit for trial. There will be no costs.

Z. K.

Order set aside.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 27 OF 1922.

January 18, 1923.

Present:—Sir Walter Schwabe, Kt.,
Chief Justice, and Mr. Justice Wallace.
LAKSHMINARAYANA AND ANOTHER—
DEFENDANTS—APPELLANTS
versus

THE STANDARD OIL CO. OF NEW
YORK, BY ITS DULY AUTHORISED ATTORNEY,
S. D. TRUSCOTT, AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. IX,
r. 13—Ex parte decree, application to set aside—
Absence owing to Vakils' mistake—Sufficient
cause—Procedure.*

Where on an application to set aside an *ex parte* decree it appeared that defendants did not appear on the day of hearing partly owing to a mistake of their Vakils and partly owing to their not having received a telegram which had been sent by their Vakils in such time that if it had been received in the normal course, they could have been present at the hearing:

Held, that the defendants had shown sufficient cause for their absence and that the *ex parte* decree must, therefore, be set aside.

It is contrary to principles of natural justice that cases should be decided on the hearing of one side only if the other side is ready and willing to be heard. In such cases, as a rule, adequate punishment is to be found in the remedy of costs, which not only penalises the party in default but, theoretically, at any rate, indemnifies the other party from the expense which he has been put to by reason of that default.

Appeal from the judgment of Mr. Justice Phillips, dated 2nd February 1922, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 664 of 1921.

Messrs. P. Narayana Murti, P. Satyanarayana and K. Rama Murti, for the Appellants.

Messrs. T. Rangaramanuja Chariar, R. Srivama Chariar and B. Satyanarayana, for the Respondents.

JUDGMENT.

Schwabe, C. J.—This is another illustration of what happens when parties do not appear at the time they ought to appear through their own fault or the fault of their legal advisers. A strong case for the plaintiff was put before the learned Judge. Defendants Nos. 2 and 3 did not appear owing to a mistake of their Vakils, and owing partly to their not having received a telegram which had been sent by their Vakils in such time that, if it had been received in the normal course, he would have got them here on the second day of the hearing. Under those circumstances, in my judgment, it is not right that they should be penalised to the extent of the case being decided against them without their being heard. It is contrary to principles of natural justice that cases should be decided on the hearing of one side only if the other side is ready and willing to be heard. In such cases, as a rule, adequate punishment is to be found in the remedy of costs, which not only penalises the party in default but, theoretically, at any rate, indemnifies the other party from the expense which he has been put to by reason of that default. In these circumstances, in this case, there must be an order setting aside the decree and sending the case back for re-hearing. The costs of the first hearing awarded against defendants Nos. 2 and 3 must be paid by them in any event, and the costs of this appeal must abide the event of re-hearing. The amount paid into Court and security given will remain pending the re-hearing of the suit. Application can be made by the plaintiff to the Original Side, if it is desired, to use the evidence already on record and to adduce further evidence. The evidence to be called on behalf of defendants Nos. 2 and 3 will be limited to their own evidence and that of the two attestors to the partition deed. The appellant will get a refund of the Court-fees paid by him for this appeal.

Wallace, J.—I agree.

V. N. V.

Z. K.

Re-hearing ordered.

HIRJI JIVRAJ BALDEO v. RAMJAS AGARWALA.

PATNA HIGH COURT.

MISCELLANEOUS APPEAL NO. 169 OF 1922.

March 9, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahai.

HIRJI JIVRAJ BALDEO—JUDGMENT-DEBTOR—APPELLANT

versus

RAMJAS AGARWALA—DECREE-HOLDER—RESPONDENT.

Execution of decree—Sale—Objection to jurisdiction, whether can be taken after sale.

An objection that the Executing Court had no jurisdiction to sell certain property, cannot be taken after the sale has taken place.

Appeal from an order of the District Judge, Manbhum-Sambalpur, dated the 23rd May 1922.

Mr. A. B. Mukerjee, for the Appellant.

Mr. L. P. Singh, for the Respondent.

JUDGMENT.

Das, J.—The second appeal does not lie. The application was an application under O. XXI, r. 90, and two Courts have successively dealt with that application. It is now contended before us by Mr. Lachhmi Narayan Sinha that the Dhanbad Court had no jurisdiction to sell the property, the decree having been passed by the Court of Purulia. We are informed that there was no order transferring the case from the Purulia Court to the Dhanbad Court. Mr. Lachhmi Narayan Sinha may be right or he may be wrong in his contention; but I am clearly of opinion that the objection, if any, should have been taken before the Court proceeded to sell the property. The property having been sold the execution case was at an end; and it cannot now be urged that the question which is raised by Mr. Lachhmi Narayan Sinha is a question that arises in execution.

Mr. Lachhmi Narayan Sinha invited us to treat this appeal as an application, and to hold that the order of the Court below is erroneous. Where the only point is that there was no formal order of transfer by the Purulia Court to the Dhanbad Court it does not seem to us that we ought to invoke our revisional jurisdiction in the matter. The appeal fails and is dismissed with costs.

Kulwant Sahay, J.—I agree.

Z. K.

Appeal dismissed.

PHILLO v. GOPI.

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 754 OF 1921.

July 28, 1922.

Present:—Mr. Justice Campbell.

Musammam PHILLO AND OTHERS—

PLAINTIFFS—PETITIONERS

versus

GOPI, REPRESENTATIVE OF SURAJ, DECEASED, AND OTHERS—DEFENDANTS—RESPONDENTS.

Tort—Joint tortfeasors, liability of—Suit against several tortfeasors—Death of one of them—Procedure.
The liability of wrong-doers in tort is joint and several.

Where a suit is brought to recover damages in respect of a tort and it is discovered that one of the defendants had died before the institution of the suit, the proper procedure is to strike out the name of the defendant who is dead and to allow the suit to proceed against the others.

Petition, under section 44 of Act IX of 1919, for revision of a decree of the District Judge, Hoshiarpur and Kangra Districts, dated the 18th June 1921, affirming that of the Munsif, First Class, Kangra, dated the 17th October 1920.

Lala Mehr Chand Mahajan, for the Petitioners.

Mr. Badr-ud-Din Kuweshi, for the Respondents.

JUDGMENT.—The plaintiffs brought a suit in the Court of the Munsif, Kangra, for damages against several defendants on the allegation that they had stopped the working of a water-mill belonging to the plaintiffs for a considerable period. One of the defendants entered in the plaint was dead before the plaint was filed. On this account the Munsif dismissed the suit *in toto*, and the order was upheld by the learned District Judge for reasons which it is difficult to follow.

The authorities quoted by the learned District Judge are in no way applicable and it is a trite proposition that the liability of a wrong-doer in tort is joint and several. Counsel for the respondents can show me no other authority for the action of the lower Courts. If one of the several defendants was not alive when the suit was brought, it was perfectly simple to strike his name out and allow the suit to proceed against the others. It would have been quite a different matter if the suit had been filed against a single dead man or against a number of persons bound jointly by an obliga-

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tion to perform some contract as was the case in *Rao Ghulam Muhammad Khan v. Nahar Ali* (1), a ruling referred to by the learned District Judge.

The Courts below have clearly failed to exercise the jurisdiction which they possessed to try the suit against the other defendants. I accept the petition, set aside the order dismissing the suit and direct that it shall proceed against those defendants (or their representatives) who were alive when it was filed.

Z. K.

Petition accepted.

(1) 53 P. R. 1896.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1493 AND 506 OF 1919.

February 21, 1923.

Present.—Mr. Justice Spencer,
Mr. Justice Kumaraswami Sastri and
Mr. Justice Ramesam.

IN S. A. No. 1493 OF 1919

P. P. P. MOHAMMAD KUNHI—

PLAINTIFF—APPELLANT

versus

P. C. V. PACKRICHU UMMA AND OTHERS
—DEFENDANTS—RESPONDENTS.

IN S. A. No. 506 OF 1919

P. P. P. ASEEMA AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

P. P. KUNHI KALANDATHI AND OTHERS
DEFENDANTS—RESPONDENTS.

Custom.—Marumakkattayam Mappillas of North Malabar—Tarwads managed exclusively by females—Males, right of, to participate in income and management.

Among the Marumakkattayam Mappillas of North Malabar, there is no custom or usage excluding males from the right to participate in the income of certain *tarwads* or *tavazhis* managed exclusively by females or from the right of being consulted in the management of the affairs of those *tarwads* or *tavazhis*. [p. 679, col. 2.]

Pudiyapuyayil Bivi Umma v. Keloth Cheriath Kutti, 8 Ind. Cas. 567; (1910) M. W. N. 693, *Kunhamina v. Kunhambi*, 1 Ind. Cas. 195; 32 M. 315, *Ottaparakal Thazath Soopi v. Charichai Pallikal*, 55 Ind. Cas. 760; 43 M. 393; 38 M. L. J. 207; 11 L. W. 200; (1920) M. W. N. 279; 27 M. L. T. 169, referred to.

IN S. A. No. 1493 OF 1919.

Appeal against a decree of the District Court, North Malabar, in Appeal

Suit No. 656 of 1917, preferred against the decree of the Court of the District Munsif, Cannanore, in Original Suit No. 312 of 1916.

IN S. A. No. 506 OF 1919.

Appeal against a decree of the Court of the Additional Temporary Subordinate Judge, North Malabar, in Appeal Suit No. 157 of 1918, preferred against the decree of the Court of the District Munsif, Cannanore, in Original Suit No. 362 of 1915.

These second appeals came on for hearing on the 3rd December 1920 and the Court (Ayling and Spencer, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Spencer, J.—In these connected second appeals a question of law has been taken wheher a course of devolution of property among females to the exclusion of males is unknown in North Malabar and is repugnant to Marumakkattayam Law as followed by Mappillas in that District. The Subordinate Judge and District Judge who heard the first appeals have come to different conclusions on the point, and the authorities to which the District Judge refers in his judgment are neither clear nor uniform.

In *Pudiyapuyayil Bivi Umma v. Keloth Cheriath Kutti* (1) an instrument of gift which limited the descent of the property to the female line was held by Collins, C. J., and Parker, J., to be valid. The learned Judges observe that the gift was of the class known as *strisothu* or *hennumula* and created an estate known to Marumakkattayam usage. They quote *Kunhacha Umma v. Kutti Mammi Hajee* (2), a Full Bench case, which is not, however, an authority upon the significance and legality of *strisothu* gifts. On the other hand in *Kunhamina v. Kunhambi* (3) Miller and Munro, JJ., refer to a similar gift to females excluding males as being an attempt "to create a perpetual succession confined to females, a course of devolution equally unknown to the Marumakkattayam and to the Muhammadan Law."

(1) 8 Ind. Cas. 567; (1910) M. W. N. 693.

(2) 16 M. 201; 2-M. L. J. 226; 5 Ind. Dec. (M. S.) 847.

(3) 1 Ind. Cas. 195; 32 M. 315.

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We might feel bound to follow this ruling, were there not certain observations in the judgment which indicate that the decision turned rather on a question whether the last survivor of a tenancy-in-common created by the gift deed had the power of disposing of the property to the exclusion of the descendants, if any, of the donees, than on the validity of the condition in the gift deed as to the exclusion of the males, which the learned Judges describe as a condition of no real importance.

To a certain extent the statement that the condition in the gift deed excluding males was invalid was thus an *obiter dictum*.

The District Judge (Mr. Reilly) states in his judgment that he has come across instances in North Malabar of devolution of property being limited to females, and a case of a *shrisothu tarwad* came before Bakewell, J., and myself in the case reported in *Ottaparakal Thazath Soopi v. Charichai Pallikal* (4). Such a usage was judicially recognized by Mr. Thompson, the District Judge of the North Malabar, in Appeal Suits Nos. 641 and 647 of 1891 on the file of that Court which came on appeal to the High Court in Second Appeals Nos. 1127 and 1128 of 1892.

In view of the divergence of opinion both in the Courts below and in this Court as to the validity of such a provision occurring in a gift, I think that the question of law as stated above should be referred to a Full Bench of this Court.

Ayling, J.—I agree to the reference proposed by my learned brother, though I should personally be content to simply follow *Kunhamina v. Kunhambi* (3).

These second appeals came on for hearing on the 15th and 16th of March 1921, in pursuance of the above Order of Reference to a Full Bench and stood for consideration till the 24th of March 1921, when the Court (Sir John Wallis, C. J., Spencer, J., and Kumaraswami Sastri, J.) delivered the following

JUDGMENT.—Opinions appear to be conflicting as to the validity among the Mappillas of North Malabar of a gift

of property as *strisothu* or women's property which, it is said, means a gift to a female and her female descendants only to the exclusion of her male descendants. In Second Appeal No. 1127 of 1892 Mr. Arthur Thompson, the District Judge of Tellichery, expressed an opinion favourable to the legality of such a *strisothu* disposition but the High Court, Muthuswami Ayyar and Best, JJ., disposed of the case on the ground that the suit of the male *karanavan* questioning it was barred by limitation.

Collins, C.J., and Parker, J., also regarded such dispositions as valid in Second Appeal No. 932 of 1904 reported as *Pudiyapurayil Bivi Umma v. Keloth Cheriya Kutti* (1) and in Second Appeal No. 1502 of 1894 with reference to the document now in suit. A deed of this kind came before Miller and Munro, JJ., in *Kunhamina v. Kunhambi* (3) where the question was whether a gift could be regarded as a gift to the females mentioned therein as tenants-in-common or a gift to the donee and her female descendants as a sort of *tavazhi*. The Court took the latter view which was sufficient for the disposal of the case. The learned Judges, however, observed incidentally that it had not been contended that the condition of enjoyment could stand so far as it excluded males altogether. For the purposes of the case, it made no difference whether males were excluded or included as the intention to create a *tavazhi* was clear and that was enough to invalidate a disposition by one of the female donees only. In *Ottaparakal Theazath Soopi v. Cherichai Pallikal* (4) it was not disputed that a woman, described as the *karnavathi*, was the manager of the Marumakkattayam *tarwad* in question which is referred to by the learned Judges as a *strisothu tarwad*, but the question whether the male members of the family were excluded from ownership as well as from management did not arise. Mr. Menon contended before us that this is the real meaning of a *strisothu* gift and that that a *strisothu tarwad* in North Malabar is merely a *tarwad* in which the right of management is in the senior female instead of in the senior male, according to the system which prevails, in the adjoining District of South Kanara with deference to

(4) 55 Ind. Cas. 760; 43 M. 393; 38 M. L. 207; 11 L. W. 200; (1920) M. W. N. 279; 27, M. T. 169.

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allyasantana tarwads, and that otherwise the male members of the family have an equal interest with the females in the *tarwad* property. He also contended that the question had never arisen directly between the female members of a *tavazhi* claiming under such a gift and the male members. Coming now to the two suits which have given rise to this reference, the District Munsif dealing with both suits purported to follow *Kunhamina v. Kunhambi* (3), and held that Mar akkattayam usage only knew of *tarwads* and *tavazhis* and that its conception of a *tarwad* or a *tavazhi* is, that it consists of a female common ancestor and her descendants, male and female in the female line, and that a *tarwad* or *tavazhi* consisting of females only to the exclusion of male descendants of females was a thing so far unrecognized by Marumakkattayam usage. The appeal in one suit came before the District Judge, Mr. Reilly, and the appeal in the other before the Subordinate Judge, the late Mr. K. V. Karunakara Menon. The latter observed in his judgment that it had rightly been conceded before him that the gift-deed did not exclude males from participating in the income of the properties and that all that was contended for was that the right of management was in the females. This contention he rejected observing that in *Kunhamina v. Kunhambi* (3) a gift like this had been held to create a *tavazhi* consisting of males and females and that the present gift must be taken to have been made to a *tavazhi* consisting of males and females. In the other appeal, the District Judge, Mr. Reilly, took a completely different view and held that Exhibit B created what was sometimes known as a *strisothu tarwad* or *tavazhi* consisting of a woman and her female descendants who alone have the right of management and that it was unnecessary to consider whether the male descendants would have any right of maintenance. He regarded the observations of Miller and Munro, JJ., in *Kunhamina v. Kunhambi* (3) as the *obiter dicta* of Judges whose experience had laid in the South and not in North Malabar, the usages of which vary in several respects. He further observed that instances in which the devolution of properties was confined

to the females of a family had come to his own knowledge among the Marumakkattayam Mappillas of North Malabar and that he understood that course of devolution was recognised in South Kanara. Accordingly, he held that the male members of the family were not entitled to question the sale by the female members under Exhibit 1.

As we regard the decisions and other materials before us as inconclusive, we have decided, before disposing of the reference, to call for a finding from the District Judge of North Malabar in Second Appeal No. 1493 of 1919, in which the question necessarily arises, as to whether, according to the custom or usage prevailing among the Marumakkattayam Mappillas of North Malabar, property may be settled as *strisothu* on the female members of a *tarwad* or *tavazhi* to the exclusion of the males, or so as at least to authorize the female members to sell the family property otherwise than for the necessary *tarwad* purposes without the consent of the males. Fresh evidence may be taken. Finding will be submitted in two months after the local vacation. Seven days will be allowed for objections.

In compliance with the order contained in the above judgment, the District Judge of North Malabar submitted the following

FINDING:—I have been directed to submit a finding on the following issue, *viz.*, whether, according to the custom or usage prevailing among the Marumakkattayam Mappillas of North Malabar, property may be settled as *strisothu* on the female members of a *tarwad* or *tavazhi* to the exclusion of the males, or so as at least to authorize the female members to sell the family property otherwise than for necessary *tarwad* purposes without the consent of the males. The order of the High Court allowed further evidence to be taken but neither side has chosen to avail itself of this opportunity. This appeal was posted to the 25th July 1921 and as the order of the High Court was passed on the 24th March 1921 the parties had four months' time to get ready with their evidence and to take steps for the production of evidence if they thought

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it necessary. The appellant had cited two witnesses and the latter were present in Court; nevertheless, the appellant's Vakils declined to examine them. The respondents have not taken any steps to summon witnesses and for production of documents and no explanation was offered for the omission to do so in the long interval of four months. The Vakils for both parties represented that they were not ready and orally applied for an adjournment on this ground. I refused to grant an adjournment as the appellant's witnesses were ready and as the respondents had taken no steps and failed to explain the omission to do so. The parties had more than sufficient time to get their evidence ready if they really desired to let in evidence. Not a single document has been produced on either side. I cannot believe that four months are not enough for producing documents or for taking other steps. No affidavit was put in by either side in support of the oral application for adjournment; in fact, beyond a mere statement by the Vakils that they are not ready, no reason was put forward for the grant of an adjournment. The Vakils did not even address any arguments in support of their case. The matter is thus left in the same state as it was before remand and there has been no addition to the material on which a finding is to be based. In this state of the case it is not necessary to deal with the issue remitted to me for a finding at any considerable length.

2. All the cases in which the present question arose have been cited in the order of remand. There is no case earlier than Second Appeal No. 1127 of 1892 in which the District Judge, Mr. A. Thompson, pronounced in favour of the legality of a *strisothu* disposition; the High Court, however, did not decide whether the District Judge's view was right or not. One would expect that if such disposition of the properties confined exclusively to females and their female descendants were sanctioned by usage there would have been earlier instances available for reference. A usage of which no trace is visible till 1892, i.e., about 30 years ago, cannot be regarded as an ancient usage. Then come Second Appeal No. 1502 of 1894 and Second Appeal No. 932 of 1904; the former is not a re-

ported case and the latter was reported only in (1910) Madras Weekly Notes. [*Pudiyapurayil Bivi Umma v. Keloth Cheriya Kutti* (1)]. But before this report, it was held in *Kunhamina v. Kunhambi* (3), a case reported in authorised Law Reports in 1909 (I. L. R. 32 Madras 315) that such devolution was equally unknown to the Marumakkattayam and to the Muhammadan Law. It would thus appear that till 1910, so far as reported decisions went, such dispositions of property were not regarded as valid or supported by usage. The only case subsequent to *Kunhamina v. Kunhambi* (3) in which reference to a *strisothu tarwad* is found is *Ottaparakal Thazath. Soopi v. Charichai Pallikal* (4). That case merely shows that the right of a woman described as *karnavathi* of a *strisothu tarwad* to manage the family properties was not disputed by the junior members. The case is, moreover, a very recent one and cannot be regarded as evidence of ancient usage. It may be one of the attempts to create *strisothu tarwads* referred to by Miller and Munro, J.J., in *Kunhamina v. Kunhambi* (3).

I am of opinion, after careful consideration, that the instances that can be relied upon in support of the existence of the usage among the Marumakkattayam Mappillas of North Malabar which allows the constitution of *strisothu tarwads* are too few and too recent to constitute evidence of such a usage as would justify its recognition by Courts of Law. They merely show that attempts were being made in comparatively recent times to bring *strisothu tarwads* into existence and nothing more. They do not show that such *tarwads* are sanctioned or recognized by ancient usage. Even the very meaning of the term "*strisothu tarwad*" seems to be uncertain. According to one view, it is merely a *tarwad* in which the senior female is the manager and there is no exclusion of the male members, *vide* the contention of Mr. Menon before the Full Bench. The other view is to the effect, that it is a *tarwad* exclusively composed of females and their female descendants and the male members of the family are not members of such a *tarwad* and have no interest in its property. If *strisothu tarwads* are so well known as they are said to be, and if they are sanctioned

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by ancient usage it is not likely that a difference of opinion would exist on this most vital point. I have not been able to get access to the decisions in the cases above referred to which are not reported in the authorized Law Reports and I cannot, therefore, say which of these two views was adopted by the High Court in those cases. It is clear, however, that the latter view was adopted in *Kunhamina v. Kunhambi* (3) and it would seem that the opposite view was taken in *Oottaparakal Thazath Soopi v. Charichai Pallikal* (4) as the interest of the male members in the property of the *strisothu tarwad* in that case seems to have been assumed to exist. If the view adopted in *Kunhamina v. Kunhambi* (3) is the true view, then, I do not see with what reason it can be urged that a *tarwad* composed exclusively of females and their female descendants is one known to Marumakkattayam usage. There is nothing to show that such *tarwads* exist among the Nayars in North Malabar; and, after all, it is among the Nayars that we might expect to find Marumakkattayam notions holding supreme sway. In the case of the Mappillas the rules of the Muhammadan Law must have, to some extent, worked in opposition to Marumakkattayam notions, and it cannot be said that the former would lend more countenance to a purely female *tarwad* or a family group composed exclusively of females than the latter. It is no doubt a matter of pure conjecture but it may, nevertheless, be mentioned, that it is *prima facie* unlikely that the notion of a *strisothu tarwad* composed exclusively of females would have found favour with the Mappilla community when such a notion did not find favour with the Nayar and other Hindu Communities in North Malabar governed by Marumakkattayam Law. If the other view is the true one, *viz.*, that a *strisothu tarwad* differs from an ordinary *tarwad* only in one point, *viz.*, that the right of management is vested in the senior female in the former while it is vested in the senior male in the latter, then what is really asserted is not the existence of a general usage recognising *strisothu tarwads* or *tavazhis* but the existence of a particular custom prevailing in particular *tarwads* or *tavazhis* according to which the right of manage-

ment is vested in the senior female member instead of the senior male. Such a particular custom has been recognised in the case of some families, *e. g.*, some of the Kovilagoms in South Malabar; but a custom of this sort which applies to particular families must be proved by instances in which the custom has been followed in such families and not by quoting instances of other families to which such a custom applies. There is no such evidence in this case and no attempt has been made to prove the custom according to law.

4. I may add, in conclusion, that in a case which came before me last year, Appeal Suit No. 43 of 1920, I followed the ruling in *Kunhamini v. Kunhambi* (3) and I have not since then discovered any reason for changing my views on this point. That ruling is the only decision on the point, so far as my knowledge goes, which has been reported in the authorised Law Reports, and, if I may be permitted to say so, apart from the weight that should be given even to the *obiter dicta* of Miller and Munro, JJ., who decided that case, my own experience has shown that these *dicta* accurately described the real state of affairs. *Strisothu tarwads* in the sense of *tarwads* composed exclusively of females are really unknown to Malabar usage but attempts have been made in recent times here and there to bring such *tarwads* into existence by individuals with the object of minimising the chances of alienation or dissipation of family property—the idea being that females are less likely to alienate or dissipate family property, than males. They seem to have thought that it was permissible by act of parties to create a perpetual succession not recognised by usage or law in spite of the ruling of the Privy Council reported in *Purna Sashi Bhattacharji v. Kalidhan Rai Chowdhury* (5), and it may be that they expected to succeed in their attempt in view of the enforcement by Courts of provisions in family *karars* relating to management of family properties in spite of their being inconsistent with, or contrary to, the general principles of Marumakkattayam usage.

(5) 11 Ind. Cas. 412; 21 M. L. J. 119; 15 C. W. N. 693; 8 A. L. J. 681; 13 Bom. L. R. 451; 14 C. L. J. 1; (1911) 2 M. W. N. 403; 38 C. 603; 10 M. L. J. 261; 38 L. A. 112 (P. C.).

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and law. It is needless, however, to speculate on the motives which led to such attempts or to determine the extent to which the attempts succeeded. The fact that such attempts have been made in recent times with some degree of success is not only no proof of established usage but it even goes to show that they were at variance with long established usage. The characteristic of a binding custom or usage is that it is a long and generally observed course of conduct. It has been happily remarked that the mode in which such habitual courses of action are formed and established is like the mode in which a path is formed—across a common. One man crosses the common in the direction suggested by convenience or accident and if many others follow in the same track a path is made. In this particular case I should say that a few only have followed in the track and the path has not yet been made. The Courts cannot affix their imprimatur to a custom which is as yet in the making and has not gathered strength or sanctity by long continued observance. The custom alleged is neither ancient nor certain. The moment has certainly not yet arrived for putting the stamp of judicial authentication on it.

5. For the reasons given above, I am of opinion that there is no usage or custom among the Marumakkattayam Mappillas of North Malabar which allows the settlement of property on groups composed exclusively of females and their female descendants to the exclusion of the males or authorises the female members to sell the family property otherwise than for necessary family purposes without the consent of the males. My finding, therefore, on the issue remitted by the High Court is in the negative.

Second Appeal No. 1493 of 1919 and Civil Miscellaneous Petition No. 3244 of 1921 praying for an order that, for the reasons stated in the accompanying affidavit, the said second appeal may be sent down again to the lower Appellate Court for adducing evidence on the issue referred by this Court in its order, dated 24th March 1921, and that a further time

of 3 months may be granted for the submission of a fresh finding, coming on for hearing on the 5th December 1921, after the return of the above finding of the lower Appellate Court, upon perusing the grounds of appeals, the judgments and the decrees of the lower Appellate Court and the Court of the first instance, the finding of the lower Appellate Court upon the said issue, and Memorandum of Objections to the said finding, and upon perusing the petition and the affidavit filed in support thereof, and upon hearing the arguments of Mr. B. Pocher, for the Petitioners in Civil Miscellaneous Petition No. 3244 of 1921 (Respondents Nos. 5, 7, 9 and 12 in S. A. No. 1493 of 1919) and of Mr. K. P. Menon, for the Respondent in the said C. M. P. No. 3244 of 1921 (Appellant in the said S. A. No. 1493 of 1919), this Court made the following

ORDER.—Seeing that both sides were not ready on July 25th and applied for an adjournment and that the time allowed for returning a finding did not expire till August 18th, we think that the District Judge might properly have granted an adjournment.

Considering the importance of the question at issue, we are not inclined to decide it on the materials on record and we direct the District Judge to give the parties another opportunity for adducing evidence.

Time for returning a fresh finding is extended to two months from this date. Fifth, 7th, 9th and 12th Respondents in Second Appeal No. 1493 of 1919 will pay the costs of this hearing in this Court.

Ten days will be allowed for filing objections.

In compliance with the above order of this Court, the District Judge of North Malabar submitted the following

FINDING.—I have been directed to give the parties in this case another opportunity for adducing evidence and to submit a fresh finding on the question,—

Whether, according to the custom or usage prevailing among the Marumakkattayam Mappillas of the North Malabar, property may be settled as *strisothu* on the female members of *tarwad* or *tavazhi* to the exclusion of the males or so as at least to

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authorise the female members to sell the family property otherwise than for necessary *tarwad* purposes without the consent of the males.

2. Two witnesses each have been examined on either side and Exhibits II to XI filed on the side of the contesting defendants and Exhibits C to L, on the other side. The burden lies on the contesting defendants to establish the alleged custom or usage. Exhibits II to XI are the copies of gift-deeds, Wills and partition-deeds the parties to which are Mappillas; but it is not established by oral evidence that they are all governed by Marumakkattayam Law. The oral evidence actually adduced relates only to Exhibits II and III. As regards Exhibit II it is the very document which was considered by Miller and Munro, J.J., in *Kunhamini v. Kunhambi* (3) and it was decided in that case that the condition in that document excluding males from enjoyment cannot be given effect to; in other words, Exhibit II is a document which is not acted upon so far as the condition in question is concerned and it cannot, therefore, be relied upon as evidence of the alleged usage; on the other hand, it is one of the attempts that failed. Exhibit C may also be referred to in this connection; the oral evidence shows that it relates to one of the properties covered by Exhibit II and two of the females to whom the document was executed were the grand-children of one of the donees under Exhibit II and one Kunhammad mentioned in Exhibit C is the son of the same donee. Exhibit C provides that a portion of the rent due thereunder should be paid to Kunhammad for the purpose of putting an end to the dispute between Kunhammad and his nieces. In short, Exhibit C shows that Kunhammad was allowed to enjoy a portion of the income derived from one of the properties gifted under Exhibit II. It is clear, therefore, that Exhibit II affords no support to the contention of the contesting defendants. As regards Exhibit III, the witness who speaks to it is the grandson of the donor; he says no doubt that he has no right to the properties gifted under Exhibit III, but he admits that this is what he learnt after making inquiries of learned men, viz., Vakils. Finally, he admits that his

"*tarwad*" follows Makkattayam. Exhibit III cannot, therefore, be relied upon as evidence of any custom or usage prevailing among Marumakkattayam Mappillas. As regards the other documents, Exhibits IV to XI, there is no oral evidence at all and it is impossible to be certain that the parties to those documents were Marumakkattayam Mappillas. On the other hand, the evidence of P. W. No. 2 shows that the executant of Exhibit IX was a follower of Makattayam. It is doubtful, therefore, whether these documents are relevant for the purpose of the present inquiry. The majority of these documents are comparatively recent, e.g., Exhibit IV of 1912, Exhibits IX of 1918, Exhibit VIII of 1920 and Exhibits X and XI of 1921. Exhibits VIII to XI are subsequent to the filing of this appeal and Exhibit X is subsequent to my original finding. It is thus seen that not one of the documents filed on the side of the contesting defendants has been proved to relate to any valid transaction between Marumakkattayam Mappillas which has been acted upon. There is thus no evidence whatever of the alleged custom or usage; it is surely remarkable that such worthless evidence alone should be forthcoming in spite of the repeated opportunities afforded to the contesting defendants to adduce evidence. It seems to me as if this evidence, if evidence it may be called, has been put forward not with any real belief that it will be accepted by any Court as sufficient evidence of an alleged custom or usage but merely for the purpose of justifying the indulgence shown to the contesting defendants in the matter of adducing evidence. I am even inclined to doubt whether they really believe in the existence of the alleged custom or usage, as the evidence adduced by them in support of it in spite of the opportunities granted to them is so "shabby." There is really no other epithet that will meet the case than "shabby." If, as Mr. Thomson observed in 1892 (*vide* the papers in Second Appeal No. 1127 of 1892), "it is not uncommon in Malabar for property to be assigned to females and to descendants of the female children of the assignees to the exclusion of the males of the family" and if, as observed by Mr. Reilly in his judgment in this appeal, "instances in which the devolution of

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certain property is confined to the females of a family have come to my own notice among Marumakkattayam Mappillas of North Malabar," one would reasonably expect much better evidence than this to be adduced in support of the alleged custom or usage. The evidence is so scanty and so worthless that it seems to me to be a clear case of *parturitum montes nascetur ridiculus mus*.

3. It seems hardly worth while, in view of the hopelessly unsatisfactory evidence adduced in support of the alleged custom or usage, to deal with the evidence on the other side at any length. Much documentary evidence cannot be expected to prove a negative. Exhibit D is a gift-deed executed by Tiyyas and the evidence of P. W. No. 1 has reference to it. The relevancy of this evidence to the present inquiry is, to say the least, extremely doubtful. The relevancy of the present remaining documents Exhibits E, F and H to L is also very doubtful. In Exhibit G, a judgment of Mr. N. S. Brodie, dated 16th July 1901, there is a reference to "*strisothu*" of "female properties" of which the 5th defendant, a male, is manager under the *karar* which constituted the *strisothu*. This is an instance of so-called *strisothu* properties managed by a male member of the family. The plaintiff's Vakil has also referred me to the observation in *Maliya Kalakath Bava v. Pathumma* (6) by Sundara Ayyar and Sadasiva Ayyar, JJ., who both had special opportunities of acquiring a first hand knowledge of Marumakkattayam customs and usages, to the effect that the tenure of the property by which the female children and their female issue would alone be entitled to the properties is one unknown either to the Muhammadan Law and to the Marumakkattayam Law by which some Muhammadans of Malabar are governed.

4. This completes the discussion of the evidence adduced in the case after remand. I have no doubt whatever that the existence of the alleged custom or usage has not been established by the evidence. The custom or usage set up in this case is not a custom prevailing in a particular family but a usage prevailing among the Marumakkattayam Mappillas generally in North Malabar;

in other words, a usage which is a part and parcel of general Marumakkattayam usage which has the force of law, a usage which constitutes the general law applicable to a community at large. The question thus seems to be really a question of law. In this connection I may refer to the observations in *Illikka Pakramar v. Kutti Kunhamed* (7) and the two earlier cases *Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri* (8) and *Vayalidada v. Appu* (9) cited therein, where the test and the standard to which the evidence adduced to support an alleged usage should conform are given. The evidence in this case does not, in my opinion, come up at all to the standard expected in cases of this kind. I may also observe that, so far as I know, no reference to this alleged usage is to be found in any standard treatise dealing with Malabar custom or Marumakkattayam usages such as Logan's Manual, Sir Thomas Strange's report on Moore's Malabar Law and Custom, and, on the other hand, the existence of this alleged usage seems to be excluded by implication. I find it difficult to believe that no mention of it would have been made in any of the books dealing with Malabar, if, as a matter of fact, *strisothu tavazhis* of this kind have always existed. As to the degree of proof required to warrant the Court in recognizing as Customary Law a usage at variance with the law, reference may be made to the ruling in *Sivananjan Perumal v. Mutthu Ramalinga* (10).

I have already discussed this question in its general aspect in my finding dated 27th July 1921, and I do not think it necessary to repeat here what I have said therein. It is enough to say that I adhere to what I have said therein and that the evidence adduced subsequent thereto does not lead me to reconsider what I have said already. It is curious that every one of the cases in which this question was raised is one in which the source of the so-called "*strisothu*" *tavazhi* can be traced directly to a document, *i. e.*, to the act of the parties, and there is no case in which the source

(7) 17 M. 69 at p. 71; 4 M. L. J. 14; 6 Ind. Dec. (N. S.) 48.

(8) 7 M. 3; 2 Ind. Dec. (N. S.) 588.

(9) 9 M. 44; 3 Ind. Dec. (N. S.) 427.

(10) 3 M. H. C. R. 75 at p. 77.

(6) 16 Ind. Cas. 689; (1912) M. W. N. 932.

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ould not so be traced and had to be found in general usage. I hope I have made myself sufficiently clear. What I mean is that there is no "*strisothu*," *tavazhi* whose source is buried in antiquity and cannot be ascertained. In every case it is traced to a document which constitutes the *tavazhi* and it is grounded on that document. In every case we see an attempt to create such a *tavazhi* and in no case do we see such a *tavazhi* existing from time out of memory. Such attempts do not, in my opinion, constitute a usage having the force of law. The manner in which custom is transformed into a law and enforced as such is really the subject-matter of general jurisprudence and Jurists are not agreed on the point. One school holds that the State through its delegates, the Judges, grants recognition as law to such customs as come up to a certain standard of general reception and usefulness.....not merely prospectively from the date of such recognition but also retrospectively; so far implying that the custom was law before it received the stamp of judicial authentication." There is on the other side the opposing school headed by Savigny and Püchta who hold that the growth of law has no dependence upon an arbitrary will or accident but "is begotten in the people (Volk) by the popular intelligence (Volksgeist)." It is an interesting topic no doubt but I do not suppose I am expected to discuss it and decide whether the earlier decisions—Second Appeal No. 1127 of 1892, Second Appeal No. 1502 of 1894 and Second Appeal No. 932 of 1904—granted recognition to this custom and transformed it into law; "*non nostrum tantas componere lites*" is all that I can say on the point. I would, however, reiterate my conviction that *strisothu tarwads* or *tavazhis* of this kind are really unknown to Marumakkattayam usage and are even inconsistent with its basic principles and that what has happened in the past is nothing more than attempts made to create such *tavazhis*—some of which ended in success and others in failure—with the object of minimising the chances of alienation or dissipation of property as far as human ingenuity could do. Women are, so to speak, acquisitive and centripetal forces in a family tending to the preservation of property in the family, while men are

dissipative and centrifugal forces tending to the contrary, and hence the expedient of tying up property by executing documents constituting *strisothu tavazhi*, and *hinc illae lachrymae* and protestations that such *tavazhis* are allowed by Marumakkattayam usage. This, in my opinion, is really what has taken place and nothing more; what is really sought to carry the theory of freedom of contract to its extreme length, but an attempt is made to camouflage this object by pleading an alleged custom or usage which recognises *strisothu tavazhis*.

6. For the reasons given above and in my previous finding, I am of opinion that the question remitted to me must be answered in the negative and I find it in the negative accordingly.

Mr. K. P. Menon, for the Appellant in S. A. No. 1493 of 1919 and Respondents in S. A. No. 506 of 1919.

Mr. B. Pocker, for the Respondents in S. A. No. 1493 of 1919 and for the Appellant, in S. A. No. 506 of 1919.

These second appeals came on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial.

OPINION.—In calling upon the District Judge to record evidence of a custom or usage prevailing in Malabar of males being excluded from *tarwads* or *tavazhis* managed exclusively by females of certain Marumakkattayam Mappillas, we discussed in some detail all the decisions in which such a custom might be said to have been judicially recognised or its recognition refused, and we stated that we regarded them as inconclusive. The District Judge was, therefore, asked to return a finding on such evidence as might be produced before him to prove the existence of the particular custom in question. This he has done, and we agree with him in holding that it is wholly inadequate to prove the prevalence of any custom by which males are treated as having no right to be consulted in the management of the affairs of the *tarwad* or *tavazhi* and no right to participate in the income of the *tarwad* or *tavazhi* properties. It is not necessary to express any opinion as to the existence

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of *tarwads* in which the manager or *kar-navathi* is a female.

We, therefore, answer the Reference made to us in the affirmative.

V. N. V.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 2,
17 AND 30 OF 1918.

August 29, 1922.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Cuming.

KAILAS CHANDRA NAG AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

BIJAY CHANDRA NAG AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Joint property—Partition—Separate acquisition—Exclusion from partition—Burden of proof—Sole occupation by one co-sharer, if constitutes ouster—Adoption, proof of—Judgments—Substance of pleadings narrated in judgment, whether evidence.

The acquisition of a property in the name of one of the brothers forming a Hindu joint family is not even *prima facie* evidence that the property was obtained by that brother for himself. Where there has been a partition among the members of a Hindu joint family, the presumption is that no property was excluded from the partition; and the burden lies upon him who alleges exclusion to establish his assertion. [p. 681, cols. 1 & 2.]

Separate possession of a property by one member of a Hindu joint family is not conclusive evidence of partition and must be interpreted in the light of all the circumstances of the case. [p. 682, col. 2.]

The sole occupation by one co-sharer, of a portion of joint property, does not constitute an ouster of the other co-sharers; and a co-sharer in possession of a portion of the common land, with the tacit or express consent of his co-sharers, cannot change the nature of that possession. [p. 683, col. 1.]

The onus of proving an adoption is on the party setting it up. But very slight evidence may be sufficient for this purpose, where the alleged adopted son has been treated as such for a long series of years. [p. 683, col. 1.]

Judgments narrating the substance of the pleadings of the parties to a litigation furnish evidence of the allegations made by them on that occasion. [p. 681, col. 2.]

Appeals against the decrees of the Subordinate Judge of Mymensingh, dated the 21st September, 1917.

Dr. Sarat Chandra Basak, Babus Braja Lal Chuckerbutty, Jatindra Mohan Chaudhuri, Prakash Chandra Pakrasi, Bimal Chandra Das Gupta, Hamendra Nath Basu, Indu Bhusan Biswas and Dines Chandra Ray, for the Appellants.

Babus Joges Chandra Ray, Mahendra Nath Ray, Gobinda Chandra De Roy, Annada Charan Karkun, Birendra Kumar De and Prafulla Chandra Nag, for the Respondents.

JUDGMENT.—These three appeals are directed against the preliminary decree in a suit for partition of joint property. The subject-matter of the litigation is described in the plaint as Chak Nagergati; the plaintiffs assert that this is also known as Rajballavpore, but is a revenue-free *lekhrāj* and does not appertain to *sikmi taluk* Rajballavpore within *Zemindaris* bearing *Touzi* Nos. 4082, 138, 139 and 141 of the Collectorate of Mymensingh. The disputed block of land which covers about 75 *bighas* is said to have been formerly the *Khanabari* of four brothers, Krishnaprasad Nag, Debiprasad Nag, Kalikaprasad Nag and Sambhunath Nag, sons of one Aditya Ram Nag. Defendants Nos. 2 to 4 represent the branch of Krishnaprasad Nag and defendants Nos. 5 to 7 represent the branch of Shambhunath Nag. The plaintiffs claim 8-annas share in the *khanabari*, 4-annas as representing the branch of Debiprasad Nag and 4-annas as acquired by adverse possession against the representatives of Kalikaprasad Nag. According to the plaintiffs, the *khanabari* included three kinds of lands, namely, first, the entire Nagergathi *lekhrāj*; secondly, *brahmattar* lands obtained in exchange for a parcel known as Haruar Bhita; and, thirdly, other lands not specifically defined. Whether or not the third class was left undefined on purpose, it is plain that this has created considerable embarrassment in the investigation of the claim. The four brothers previously mentioned separated in or about the year 1781; but it is alleged that the homestead was never formally divided; though the co-owners have occupied different portions separately for convenience for over a century and have built houses thereon. The plaintiffs, consequently, seek partition of the lands which were so left joint. Their claim, it is conceded, is not supported by the Record-of-Rights which does not show the lands as joint property or as *lekhrāj*. This, however, admittedly does not debar an enquiry into the true character of the lands. The defendants deny in substance that the lands are joint *lekhrāj*,

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and they urge that the claim is barred by limitation. They also raise questions as to acquisition of title by adverse possession and challenge the validity of the title of the father of the plaintiff as the adopted son of Gāngadhar Nag, the son of Debiparsad Nag. Questions were further raised as to the validity of conveyances relied upon by some of the defendants. A Commissioner was appointed to hold a local enquiry and to prepare a map with special reference to a *chitta* made by Rai Bahadur Tarachand Ghose, a Deputy Collector, in connection with resumption proceedings which took place in 1842. The Subordinate Judge came to the conclusion that the case put forward by each side was only partially true, and that plots Nos. 2, 3, 6 and 7 of the *chitta* of Tarachand Ghose as shown in the map of the Pleader Commissioner, were still joint properties of the parties, liable to be partitioned at their instance. He has further found that the share of the plaintiffs was 6-annas, that of the defendants Nos. 2 to 4, 4-annas, that of the defendants Nos. 5 to 7, 4-annas, and that of the defendant No. 8 *ka*, 2-annas. The Subordinate Judge has accordingly made a preliminary decree for partition of the four plots and has dismissed the suit with regard to the rest of the lands which are not joint properties. Three appeals have been preferred against this decree, namely, Appeal No. 2 by defendant No. 3, Appeal No. 17 by defendants Nos. 5, 6 and 7, and Appeal No. 30 by defendant No. 8 *ka*. There were cross-objections in some of these cases, but they have not been pressed. We are consequently not called upon to consider, whether the plaintiffs should have been granted further relief; we have only to examine, whether the decree made in their favour can be maintained.

The primary question for consideration is, whether the plaintiffs have established their title to the disputed lands or to any portion thereof as joint property. The earliest document directly relevant to the point is a list of *sanads* of *lekhrāj* lands, filed on the 11th March 1796, presumably under Regulation XLVIII of 1793, which shows the existence of 7 *kurs* or 21 *bighas* of *lekhrāj* in Chak Nagerganthi under a *sanad* dated the 28th June, 1766. This stood in the name of Krishnaprasad Nag, one of the four

brothers already mentioned. This is not even *prima facie* evidence that the *lekhrāj* was obtained by Krishnaprasad Nag, for himself, from Suryanarayan Chaudhuri and Kritinarayan Chaudhuri, because at the time of acquisition the family was still joint: *Luximon v. Mullar* (1), *Prit Koer v. Mahadeo Pershad Singh* (2), *Dhurm Das Pandey v. Shama Soondri Dibiah* (3), *Rampershad Tewarry v. Sheochurn Doss* (4), *Umrithnath Chowdhry v. Goureenath Chowdhry* (5). But as, after acquisition, there was a partition among the members of the family in 1781, there is no presumption with regard to this or any other property, that it was excluded from the partition; and the burden lies upon him who alleges exclusion, to establish his assertion: *Narayan v. Nana* (6). The plaintiff has sought to discharge this onus by evidence of a later date which has an important bearing on the matter. We have papers of a litigation which took place in 1825 between the predecessors of the parties to this suit. The judgments of the Trial Court and the Appellate Court, but not the pleadings, are available. The substance of the pleadings is, however, narrated in the judgments, and they furnish evidence of the allegations made by the parties on that occasion; see *Parbutty Dassi v. Purno Chunder Singh* (7), *Bhaya Dirguj v. Pande Fateh Bahadoor Ram* (8) *Byathamma v. Avulla* (9), *Thama v. Kondar* (10), *Krishnasami Ayyangar v. Rajagopala Ayyangar* (11), *Malcomson v. O'Dea* (12), *Lyell v. Kennedy* (13) and *Neill v. Devonshire* (14).

(1) (1831) 2 Knapp 60; 5 W. R. P. C. 67; 1 Norton's L. C. 169; 12 E. R. 401.

(2) 21 I. A. 134; 22 C. 85; 6 Sar. P. C. J. 485; 11 Ind. Dec. (N. S.) 59 (P. C.).

(3) 3 M. I. A. 229; 6 W. R. P. C. 43; 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 271; 18 E. R. 484.

(4) 10 M. I. A. 490 at p. 505; 2 Sar. P. C. J. 177; 19 E. R. 1058.

(5) 13 M. I. A. 542; 15 W. R. P. C. 10; 6 B. L. R. 232; 2 Suth P. C. J. 381; 2 Sar. P. C. J. 618; 20 E. R. 653.

(6) 7 B. H. C. R. 153.

(7) 9 C. 586; 4 Ind. Dec. (N. S.) 1038.

(8) 3 C. L. J. 521.

(9) 15 M. 19; 5 Ind. Dec. (N. S.) 363.

(10) 15 M. 378; 5 Ind. Dec. (N. S.) 616.

(11) 18 M. 73; 4 M. L. J. 212; 6 Ind. Dec. (N. S.) 400.

(12) (1863) 10 H. L. C. 593; 9 Jur. (N. S.) 1135; 9 L. T. (N. S.) 93; 12 W. R. 178; 11 E. R. 1155; 138 R. R. 317.

(13) (1889) 14 A. C. 437; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353.

(14) (1883) 8 A. C. 135; 31 W. R. 622.

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The summary of the pleadings, as given in the judgments, shows that the dispute related to the piece of land which the parties got in exchange for Haruar Bhita and that they admitted that the main part of the *khanabari*, that is, where their residences were built, appertained to *lekhray* Nagerganthi. The importance of the judgments lies in the fact that it enables us to locate the *lekhray* Nagerganthi, with some approach to certainty, from the admission made by the parties to that suit. The judgment of the Appellate Court shows that the *khanabari* was alleged to be covered by the *sanad* in the name of Krishnaprasad Nag, dated 28th June 1766, which was distinct from the Adityaram *taluk* under *sanad* dated 19th June 1748. It is not possible, however, from the summary of the pleadings in these judgments alone, to locate the lands, because no mention is made of the boundaries of the disputed *lekhray*. For this purpose, the Subordinate Judge has relied upon the resumption proceedings of 1842, where reference is made to the map mentioned in the list of *sanads* dated 11th March 1796. A *chitta* was made in that proceeding by the Amin Biswanath Datta, on the 30th May 1840, which showed *Mouza* Nagerganthi as distinct from *Mouza* Rajballavpore. The matter was referred to the Deputy Collector Tarachand Ghose, and his *robokari* dated 23rd April 1842, is on the record. The Deputy Collector negatived the claim for resumption on the ground that the area was less than 50 *bighas*, and this view was, no doubt, not accepted by the superior Revenue Authorities. But this does not take away from the value of his investigation. He measured the disputed lands in the presence of all the parties concerned, and he came to the conclusion that, out of ten plots, only six plots, namely, Nos. 1, 2, 3, 5, 6 and 7 which measured about 13 *kurs* and odd, that is, nearly 40 *bighas*, constituted *lekhray* Nagerganthi. The original area of the *lekhray* was, as we have seen, seven *kurs* or 21 *bighas*, and the *lekhraydars* had evidently annexed other lands not comprised in the grant. They naturally denied the *lekhray* and alleged that the lands belonged to their other *taluks*, so as to escape resumption and assessment of revenue. The representatives of the parties admitted their joint possession in respect of plots Nos. 2, 3,

6, 7, though not in respect of Nos. 1, 4, 5, 8. The Subordinate Judge has from this concluded that these were not *lekhray* or joint property. We pass on next to the proceedings of the *Thak* Survey of 1856. The evidence does not establish conclusively the presence of the Nags at the time of the Survey, though the very fact of previous disputes and the resumption proceedings would render their absence highly improbable. *Thak* Chak No. 27 covers the lands, which are treated as comprised in the *shikmi taluks* of the Nags. This could not be correct, and it is significant that the very existence of the resumption proceedings of 1842 was suppressed; in the face of the *Taidad* of 11th March, 1796, and of the admissions made in the suit of 1825, it is difficult to see how the entry could have been made in the form it took, if the resumption proceedings had not been kept in the back ground. In the suit of 1825, the main homestead portion, but not the fringe area, was admitted to be joint, though the parties were in occupation of different portions. As explained by this Court in *Kulada Prosad Tewary v. Sadhu Charan* (15) and *Anand Kisore Chowdhury v. Daiji Thakurain* (16), separate possession is not conclusive evidence of partition and must be interpreted in the light of all the circumstances of the case. In our opinion, the Subordinate Judge has correctly held that the disputed land is not joint property in its entirety and that plots Nos. 2, 3, 6, 7 alone, of the *chitta* of Tarachand Ghose, constitute joint property still capable of partition. The plaintiffs cannot successfully claim partition of the remaining plots, and the appeal by the third defendant must also fail.

The fifth and seventh defendants, who have preferred a separate appeal, claim, in addition to their 4-annas share, specific lands based on title by compromise with a previous owner; they further challenge the validity of the adoption of Gurucharan Nag, the father of the plaintiffs. These allegations are entirely unfounded. The adoption took place nearly a century ago, in or about the year 1823. The person, whose adoption

(15) 27 Ind. Cas. 412; 20 C. L. J. 32.

(16) 28 Ind. Cas. 589; 21 C. L. J. 296.

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is challenged, enjoyed the status of an adopted son all his life, but at this distance of time direct evidence cannot be expected. No doubt, as stated by Lord Atkinson in *Kishori Lal v. Chunni Lal* (17), the onus of proving an adoption is on the party setting it up. But very slight evidence may be sufficient for this purpose, where the alleged adopted son has been treated as such for a long series of years. In *Rup Narain v. Gopal Devi* (18), where a question arose as to the factum of an adoption alleged to have been made nearly half a century before suit, the Judicial Committee held that the Trial Court was right in holding the adoption proved, when, in the absence of direct evidence of much value, it appeared that the alleged adopted son had, without controversy, succeeded to his father's estate and enjoyed it till his death, and, further, that transactions during and after his death took place on the footing of the adoption. The allegation of title by adverse possession is not more promising. The sole occupation by one co-sharer, of a portion of joint property, does not constitute an ouster of the other co-sharers; and a co-sharer in possession of a portion of the common land, with the tacit or express consent of his co-sharers, cannot change the nature of that possession; see the judgment of Viscount Cave in *Varada Pillai v. Jeevarathnammal* (19) and of Lord Buckmaster in *Hardit Singh v. Gurmukh Singh* (20); see also *Lokenath Singh v. Dhwakeshwar Prosad Narayan Singh* (21) and *Israil v. Samset Rahman* (22). In our opinion, there

is no substance in the appeal preferred by defendants Nos. 5 and 7.

The defendant No. 8 *ka*, who also has preferred a separate appeal, has pressed the question raised in the tenth issue, namely, whether the conveyance set up by him covers the land in suit, and whether it is valid or void for want of consideration and for undue influence. The conveyance was executed on the 14th November, 1910 by one Harinath Bose for about one-tenth of the real value of the property. The Subordinate Judge has found that there was in fact no consideration at all for the conveyance, and that it was secured by the exercise of undue influence. The evidence has been placed before us, and we feel no doubt that the Subordinate Judge has rightly held that the document was really obtained on false pretences and was not operative to transfer title.

Upon a scrutiny of all the materials, our conclusion is that the decree of the Subordinate Judge is amply supported by the evidence on the record and cannot be successfully impeached. The appeals and cross-objections are all dismissed, and the parties will pay their own costs in this Court.

B. N.

Appeals and cross-objections dismissed.

(17) 1 Ind. Cas. 128; 36 I. A. 9; 31 A. 116; 9 C. L. J. 172; 5 M. L. T. 58; 13 C. W. N. 370; 11 Bom. L. R. 196; 19 M. L. J. 186 (P. C.).

(18) 3 Ind. Cas. 382; 36 I. A. 103; 36 C. 780; 10 C. L. J. 58; 6 A. L. J.; 567 10 C. L. J. 58; 13 C. W. N. 920; 5 M. L. T. 423; 11 Bom. L. R. 833; 19 M. L. J. 548; 93 P. R. 1909; 146 P. W. R. 1909; 68 P. L. R. 1910 (P. C.).

(19) 53 Ind. Cas. 901; 46 I. A. 285; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.). 64; 22 Bom. L. R. 444 (P. C.).

(20) 47 Ind. Cas. 626; 28 C. L. J. 437; 58 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.).

(21) 27 Ind. Cas. 465; 21 C. L. J. 253; 20 C. W. N. 51.

(22) 21 Ind. Cas. 861; 41 C. 436; 19 C. L. J. 47; 18 C. W. N. 176.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 379 TO 383 OF 1921.

February 12, 1923.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

P. VARADA REDDY AND OTHERS—
APPELLANTS

versus

SRINIVASA MUDALIAR—RESPONDENT.

Madras Estates Land Act (I of 1908) ss. 13 (3), 32 (3)—Waram rent—Muchilka for money rent for stated period—Ryot undertaking to cultivate under Amani rules—Tender of fresh pattah containing waram rent, whether necessary—Waram rent, whether enhancement of rent.

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Under the Madras Estates Land Act, a landholder is always entitled to revert to the *waram* system unless the *ryots* establish that it has been superseded permanently by the cash system by contract, express or implied, between them and the landholder. [p. 684, col. 2.]

Ayyaperumal Odayan v. Ramasami Chettiar, 30 Ind. Cas. 983; 29 M. L. J. 362; 2 L. W. 650; (1915) M. W. N. 614, *Muthiah Chettiar v. Periyar Cone*, 55 Ind. Cas. 78; 11 L. W. 311; (1920) M. W. N. 15; 27 M. L. T. 226, followed.

The fact that for several years the *ryots* paid money rents under specific contracts in term *pattas* for stated periods on varying rates would only show the existence of special contracts remaining in force in particular years and not that the *waram* system was permanently given up. [p. 684, col. 2, p. 685, col. 1.]

Where in a *muchilika* providing for money rent for a period, the *ryots* undertook that, after the expiry of the period fixed under it, they would cultivate the land under the Amani Rules:

Held, that the landholder was entitled to revert to the *waram* system after the expiry of the period fixed without tendering a fresh *pattah* under section 52 of the Madras Estates Land Act providing for *waram* rent. [p. 685, col. 1.]

Under the Madras Estates Land Act, no prior tender or exchange of *patta* or *muchilika* is necessary to entitle a landholder to sue for rent. [p. 685, col. 2.]

The second part of clause (3) of section 52 of the Madras Estates Land Act is only a corollary to the first part and where the latter does not apply, the former is also inapplicable. [p. 685, col. 2.]

The phrase "Amani system" means *waram* tenure as opposed to *rokkam* tenure. [p. 685, col. 2.]

Muthiah Chettiar v. Periyar Kone, 55 Ind. Cas. 78; 11 L. W. 311; (1920) M. W. N. 15; 27 M. L. T. 226, followed.

Under the *waram* system, the landholder is entitled to a share in all the produce of the land unless there is a special contract to the contrary exempting any particular crop, and his claim to share in all the crops does not amount to an enhancement of rent and section 13 (3) of the Madras Estates Land Act does not apply to such a case. A landholder is, therefore, entitled to *waram* even in second crop on the lands though raised by the tenants with the aid of their own well water without taking the landholder's water. [p. 685, col. 2.]

Second Appeals against the decrees of the District Court, Chingleput, in Appeal Suits Nos. 82, 84, 85, 95 and 96 of 1919, preferred against that of the Court of the Revenue Divisional Officer, Chingleput, in Summary Suits Nos. 72, 75, 86 and 87 of 1918 respectively.

Messrs. B. Somayya and S. Varada Chariar, for the Appellants.

Mr. L. A. Govindaraghava Aiyar, for the Respondent.

JUDGMENT.—These second appeals arise from suits brought by the plaintiff landholder under section 77 of the Estates

Land Act for the rent of *Fasli* 1325 alleged to be due to him from his permanent occupancy tenants the defendants. He claims rent according to the *waram* system but the tenants plead that they are bound to pay only money rents as fixed in their *muchilikkas*, Exhibit C series. The lower Courts have decreed the landholder's claim as brought and hence these appeals by the tenants.

The main dispute between the parties centres round the first issue whether the tenure is *rokkam* or *waram*. The landholder is entitled to revert to the *waram* system unless the *ryots* establish that it has been superseded permanently by the cash system by contract, express or implied, between them and the landholder. See *Ayyaperumal Odayan v. Ramasami Chettiar* (1) and *Muthiah Chettiar v. Periyar Kone* (2). Now, in this case there is an express finding by the lower Courts that the *waram* system was the prevailing tenure in the estate. It is, however, contended that this finding should not be accepted as it is based on recitals in *pattas* Exhibits A, C and Q which as admissions in his own favour by the landholder cannot be relied on by him and on statements in *muchilikkas* Exhibits B, D and F which have not been proved. These *muchilikkas* were taken to be more than 30 years old by the lower Courts and as coming from proper custody their proof was dispensed with. The lower Courts are shown to have gone wrong there as the dates on the Exhibits show that they were not really 30 years old when tendered in evidence. But, apart from these documents, there is evidence to show that the tenure was a *waram* tenure to start with, and that also being the presumption, evidence is not necessary to prove it unless the presumption is rebutted, to do which, the burden is on the *ryot*. In this case there is some evidence that for several years the *ryots* paid money rents but such payments were made under specific contracts in term *pattas* for stated periods and the rates varied from time to time. They only show the existence of special contracts

(1) 30 Ind. Cas. 983; 29 M. L. J. 362; 2 L. W. 650; (1915) M. W. N. 614.

(2) 55 Ind. Cas. 78; 11 L. W. 311; (1920) M. W. N. 15; 27 M. L. T. 226.

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remaining in force in particular years and no inference can be drawn from them that the *waram* system was permanently given up. The last of such contracts is evidenced by Exhibit O series which provided for a money payment for 10 years from *Fasli* 1314 to 1323; by its own terms the contract came to an end in *Fasli* 1324 and from that *fashli* the landholder was entitled to revert to the *waram* rates.

It is next argued that, even assuming that the plaintiff was entitled to revert to *waram* rates, he is nevertheless disentitled to enforce those rates in *Fasli* 1325 without properly tendering a *waram patta* in *Fasli* 1324 by reason of the provision in the latter part of clause (3) of section 52 of the Estates Land Act and such a tender has not been made out. Before dealing with the applicability of the section it may be stated that *waram pattas* were attempted to be tendered to the *ryots* by the plaintiffs in *Fasli* 1324, in which year he distrained the crops for rent. But in the *ryots'* suit to set aside the distraint, it was held by the Courts that the tender was not proper as regards the present defendants and in consequence the distraints were set aside. That finding in Exhibit X is clearly *res judicata* and the question cannot be re-agitated and we must take it that there was no proper tender of any *patta* in *Fasli* 1324.

The question then is, whether the landholder is precluded from claiming *waram* rates in *Fasli* 1325. As already stated, up to the end of *Fasli* 1323, money rents were paid by the *ryots* and the argument for them is that under the first part of clause (3) of section 52 that arrangement should be treated as remaining in force for subsequent years and that to introduce a change the landholder was bound under the second part to tender a new *patta* in the *fashli* prior to one in which he proposed to enforce new terms. The lower Appellate Court has held that clause (3) does not apply to this case and we think that view is right. In the *muchilikkas* Exhibit O series, there is a provision by which after the expiry of the period fixed under it the *ryots* undertake to cultivate the land under "*pattukattu muchilikka* as according to the Amani Rules." These words have been understood by the lower Courts as meaning that the *ryots* would cultivate under the *waram* system.

No doubt, the learned District Judge seems to have erroneously thought that the word *varapathu* was in the covenant but that mistake, however, does not affect the meaning he attributed to the clause. "Amani system" has been treated as meaning *waram* system in our judgment in *Muthiah Chettiar v. Periyar Kone* (2), and as regards this very estate by the District Munsif in his judgment Exhibit W of 1887 when the landholder brought suits against the *ryots* to compel them to accept *waram pattas*. The lands are described in an earlier part of Exhibit O series as "*varapathu* and *kaiipathu*" lands. That also supports the view taken by the lower Appellate Court. The meaning of the covenant thus seems to be clear that the *ryots* agreed to revert to the *waram* system after the period fixed in O series was over. It is, therefore, not necessary for the landholder to rely on the first part of clause (3) of section 52 to regulate his relationship with his tenants for *Fasli* 1324 and thereafter the contract in the *muchilikkas* itself regulating it. In fact, in the face of that covenant, the arrangement to pay money rent cannot be held to continue in force after *Fasli* 1323. The second part is only a corollary to the first part of clause (3) and as the latter does not apply, it must be held that the former also does not apply to this case. As under the present Act no prior tender or exchange of *patta* and *muchilikka* is necessary to entitle a landholder to sue for rent, the present suit is clearly maintainable as brought and the plaintiff is entitled to the *waram* rates decreed to him.

The only other question argued is as regards the second crop on these lands raised by the tenants with the aid of their own well water without taking the landholder's water. It is contended that the plaintiff is not entitled to *waram* on that crop under section 13 (3) of the Act. That provision does not seem to apply as it cannot be said that any higher rate of rent is being claimed on account of increased production in consequence of the tenants' improvement. Under the *waram* system the landholder is entitled to a share in all the produce of the land unless there is a special contract to the contrary exempting any particular crop. His claim to share in all the crops cannot be looked upon as an enhancement of rent.

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The lower Appellate Court is, therefore, right in giving a share to the plaintiff in the second crop also.

The second appeals thus substantially fail but the decrees of the lower Appellate Court must be modified by striking out the declarations embodied in them and by confining them to decrees for rent as the suits are purely suits for rent. With this modification the second appeals are dismissed with costs. Vakils' fee Rs. 10 in each case.

V. N. V.

*Appeal dismissed.***CALCUTTA HIGH COURT.**

APPEAL FROM ORIGINAL DECREE NO. 161 OF 1922.

August 10, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

KALI KRISHNA ROY AND ANOTHER
—DEFENDANTS—APPELLANTS

versus

MAKHAN LAL MUKHERJEE—

PLAINTIFF—RESPONDENT.

Probate and Administration Act (V of 1881), s. 21—Residue of testator's property left to idol—Residuary legatee—Shebait purohit—Shebaitship, how determined—Benefaction to existing endowment—Benefactor, position of.

Where a Will directs that, after payment of obsequious ceremonies of the testator, and certain legacies to specified persons, the residue is to be devoted to the maintenance of the worship of an idol, the residuary legatee under section 21 of the Probate and Administration Act, is the *shebait* of the idol, and not the priest appointed by the *shebait* to conduct the worship, as such appointment has not the effect of transferring the management of the *debutter* estate from the *shebait* to him [p. 687, cols. 1 & 2.]

Maharanes Indurjeet Koorer v. Chundamun misser, 16W. R. 99, relied on.

Where the appointment of a *purohit* or priest of a temple has been at the will of the founder the mere fact that the appointees have performed the worship for several generations will not confer an independent right upon the members of the family so appointed and will not entitle them as of right to be continued in office as priest. [p. 687, col. 2.]

Nanabhai v. Trimbah, (1878) P. J. 195 and *Narayana v. Ranga*, 15 M. 183; 2 M. L. J. 191 5 Ind. Dec. (N. S.) 477, followed.

When the worship of an idol has been founded, the *shebaitship* is vested in the founder and his heirs, unless he has disposed of it otherwise there has been some usage or course of dealing which points to a different mode of devolution. [p. 688, col. 1.]

Gossami Sri Gridhariji v. Romanilalji Gossami, 16 L. A. 137; 17 C. 3; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350; 8 Ind. Dec. (N. S.) 541, *Jagadindra Nath Roy v. Hemanta Kumari Debi*, 31 L. A. 203; 32 C. 129; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.) and *Mohan Lalji v. Tikait Sri Gordan Lalji*, 19 Ind. Cas. 337; 40 L. A. 97; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27; 35 A. 283; (P. C.), relied on.

A person who makes a benefaction to an existing endowment cannot be regarded as its founder, where such benefaction is nothing more than an accretion or addition to the existing foundation. [p. 688, col. 1.]

Annasami Pillai v. Rama Krishna Mudaliar, 24 M. 219; 11 M. L. J. 1 and *Appasami v. Nagappa*, 7 M. 499; 2 Ind. Dec. (N. S.) 931, followed.

Appeal against the decree of the District Judge, 24-Parganas, dated the 1st March 1922.

Babu *Rupendra Kumar Mitra* (with him Babu *Pasupati Ghosh*), for the Appellants.—The defendants are the appellants. The appeal arises out of proceedings for grant of Letters of Administration with copy of the Will annexed. The facts are shortly these. One Bidhumoni left a Will dated 29th November 1898 directing Rs. 600 to be spent for her *sraddh* and made specific bequests to the extent of Rs. 1,400. The residue was left for the worship of the family idol. In 1904 the lady's first cousin took out Letters of Administration and on his death her priest Makhan Lal Mukerjee applied for Letters which have been granted by the District Judge. Against that order the present appeal is directed. I submit the residue of the lady's properties having been bequeathed to the idol its *shebait* is entitled to grant of Letters. The priest cannot be the *shebait* of the idol. See *Nafar Chandra Chatterjee v. Kailash Chandra Mondal* (1). I submit under the circumstances the priest is not entitled to the grant of Letters of Administration.

Babu *Probodh Kumar Das* (with him Babu *Panshanon Ghose*), for the Respondent.—

(1) 62 Ind. Cas. 510; 25 C. W. N. 201,

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I was appointed by the *shebait* to worship the idol as *purohit* and I have been acting as such for a very long time. Of course, I cannot be held to be the residuary legatee. But I am entitled to administer by virtue of my position as priest appointed by the lady.

JUDGMENT.—This appeal is directed against an order for the grant of Letters of Administration, with copy of the Will annexed, to the estate left by one Bidhumani Debi. The lady made a testamentary disposition of her properties on the 29th November 1898 and died on the 16th December 1898; she directed the expenditure of Rs. 600 on the occasion of her obsequious ceremonies and Rs. 1,400 in the payment of specified amounts as legacies to various persons. The residue, she directed, would be devoted to the maintenance of the worship of the idol Sri Sri Iswar Lakshmi Janardan established by the ancestors of her husband. The executor named in the Will did not take out Probate and it was not till the 5th November 1904 that one Rajendra Nath Roy, a first cousin of the lady, came forward to take out Letters of Administration with copy of the Will annexed. We are not now concerned with the history of the management of the estate by the administrator. It is sufficient to state that on his death, one Makhanlal Mookerjee, the priest of the testatrix, applied for Letters of Administration. In the first instance, an *ex parte* order was made in his favour; this was subsequently re-called and the case was re-heard in the presence of Kali Krishna Ray and Satis Chandra Ray who are the grandsons of the brothers of the testatrix and have come forward to obtain Letters of Administration. The District Judge has made a grant in favour of the priest under section 21 of the Probate and Administration Act. We are now called upon to consider whether this order can be sustained.

Section 21 is in these terms:

"When there is no executor, and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other lega-

tee having a beneficial interest, or a creditor, may be admitted to prove the Will, and Letters of Administration may be granted to him for them accordingly."

The District Judge has made an order in favour of the priest on the ground that he was the residuary legatee. In our opinion, this position cannot be supported; and, indeed, in the course of argument, the view that the priest was the residuary legatee has been abandoned. The Will directs the payment of a legacy of Rs. 50 to the priest; this clearly does not make him the residuary legatee. But it has been admitted before us that this sum has already been paid to the priest out of the estate. He cannot, consequently, be regarded as a legatee having a beneficial interest in the estate. The residuary legatee is unquestionably the idol established by the ancestors of the testatrix. It is to the idol that the residue of the estate is bequeathed, and, under section 89 of the Indian Succession Act, which is applicable to Hindus under section 2 of the Hindu Wills Act, a residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated should take the surplus or residue of his property. Consequently, the person entitled to Letters of Administration, as residuary legatee, under section 21 of the Probate and Administration Act, is the *shebait* of the idol. It cannot be suggested that the priest is the *shebait*. The *shebait* appointed the *purohit* to conduct the worship, but that does not transfer the management of the *debutter* estate from the *shebait* to the *purohit*, *Maharane Indurjeet Kooer v. Chundemun Misser* (2), *Nagar Chandra Chatterjee v. Kailash Chandra Mondal* (1). Where the appointment of a *purohit* has been at the Will of the founder, the mere fact that the appointees have performed the worship for several generations will not confer an independent right upon the members of the family so appointed, and will not entitle them as of right to be continued in office as priest; *Nanabhai v. Trimbak* (3), *Narayana v. Ranga* (4). We are consequently of opinion that the respondent

(2) 16 W. R. 99.

(3) (1878) P. J. 195.

(4) 15 M. 183; 2 M. L. J. 19; 5 Ind. Dec. (N. S.)

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is not entitled to the Letters of Administration as residuary legatee or otherwise, and the order made in his favour cannot be supported.

The result is, that the appeal is allowed and the application for Letters of Administration made by Makhan Lal Mukerjee dismissed with costs, both here and in the Court below. The hearing fee in this Court will be assessed at two gold *mohurs*.

The case will be remitted to the lower Court so that the question of grant of Letters of Administration to the appellants or other persons may be further considered. The residuary legatee is the person entitled to the office of *shebait*. We are not in a position to decide, from the materials on the record, who is entitled to the *shebaitship*. But we may add that it is well settled that, when the worship of an idol has been founded, the *shebaitship* is vested in the founder and his heirs, unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution; *Gossami Sri Gridhariji v. Romanlalji Gossami* (5), *Jagadindra Nath Roy v. Hemanta Kumari Debi* (6), *Mohan Lalji v. Tikait Sri Gordhan Lalji* (7). In this connection, it must be borne in mind that, as stated in the Will of the lady, the worship of the idol was established by the ancestors of her husband. She is consequently not the original founder; nor can she be regarded as a founder because of her subsequent benefaction, which is nothing beyond any accretion or addition to the existing foundation; *Annasami Pillai v. Rama Krishna Mudaliar* (8), *Appasami v. Nagappa* (9). The question of *shebaitship* is thus a matter for careful investigation, and we direct that the application for Letters of Administration made by the present appellants be re-heard, after notice to the

heirs of the husband of the lady and to the Government Pleader as representing the Crown.

B. N.

W. C. A.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 163 OF 1922:

February 21, 1923.

Present:—Mr. Justice Oldfield.

HARI KRISHNA PILLAI—CLAIMANT—
PETITIONER

versus

ARUR PANDITHAR—COUNTER-
PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 115, 152, O. XX, r. 3—Judgment dictated in open Court—Transcript, whether can be revised—Irregularity—Revision.

A Judge who pronounces his judgment by dictation to a shorthand-writer in open Court can revise the transcript only so far as to correct clerical or arithmetical mistakes arising from any accidental slip or omission. He cannot alter the effective part of the judgment or substitute a wholly new decision for the one which was originally pronounced. [p. 689, col. 2.]

Where a Judge corrects the shorthand transcript of his judgment so as to entirely change the effect of what he said in open Court, there is such material irregularity as will entitle the High Court to interfere in revision under section 115 of the Civil Procedure Code, notwithstanding the fact that the order relates to claim proceedings and another remedy is open to the aggrieved party in the form of a suit under O. XXI, r. 63 of the Code. [p. 689, col. 1, p. 690, col. 1.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif, Srirangam, in E. A. No. 303 of 1921, in Original Suit, No. 519 of 1915.

Mr. T. V. *Muthukrishna Aiyar*, for the Petitioner.

Mr. S. T. *Srinivasagopalachariar*, for the Respondent.

JUDGMENT.—The facts of this case are exceptional and fortunately so; and it is, fortunate, further, that there is no dispute about the good faith of the District

(3) 16 I. A. 137; 17 C. 3; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350; 8 Ind. Dec. (N.S.) 541.

(6) 31 I. A. 203; 32 C. 129; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.).

(7) 19 Ind. Cas. 337; 40 I. A. 97; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L. R. 566; (1913) M. W. N. 536; 14 M. L. T. 27 35 A. 283; (P. C.).

(8) 24 M. 219; 11 M. L. J. r.

(9) 7 M. 499; 2 Ind. Dec. (N. S.) 931.

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Munsif concerned, whatever opinion may be formed of the propriety of his conduct.

The facts are that, on the 29th September 1921, the District Munsif gave a judgment on the present petitioner's claim to draw certain money, the subject of attachment, which was alleged to be due to the judgment-debtor from the Trichinopoly District Board. The District Munsif delivered that judgment orally, dictating it to a shorthand-writer; and there is no dispute that, in substance, whatever the exact words he used may have been, he allowed the petitioner to draw the money in case he got Probate or Succession Certificate or got his rights determined in a separate suit or gave security on unencumbered immoveable property for the amount. This order may be difficult to understand, because it is not of the nature contemplated by O. XXI, r. 60, being based on assumptions in the alternative that the judgment-debtor or the claimant was entitled to the property. With the merits of that order, however, we are not, at present, concerned. What we are concerned with is that, when the shorthand transcript reached the District Munsif for correction, he entirely changed the effect of what he had said in open Court, by leaving out the reference to the withdrawal of the money by the petitioner in case he gave security. There is no dispute that this change was made. In fact the District Munsif, when the petitioner's Vakil remonstrated with him on 8th October, 1921, dealt with the matter in a lengthy order, in which he sustained the judgment as corrected and declined to make any alteration in it, saying that it and not the judgment as pronounced, expressed his real decision. The order contains a good deal regarding the circumstances, in which the District Munsif found it necessary to make this material correction in his judgment and those in which the petitioner's Vakil discovered, owing to his clerk's consulting the Court diary that a change had been made. It is not necessary to pursue those matters. I turn to the arguments to be dealt with, first, whether the District Munsif acted with material irregularity in the exercise of his jurisdiction and, secondly, whether I should interfere in revision, when it is said that

the petitioner has another remedy open to him by a suit under O. XXI, r. 63.

On the question of material irregularity and the right of the District Munsif to correct his judgment as he did, in fact, by substituting a refusal of relief for grant of it, reference has been made to the rule substituted by this Court for O. XX, r. 3. That rule deals with the case of a Judge, who has been empowered to pronounce his judgment by dictation to a shorthand-writer in open Court and says that the transcript of the judgment so pronounced shall, "after such revision as may be deemed necessary," be signed by the Judge; and it is urged that this authorises the Judge to revise the transcript and to substitute fresh words for the words which fell from his mouth to any extent he may deem necessary. Such a case as this is not likely to have any precedent and, accordingly, no authority on the interpretation of the rule has been brought to my notice. It seems to me, on reference to section 152 and the rule issued by this Court and from obvious considerations of principle, that the revision contemplated cannot be of the effective part of the judgment and must be of the nature referred to in section 152, one relating to "clerical or arithmetical mistakes arising from any accidental slip or omission." It is in fact impossible to see how there can be any purpose in the provision in O. XX, r. 1 that the parties and Pleaders shall be present or have notice of the pronouncement of judgment in open Court, if the decision which is to bind them ultimately is to be contradictory of what was then said. Certain judgments dictated must inevitably contain verbal or arithmetical mistakes, in respect of which revision will be advisable or even necessary. But that is not to say that by revision the Court can substitute a wholly new decision for the one which was originally pronounced. Taking this view, I hold that what purports to be the District Munsif's judgment in its ultimate form is not really the judgment. It is clear that the terms of his judgment, as originally formulated and as it must be taken for the present purpose to have been given, were to an entirely different effect; although it must be held that it is not possible to reconstruct them exactly from the materials available.

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I turn to the second question whether the District Munsif having been guilty of a material irregularity to the prejudice of the petitioner, the fact that the petitioner can bring a suit under O. XXI, r. 63, will disable me from proceeding in revision. It is, no doubt, the practice of this Court not to interfere in revision when another remedy is available. The present case, however, is exceptional and it is not clear that there is in fact another remedy. True, the petitioner, may sue in manner contemplated by O. XXI, r. 63 to set aside the order as ultimately promulgated by the District Munsif. But that is no reason why he should be called on to forego the advantage he obtained in the order as pronounced, which I feel bound to regard as the real order in the case. There is, moreover, the consideration that the procedure under O. XXI, r. 63 is for the establishing of the right of the party who has failed in the claim proceedings. If the petitioner were to sue for the purpose it would be difficult to see how he could be allowed to put forward what would certainly be a material part of his case, that he did not really fail in the proceedings, but was virtually successful. In any case, it seems to me that it will be a fair exercise of my discretion to use the power of revision to clear up the position of the parties; and to enable them to obtain an order which cannot be open to the very grave objections applicable to the one before me and on which they can take further action.

Taking this view, I hold that a material irregularity has been committed and that it is a proper exercise of this Court's power in revision to interfere to set it right. The only difficulty is, as I already indicated, that it is impossible to re-construct exactly the District Munsif's original order and, therefore, impossible to restore it. There is the further consideration that, if it is restored the respondent here, owing to a misapprehension for which he is not responsible, will be prejudiced in respect of the period available to him for suing, if he has to do so, under O. XXI, r. 63. The course I take is, therefore, to set aside the whole proceedings in the lower Court on the petition and to direct the present District Munsif to hear it and deal with it

according to law. Costs in this Court and up to date in the lower Court will be costs in the claim petition and will be provided for in the order thereon.

V. N. V.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 150 OF 1922.

January 23, 1923.

Present.—Justice Sir William Ayling, Kt.,
and Mr. Justice Ramesam.

SUNDARARAJA CHARARIAR—

APPELLANT

versus

ALI MUHAMMAD ETHIBAR KHAN

SAHIB AND OTHERS—RESPONDENTS.

Construction of grant—Charity Inam—Commutation of waram into fixed money rent by trustee, whether binding on trust—Estoppel—Adverse possession—Tenant, whether can prescribe for higher right.

An inam grant of a village was confirmed by the Inam Commissioner "for the support of a mosque and Chatram on the undertaking that the whole village will be resumed unless 2-3rds of the proceeds are appropriated to the support of the above purposes."

Held, that the fact that a third share of the proceeds could be appropriated by the Inamdar for his private use did not make it any the less a charity Inam since the grant was only one and could not be split up into two parts, a personal grant of a third and a charity grant of the remaining two-thirds. [p. 691, col. 2.]

Ramanadan Chettiar v. Vava Luvai Marahayar, 39 Ind. Cas. 235; 40 M. 116; 31 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C.L.J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 I. A. 21 (P. C.), followed.

A permanent grant to the *Kudivaramdar* by a trustee of a charity by which the *waram* is commuted into a fixed money rent is not binding on the charity, and a succeeding trustee is not estopped from repudiating such a transaction, even though he himself may have recognised it for some time inasmuch as the charity cannot suffer from the conduct of the trustees. [p. 692, col. 1.]

SUNDARAJA CHARIAR v. ALI MUHAMMAD.

Sena Yasim Sahib v. Kadur Ekambara Iyer, 54 Ind. Cas. 497; 37 M. L. J. 698; 26 M. L. T. 441; 10 L. W. 672; relied on.

A tenant who enters into possession on certain terms cannot prescribe for the estate of a tenant holding on more favourable terms because the original character of the tenant's possession continues so as to bar any right of prescription. [p. 692, col. 1.]

Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar, 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 48 I. A. 302; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. L. R. (P. C.) 123 (P. C.). *Damodar Das v. Lahhan Das*, 7 Ind. Cas. 240; 37 C. 885; 14 C. W. N. 889; 12 C. L. J. 110; (1910) M. W. N. 303; 7 A. L. J. 791; 8 M. L. T. 145; 20 M. L. J. 624; 12 Bom. L. R. 632; 37 I. A. 147 (P. C.). *Narsya Udpa v. Venhataramana Bhatta*, 16 Ind. Cas. 53; 23 M. L. J. 260; 12 M. L. T. 218; (1912) M. W. N. 870, *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*, 23 M. 271; 2 Bom. L. R. 597; 4 C. W. N. 329; 27 I. A. 69. 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591 (P. C.); referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Trichinopoly, in Appeal Suit No. 63 of 1918, (Appeal No. 331 of 1917 on the file of the District Court), preferred against the decree of the Court of the District Munsif, Srirangam, in Original Suit No. 60 of 1914.

Mr. T. Narasimha Iyenger, for the Appellant.

Messrs. S. Varadaachariar and V. Ganapathi Iyer, for the Respondents.

JUDGMENT.—The suit was brought for an injunction restraining the defendants from interfering with the plaintiff's possession of the suit lands. The plaintiff alleged that he had been the *Kudivaramdar* of the suit lands prior to 1882 on condition of delivering *waram* to the landlord and that in 1882 the predecessor-in-title of the defendants executed Exhibit A under which the *waram* was commuted into a fixed money-rent and that the defendants claiming to revert to the *waram* rate were interfering with the plaintiff harvesting his crops. The defendants originally denied that plaintiff was the *Kudivaramdar* and contended that as the *inam* was a charity *inam*, Exhibit A was not binding on them. During the course of the trial, the plaintiff's right as *Kudivaramdar* was conceded. The Subordinate Judge decided against the plaintiff and he appeals.

The first question that arises for decision is the nature of the *inam*. Exhibit II is

the *Inam* Register. In column 8 it was described as *Kyrati* which means, according to Maclean's Glossary, Volume III, page 415, a charity *inam* (*Kheirauty*) (see also Wilson's Glossary *Khairat*). The suit *inam* was described in Wallace's Register as "to the charity of Ithabar Khan" (*vide* column 14 Exhibit II). This is the earliest description of it now available. In column 21 the Deputy Collector describes it as forming "the grant for the support of the charities of Muhammad Ithabar Khan consisting of a Chatram, a water pandal and a mosque." He then mentions that a former Collector and the Board of Revenue considered it as falling within the operation of Regulation VII of 1817 (The Madras Endowments and Escheats Regulation, 1817) and concluded by proposing to fix a *Jodi* of $\frac{3}{4}$ of the Regular Survey Assessment, which will become the property of the charities to be applied to them by the Managers for the time being. "But in column 22, the order of the Commissioner was confirmed for the support of the mosque, water pandal and Chatram on the undertaking that the whole village will be resumed unless $\frac{3}{4}$ of the proceeds are appropriated to the support of the above purposes." It is clear that the *Inam* Commissioner did not accept the recommendation of the Deputy Collector. The entry in column 2 as "personal" and in column 9 "Free *Jodi* now imposed Rs. 310" must be regarded as embodying the Deputy Collector's view and as not being adopted by the Commissioner. The fact that a third share of the proceeds are being appropriated by the *inamdars* for their private uses does not make it the less a charity *inam* [see *Ramanadan Chettiar v. Vava Levvai Marakayar* (1)] as the grant was only one and cannot be split up into two parts a personal grant of one-third and a charity grant of $\frac{3}{4}$ of the *inam*. It follows that Exhibit A is not binding on the charity.

The next point argued is, that the defendants are barred by limitation from repudiating the transaction of 1882. The plaintiff is a tenant and had been a tenant

(1) 39 Ind. Cas. 235; 40 M. 16; 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 I. A. 21 (P. C.).

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of the suit land prior to 1882. It is impossible for him to prescribe for the estate of a tenant holding on more favourable terms as the character of the tenant's possession continues and there can be no prescription. In this view, no question of limitation arises and it is unnecessary to consider the effect of the decisions in *Vidya Varuthi Thiritha Swamigal v. Balusami Ayyar* (2), *Damodar Das v. Lakhan Das* (3), *Narsya Udpa v. Venkataramana Bhatta* (4) and *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (5).

Nor are the defendants estopped by their conduct from questioning Exhibit A. In so doing, they do not act in their personal right but as trustees of the institution which cannot suffer from their conduct [see *Sena Yasim Sahib v. Kadur Ekambara Iyer* (6)].

The result is there will be a declaration that the plaintiff is entitled to hold the suit land as *Kuduvaramdar* on condition of paying the *waram* rate prevailing prior to 1882. The decree will be modified accordingly. As Exhibit A provides that, when the landlord wishes to revert to the *waram*, he can do so only on returning the Rs. 3,000 borrowed by him from the plaintiff, our decision will not stand in the way of plaintiff, recovering such portion of the Rs. 3,000 as may be binding on the trust from the properties appertaining to the charity or the whole of the amount from the heirs of the executants of Exhibit A, if so advised. As the plaintiff has substantially failed he will pay the defendants' costs.

V. N. V.

Decree modified.

(2) 65 Ind. Cas. 161; 44 M. 831; (1921) M.W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 48 I. A. 302 (P. C.); 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123.

(3) 7 Ind. Cas. 240; 37 C. 885; 14 C. W. N. 889; 12 C. L. J. 110; (1910) M. W. N. 303; 7 A. L. J. 791; 8 M. L. T. 145; 20 M. L. J. 624; 12 Bom. L. R. 632; 37 I. A. 147 (P. C.).

(4) 16 Ind. Cas. 53; 23 M. L. J. 260; 12 M. L. T. 218; (1912) M. W. N. 870.

(5) 23 M. 271; 2 Bom. L. R. 597; 4 C. W. N. 329; 20 I. A. 69; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. S.) 591 (P. C.).

(6) 54 Ind. Cas. 497; 37 M. L. J. 698; 26 M. L. T. 441; 10 L. W. 672.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

NO. 2054 OF 1920.

August 7, 1922,

Present :—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

GULJAR MANDAL—PLAINTIFF—

APPELLANT

versus

SARIMAN MANDALINI AND OTHERS.

DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 25 (3)—*Limitation Act* (IX of 1908), ss. 19, 20—*Borrowing fresh sum and signing old account—Promise to pay—Acknowledgment.*

A debtor's conduct in borrowing a fresh sum and making up and signing an old account must be taken as a promise which is the foundation of a new contract and not as an acknowledgment. Such promise is applicable as much to the sum borrowed on that day as to the sum found due on adjustment of account. [p. 694, cols. 1 & 2.]

Where there are debts due on both sides and the accounts are gone through by the parties and a balance struck, this in effect constitutes a payment to the amount of the smaller debt. But it is the striking of the balance that constitutes the payment, not the mere existence or even statement in writing of cross demands. [p. 695, col. 1.]

Where on an adjustment of accounts on a certain date between a borrower and the lender it was found that the debtor was liable for a certain sum, and on that date the debtor took a fresh advance in cash and executed a *hatchita* for the aggregate amount, which was duly stamped and signed by the debtor:

Held, that as the entry in the *hatchita* was made in respect of an aggregate sum, with regard to a portion whereof there could only be a promise to pay and not an acknowledgment, the legitimate interpretation of the entry was that there had been a promise to pay the fresh advance taken on the date of the execution of the *hatchita* as also a promise to pay the amount found due on adjustment of account on that date. Consequently, the liability of the debtor must be determined on the basis that there was a legally enforceable debt recoverable by the lender on the date of the execution of the *hatchita*, to the extent of the aggregate amount. [p. 694, col. 2; p. 695, col. 1.]

Ramji v. Dharma, 6 B. 683; 3 Ind. Dec. (N. S.) 911, *Chowksi Himulal v. Chowksi Achruulal*, 8 B. 194; 4 Ind. Dec. (N. S.) 503, *Ranchhoddas Nathubhai v. Jeychand Khushalchand*, 8 B. 405; 4 Ind. Dec. (N. S.) 644, *Jethibai v. Pullibai*, 17 Ind. Cas. 722; 14 Bom. L. R. 1020, *Gobind Das v. Sarju Das*, 30 A. 268; 5 A. L. J. 274; A. W. N. (1908) 129 and *Ramaswami Pillai v. Kuppuswami Pillai*, 7 Ind. Cas. 907; 20 M. L. J. 656; 8 M. L. T. 182; (1910) M. W. N. 547, distinguished.

GULJAR MANDAL, v. SARIMAN MANDALINI.

Appeal against a decree of the Subordinate Judge of Rajshahi, dated the 8th April 1920, affirming that of the Munsif, Malda, dated the 15th January 1919.

Babu Sarat Chandra Mukherjee, for the Appellant.

Babus Mahendra Nath Ray and Manmatha Nath Ray, for the Respondents.

JUDGMENT.

Mookerjee, J.—This is an appeal by the plaintiff in a suit for recovery of money due from the defendants as representatives in estate of one Sefatulla Mandal, who had loan transactions with the plaintiff as also with the fourth and fifth defendants. There was an adjustment of accounts on the 23rd September 1909, when it was found that the debtor was liable for a sum of Rs. 2,977-3as.-15gds. On that date, the debtor took a fresh advance of Rs. 500 in cash and executed a *hatchita* for Rs. 3,477-3as.-15gds. The document was duly stamped and was signed by Sefatulla. On the 27th September 1909, Sefatulla paid Rs. 500 in cash and an entry to that effect was duly made in the *hatchita*. The subsequent transactions, as may be gathered from the entries in the *hatchita*, were as follows:

11th October 1909 ..	Sefatulla	borrowed
	Rs. 2	
20th October 1909 ..	Sefatulla	paid
	Rs. 16.	
6th November 1909 ..	Sefatulla	borrowed
	Rs. 400.	
18th September 1912..	Sefatulla	paid
	Rs. 2.	

The accounts were adjusted on the date last mentioned, and it was found that Rs. 3,361-3as.-15gds was due to the lender. On the 27th December 1914, Sefatulla paid Rs. 5. An entry was thereupon made in the *hatchita* in the following terms:

"Through self and Naziruddin Pramanick
...Rs. 5."

Credit was given for the sum and the balance due was specified at

Rs. 3,356-3as.-15gds. This entry was duly stamped and signed by Sefatulla "in the pen of Nazir-ud-din." The evidence shows that Nazir-ud-din was an officer of Sefatulla, and that Sefatulla who had been ill for some time previously, died on that very day after the payment had been made and the signature affixed. After the death of Sefatulla, his widow paid Rs. 20 on the 11th October 1916, for self and on behalf of his two infant daughters. The entry was signed by the widow in the pen of Niamatulla. The present suit was instituted on the 2nd January 1918 for recovery of the sum due to the plaintiff together with damages. The defendants, the widow and the infant daughters of Sefatulla, denied all knowledge of the transactions and also pleaded the bar of limitation. The Trial Court found in favour of the plaintiff on the merits, but dismissed the claim as barred by limitation. This decree has been affirmed by the Subordinate Judge. On the present appeal, the plaintiff has urged that the suit is not barred by limitation. From the arguments addressed to us, two points have emerged for consideration, namely, first, what is the legal effect of the entry signed by the borrower on the 23rd September 1909, and, secondly, what is the legal effect of the entry of the payment made on the 18th September 1912.

As regards the first question, the Subordinate Judge has held that the entry made on the 23rd September 1909, which recites that Rs. 3,477-3as.-15gds. was due on that date, is an acknowledgment, and is not sufficient to save the claim from the bar of limitation, inasmuch as the plaintiff has not established that the acknowledgment was made, as required by section 19 of the Indian Limitation Act, before the expiration of the period prescribed for a suit for recovery of the amount due. We are of opinion that there is no substance in this contention. The details of the entry made on the 23rd September 1909 show that Rs. 2,320-9as.-15gds and Rs. 656-10as. were found due upon adjustment of two accounts of the previous years and that a sum of Rs. 500 in cash was taken as loan on that date. These three sums made up the aggregate of Rs. 3,477-3as.-15gds. There could not be an acknowledgment

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of a pre-existing liability in respect of the sum of Rs. 500, there could only be a promise to pay that sum. Consequently, the legitimate interpretation of the entry is, that there was a promise to pay Rs. 500 taken on the 23rd September 1909 as also a promise to pay Rs. 2,977-3as-15gds. found due on the adjustment of account on that date. The view we take is supported by the judgment of Sir John Stanley, C. J., and Banerji, J., in *Muhammad Abid Hussain Khan v. Bhagwan Das* (1). In that case, a certain debt, barred by limitation, stood due to the plaintiff by the defendant. The plaintiff remitted a portion of the debt and advanced a further sum in cash. The defendant thereupon executed a *sarkhat*, in which he admitted the receipt in cash of a sum including the unremitted portion of the barred debt and the further sum advanced at the time, and undertook to pay interest thereon at a certain rate. It was ruled that the transaction amounted to a new contract and was not merely an acknowledgment of the barred debt. Sir John Stanley pointed out that the amount of the old debt might have been actually paid and then repaid, and if the parties had recourse to such formality, the transaction would undoubtedly have been treated as a new contract to secure the entire amount specified in it. Reference was made to the decision of the Bombay High Court in *Jodharaj v. Raghavgir* (2) and *Vasudeo Anant v. Ramkrishna Rao Narayan* (3), where it was held that the defendant's conduct in borrowing a fresh sum and making up and signing the old account must be taken as a promise which was the foundation of a new contract. From this point of view, it is needless to explore the history of the transactions between the parties antecedent to the 23rd September 1909, for it was open to the borrower to make a promise in writing signed by himself, to pay a debt of which his creditor might have enforced payment but for the law for the limitation of suits; see section 25 (3) of the Indian Contract Act:

(1) 5 Ind. Cas. 418.

(2) (1893) P. J. 48.

(3) 24 B. 394; 2 Bom. L. R. 122; 12 Ind. Dec. (N. S.) 795.

Matu Sheikh v. Baikuntha Nath Kar (4), *Bhawani Misser v. Peari Jha* (5). If the entry be construed as a promise to pay, such promise is applicable quite as much to the sum borrowed on that day as to the sum found due on adjustment of account: *Appa Rao v. Suryaprakasa Rao* (6); *Mohammad Abdullah Khan v. Bank Instalment Co.* (7), *Ganapathy Mudaly v. Munisawmy Mudaly* (8). The distinction between an acknowledgment and promise to pay is sometimes difficult to draw, specially as, in the words of Sir Alfred Wills in *Mantaram v. Seth Rupchand* (9), an unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary; it is what every honest man would mean to do. The case before us is reasonably free from difficulty, as the entry was made in respect of an aggregate sum, with regard to a portion whereof there could only be a promise to pay and not an acknowledgment. This distinguishes the present case from the decisions in *Debi Prosad v. Ram Ghulam Sahu* (10), *Ramji v. Dharma* (11), *Chowksi Himullal v. Chowksi Achrutlal* (12), *Ranchhodas Nathubhai v. Jeychand Khushalchand* (13), *Jeethibai v. Putlibai* (14), *Gobind Das v. Sarju Das* (15), *Ramaswami Pillai v. Kuppuswami Pillai* (16).

Reference may in this connection be made to the well-known principle that it is not necessary that the payment should be actually made in money, for any arrangement between the parties intended to have the

(4) 20 Ind. Dec. 809; 18 C. L. J. 269.

(5) 21 Ind. Cas. 254; 18 C. L. J. 329.

(6) 23 M. 94; 9 M. L. J. 330; 8 Ind. Dec. (N. S.)

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(7) 2 Ind. Cas. 379; 31 A. 495; 6 A. L. J. 611.

(8) 5 Ind. Cas. 754; 33 M. 159; 7 M. L. T. 81.

(9) 33 L. A. 165; 33 C. 1047; 4 C. L. J. 941; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130 (P. C.).

(10) 25 Ind. Cas. 89; 19 C. L. J. 263.

(11) 6 B. 683; 3 Ind. Dec. (N. S.) 911.

(12) 8 B. 194; 4 Ind. Dec. (N. S.) 503.

(13) 8 B. 405; 4 Ind. Dec. (N. S.) 644.

(14) 17 Ind. Cas. 722; 14 Bom. L. R. 1020.

(15) 30 A. 268; 5 A. L. J. 274; A. W. N. (1908)

129.

(16) 7 Ind. Cas. 901; 20 M. L. J. 656; 8 M. L. T. 282; (1910) M. W. N. 547.

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effect of discharging *pro tanto* the party indebted, will have the same effect as a payment of money: *Maber v. Maber* (17). Thus, where there are debts due on both sides and the accounts are gone through by the parties and a balance struck; this in effect constitutes a payment to the amount of the smaller debt: *Ashby v. James* (18), *In re Hawkins* *Hawkins v. Hawkins* (19). But it is the striking of the balance that constitutes the payment, not the mere existence or even statement in writing of cross-demands: *Williams v. Griffiths* (20), *Cottam v. Partridge* (21), *Clark v. Alexander* (22), *Scholey v. Walton* (23), *Patt v. Clegg* (24), *Stewart v. Connick* (25). Hence, it has been ruled that an agreed statement of accounts, where all the items are on one side only, if the statement is not signed by the party liable and is inoperative as an acknowledgment, will not be allowed to support an action on an account stated in respect of items which are statute-barred: *Jones v. Ryder* (26), *Nash v. Hill* (27); *Brenan v. Crawley* (28).

We hold accordingly that the liability of the defendants must be determined on the basis that there was a legally enforceable debt recoverable by the plaintiff from their predecessor on the 23rd September 1909 to the extent of Rs. 3,477-3as.-15gds.

As regards the second question, we have to consider whether the entry of the payment of Rs. 2 on the 18th September 1912 made before the lapse of three years from the 23rd September 1909 fulfils the requirements of section 20 of the Indian Limitation

Act. That section provides that where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made: provided that the fact of the part payment of the principal of the debt appears in the handwriting of the person making the same. In the case before us, the payment was made by the debtor through the hand of his officer Naziruddin, and the entry was made in the following form "through self and Naziruddin Pramanick." This entry, it has been established, is in the handwriting of Naziruddin and must have been made with the concurrence of the creditor who had the *hatchita* in his custody. When an entry has been so made with the mutual consent of the creditor and the debtor—the only two persons interested—neither of them can be permitted to repudiate the entry to the prejudice of the other. It is consequently needless to investigate, whether the money was handed over by the debtor direct to the creditor or through the hand of his officer. They were all present on the scene, and the payment must have been made in the manner alleged in order that the entry might, if necessary, be made by Naziruddin. It is clearly not open to the representatives of the borrower now to resile from an arrangement and the record thereof which was deliberately made by their predecessor with the approval of the creditor. We need not, accordingly, attempt to reconcile the decisions which deal with the precise effect of payment through a messenger or a menial servant: *Sarajubala Debi v. Saradanath Bhattaacharjee* (29), *Duraiswami Aiyar v. Krishniah* (30), *Ram Kishan Das v. Shyam Sunder Lal* (31). We are of opinion that the entry of the payment dated the 18th September 1912 was effective to extend the period of limitation. This was followed by the payments of the 27th December 1914 and 11th October 1916.

(17) (1867) 2 Ex. 153; 36 L. J. Ex. 70; 16 L. T. 26.

(18) (1843) 11 M. & W. 542; 63 R. R. 676; 12 L. J. Ex. 295; 152 E. R. 542.

(19) (1879) 28 W. R. 240.

(20) (1835) 2 Cr. M. & R. 45; 41 R. R. 685; 1 Gale 65; 5 Tyr. 748; 4 L. J. (N. S.) Ex. 129; 150 E. R. 19.

(21) (1842) 4 M. & G. 271; 4 Scott N. R. 819; 11 L. J. C. P. 161; 134 E. R. 111.

(22) (1844) 8 Scott N. R. 147; 66 R. R. 844; 13 L. J. C. P. 133; 8 Jur. 496.

(23) (1844) 12 M. & W. 510; 67 R. R. 414; 13 L. J. Ex. 122; 8 Jur. 319; 152 E. R. 1299.

(24) (1847) 16 M. & W. 321; 73 R. R. 517; 16 L. J. Ex. 210; 11 Jur. 289; 153 E. R. 1212.

(25) (1871) 5 Ir. C. L. R. 562.

(26) (1838) 4 M. & W. 32; 51 R. R. 452; 1 H. & H. 256; 7 L. J. (N. S.) 216; 150 E. R. 1331.

(27) (1858) 1 F. & F. 198; 115 R. F. 897.

(28) (1868) 16 W. R. 754.

(29) 50 Ind. Cas. 862; 23 C. W. N. 336.

(30) 54 Ind. Cas. 318; (1919) M. W. N. 797; 10 L. W. 466.

(31) 61 Ind. Cas. 918; 8 O. L. J. 115.

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The result is that the appeal is allowed. The suit will be decreed against the first three defendants for Rs. 1,663-1-17 gds.-2 karas with interest thereon at 6 per cent, per annum from the date of the suit till the date of the realisation. This order will carry costs in all the Courts. The sum decreed will be realisable only out of the assets of the original debtor in the hands of his representatives.

B. N.
N. H.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO.
2908 OF 1920.

August 9, 1922.

Present:—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Chotzner.

THE CHAIRMAN, SERAJGUNJ MUNI-
CIPALITY—DEFENDANT—APPELLANT
versus

THE CHITTAGONG CO., LTD.—PLAINTIFF
—RESPONDENT.

Evidence Act (I of 1872), s. 96—Latent ambiguity—Extrinsic evidence, admissibility of—Evidence of intention and user—Principle applicable—Instruments, ancient and modern.

When an instrument appears, on the face of it, to be free from ambiguity, but upon the endeavour being made to apply it to the persons or things indicated, it transpires that the words are equally applicable to two or more persons or to two or more things, there is what is called a latent ambiguity. This class of ambiguity, sometimes called an equivocation, is not discovered till the instrument comes to be applied to external circumstances. In such a case as extrinsic evidence has created the ambiguity, extrinsic evidence is admissible to re-solve it; and direct evidence of intention may be given for the purpose of ascertaining which of the several persons or things to whom the words are applicable was intended to be denoted. [p. 697, col. 2.]

The principle that when an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it is latent. [p. 699, col. 2; p. 698, col. 1.]

Appeal against a decree of the Sub-ordinate Judge, Pabna, dated the 27th

August 1920, affirming that of the Munsif, Serajgunj, dated the 5th August 1919.

Babu Atul Chandra Gupta, for the Appellants.

Babu B. Chakravarty, (with him Babu Suryya Kumar Guha), for the Respondents.

JUDGMENT.—This is an appeal by the defendant Municipality against the plaintiff Company in a suit for damages of illegal distress in execution of a warrant issued for recovery of latrine tax which is alleged to have been not leviable under the law.

On the 27th March 1905 the Commissioners of the Serajgunj Municipality, at a meeting decided to extend the latrine area in accordance with the provisions of the Bengal Municipal Act, 1884. Thereupon, on the 27th November 1905, the Government of Bengal extended the provisions of Part IX of the Bengal Municipal Act to the area mentioned in the resolution, and empowered the Commissioners to levy the latrine tax within the limits specified. The boundaries of the area were set out in the notification in the following terms: North—By Elliot Bridge. South—By Chur Raipur. East—By Hossainpur and Mirpur. West—By the Dhanbandi river.

From before the issue of this notification, the Municipal Commissioners had received from the European firms within the Municipality, a sum of Rs. 90 annually as latrine tax, and this state of things continued down to the first quarter of the year 1916-17. In the second-quarter of that year, a demand was made upon the Company, who have a cooly depot within the jurisdiction of the Municipality, for latrine tax on the footing that the depot was situated within the latrine area, so that latrine tax was leviable thereon. The amount demanded was paid under protest, and the present suit was instituted by the Company against the Municipality to test the legality of the claim. The point in controversy is, whether the cooly depot of the Company is situated within the latrine jurisdiction of the Municipality. The answer depends upon the true construction of the Government Notification dated 27th November 1905. The Courts below have concurrently

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answered the question in the negative. On the superficial view, it may seem that the matter in issue raises nothing beyond a question of fact. On closer examination, however, it appears that a question of interpretation is really involved.

Reference has been made in the course of argument to a map of the Serajgunj Municipality, which shows the Elliot Bridge, the Chur Raipur, and the Dhanbandi river. The map also shows, towards the east of the river, tracts marked as "Hossainpur," "land of Hossainpur Mouza," "Mirpur," and "land of Mirpur Mouza." Apparently, the tracts which are marked as "land of Hossainpur Mouza" and "land of Mirpur Mouza," extend right up to the eastern bank of the river, while the tracts marked as "Hossainpur" and "Mirpur" are smaller areas, the western boundaries whereof are at some distance from the eastern bank of the river. If, in the Notification, the terms "Hossainpur" and "Mirpur" were used to indicate the "land of Hossainpur Mouza" and the "land of Mirpur Mouza" the area covered by the Notification would reduce to a line without breadth, because the lands of these *Mouzas* extend up to the eastern bank of the Dhanbandi river, leaving no area between what are set out as eastern and western boundaries. On the other hand, if the terms "Hossainpur" and "Mirpur," used in the Notification, were intended to represent not the "land of Hossainpur Mouza" and "land of Mirpur Mouza," but only to the smaller areas shown as "Hossainpur" and "Mirpur" on the map, there would be a considerable area between the eastern bank of the river and the western boundaries of these localities. The question would then arise, whether the cooly depot of the Company is or is not situated within the Municipality latrine area so determined.

The substance of the matter thus is, that there is a latent ambiguity in the eastern boundary as given in the Notification dated 27th November 1905 and, consequently, the principle enunciated in section 56 of the Indian Evidence Act applies, namely, that when the facts are such that the language used might have been meant to apply to any one and could not have been meant to apply to more than one of several persons or things, evidence may

be given of facts which show which of those persons or things it was intended to apply to. It is well settled that when an instrument appears on its face to be free from ambiguity, but upon the endeavour being made to apply it to the persons or things indicated, it transpires that the words are equally applicable to two or more persons or to two or more things, there is what Lord Bacon calls a latent ambiguity (Law Tracts Rules 23-25; Bacon's Works, Ed. Spedding and Heath, Vol. VII, p. 385). This class of ambiguity, sometimes called an equivocation, *Doe v. Hiscocks* (1) and *Douglas v. Fellows*(2), is not discovered till the instrument comes to be applied to external circumstances. In such a case, as Lord Wrenbury puts it, "extrinsic evidence has created the ambiguity, and extrinsic evidence is admissible to re-solve it"; See the decision of the House of Lords in *Great Western Railway and Midland Railway v. Bristol Corporation* (3) and direct evidence of intention may be given for the purpose of ascertaining which of the several persons or things to whom the words are applicable was intended to be denoted. Reference may in this connection be made to the observation of Baron Alderson in *Smith v. Jeffryes* (4); of Mr. Justice Erskine, Baron Parke, and Tindal, C. J., in *Shore v. Wilson* (5); of Lord Wensleydale in *Waterpark v. Fennell* (6); of Lord Halsbury in *Van Diemen's Land Co. v. Marine Board of Table Cape* (7), and of Lord Atkinson in *Watcham v. Attorney-General on behalf of the Government of the East Africa Protectorate* (8). The decision of the Judicial Committee last mentioned shows that the principle that when an instru-

(1) (1839) 5 M. & W. 363 at p. 369; 52 R. R. 748; 9 L. J. (N. S.) Ex. 27; 3 Jur. 955; 2 H. & H. 54; 151 E. R. 154.

(2) (1853) Kay. 114 at p. 120; 101 R. R. 527; 23 L. J. Ch. 167; 2 W. R. 654; 69 E. R. 49.

(3) (1918) 87 L. J. Ch. 414 at p. 429; 82 J. P. 233; 16 L. G. R. 393.

(4) (1846) 15 M. & W. 561 at p. 572; 71 R. R. 761; 15 L. J. Ex. 325; 153 E. R. 972.

(5) (1839) 9 Cl. & F. 355; 57 R. R. 2; 8 E. R. 450.

(6) (1859) 7 H. L. C. 650 at p. 685; 115 R. R. 317; 5 Jur. (N. S.) 1135; 7 W. R. 634; 11 E. R. 259.

(7) (1906) A. C. 92; 75 L. J. P. C. 28; 93 L. T. 709; 54 W. R. 498; 22 T. L. R. 114.

(8) (1919) A. C. 533; 87 L. J. P. C. 150; 34 T. L. R. 481; 120 L. T. 258.

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ment contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument and where the ambiguity is patent as well as where it is latent.

We are of opinion that the question of interpretation of the Government Notification dated 27th November 1905 has not been approached from the correct standpoint, and the case before us has not been properly tried. The result is that this appeal is allowed, the decree of the Subordinate Judge set aside, and the case remitted to the Court of first instance for re-trial. Each party will be at liberty to adduce fresh evidence as to what was intended by the terms "Hossainpur" and "Mirpur," and, if necessary, a map will be prepared on fresh Survey. The costs in this Court and in the lower Appellate Court will abide the result.

B. N.

*Appeal allowed:
Case remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 112.
OF 1919.

July 25, 1922.

Present.—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Chotzner.

LALIT MOHAN SEN—DEFENDANT—

APPELLANT

versus

**MANORANJAN GHOSH CHAUDHURI
AND OTHERS—PLAINTIFFS—RESPONDENTS.**

Benami transaction—Test—Court, duty of—Co-sharers—Default in payment of Government dues—Sale of estate—Defaulting co-sharer, purchase by—Other co-sharer, right of—Public Demands Recovery Act (I B. C. of 1895), s. 10—Omission to serve notice of sale—Sale, whether nullity—Public Demands Recovery Act (III B. C. of 1913), ss. 31, 36, 37—Retrospective effect.

The Courts in India need not approach a transaction alleged to be *benami* with that scrupulous rigour which, in other systems of jurisprudence, may demand the existence of the clearest positive evidence that the *ex facie* owner of a property holds the same for the interest of another. The vital test in cases of this class is, what is the source from whence the consideration came. The Court should also take into consideration the question of possession. But where the production of evidence of a conclusive character to satisfy these tests is hardly feasible, the Court must examine the surrounding circumstances. [p. 700, cols. 1 & 2.]

A co-sharer who has defaulted to pay the Government dues and has thereby brought about the sale of an estate, cannot be permitted, if he purchases the estate at the sale, to hold it for his own benefit to the exclusion of his co-owner. [p. 701, col. 1.]

The co-owner who thus acts in breach of his obligation, contractual or fiduciary, cannot be permitted to profit by his own wrong to the detriment of the person whose interest it was his duty to protect. [p. 701, col. 2.]

When notice has not been served under section 10 of the Public Demands Recovery Act, 1895, a sale under the Act must be deemed to be a nullity, a sale wholly without authority. In such circumstances, the plaintiff in a suit to recover possession need not ask that the sale be set aside; he is entitled to recover possession upon the footing that the sale has not affected his title. [p. 702, col. 1.]

There is abundant indication in the provisions of the Public Demands Recovery Act, 1913, that it was not intended to have retrospective operation so as to extinguish or modify causes of action which might have already accrued by reason of failure to serve the notice issued under section 10 of the Public Demands Recovery Act, 1895, for section 36 of the new Act must be read along with section 3 (1). [p. 703, col. 1.]

Appeal against the decree of the Subordinate Judge, Bakerganj, dated the 14th March 1919.

Babus Jogesh Chunder Roy and Abinas Chandra Guha, for the Appellant.

Babus Gnnada Charan Sen and Beptin Chandra Bose, for the Plaintiff-Respondent.

Babus Sures Chandra Talukdar, for Defendants Respondents Nos. 2 and 3.

Babu Nilkanta Ghose for Defendants Respondents Nos. 6 and 7.

JUDGMENT.—This is an appeal by the first defendant in a suit for confirmation or recovery of possession of land on establishment of title. The disputed property is one-and-a-quarter annas share of taluk Ramprosad which bears *louzi* No. 1631 of the Bakerganj Collectorate. In respect of seven-and-three-quarters annas share

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of the entire *taluk*, a separate account had been opened in the Collectorate; of this share, four annas belonged to the *zemindars* of Kirtipasa with whom we are not concerned here, and three-and-three-quarters annas to the Guhas, who are the sixth and seventh defendants in this litigation. Of the residuary share, one-and-a-quarter anna belonged to Ellen Jolly, three-and-a-half annas to the Boses who are the second, third and fourth defendants in this suit, and another three-and-a-half annas share to the Guhas, who are the sixth and seventh defendants. The plaintiff purchased the share of Ellen Jolly on the 7th February, 1895, and, at the time of the events which have led up to this litigation, he was the proprietor thereof. Before the conveyance in favour of the plaintiff, Ellen Jolly had, on the 24th May 1888, created a tenure in respect of her share in favour of Ambica Charan Guha (now represented by the sixth and seventh defendants) and Manikyamala Bose (the predecessor-in-interest of the second and third defendants). The rent was settled at Rs. 920, and out of this sum, the lessees undertook to pay into the Collectorate, on behalf of the lessor, a sum of Rs. 573, as revenue and cesses leviable in respect of his share of the *taluk*. The position, consequently, was, that the second and third defendants were co-sharers of the plaintiffs and also tenure-holders under him, and were thus bound to pay cesses in respect of his share and their own share. The fourth and fifth defendants were co-sharers of the plaintiff and were bound to pay cesses in respect of their own share alone. The sixth and seventh defendants were co-sharers of the plaintiff and also lessees under him, and were thus bound to pay cesses in respect of his share besides their own share. The second and third defendants, however, in breach of their obligation, defaulted to pay the cesses due for the September instalment of the year 1912. The consequence was that, on the 23rd December 1912, the Collector made a certificate under the Public Demands Recovery Act, 1895. Notice was thereupon directed to issue under section 10. On the 11th March 1913 it was reported to the Collector that the notice had been duly served upon the defaulting proprietors. A distress warrant was thereafter issued on

the 4th April 1913, and is stated to have been served on the 20th April 1913. On the 2nd May 1913 the property in arrear was ordered to be sold, and a notice under section 10 was again directed to issue on the judgment-debtors. On the 18th June 1913 notice was ordered to issue for settlement of sale proclamation under O. XXI, r. 66 (2) of the Civil Procedure Code, 1908; this notice, it is said, was served on the 24th June 1913. On the 24th July 1913 the sale proclamation was ordered to issue. The sale proclamation is alleged to have been served on the 8th August 1913. On the 30th September 1913 the property was put up to sale by the Collector. The first defendant Sen was the sole bidder present, and he bought the property for the sum of Rs. 82-10-3 which was the amount due on the certificate. The sale was confirmed on the 1st December 1913. The sale-certificate was granted on the 7th July 1914. The purchaser got his name registered in the Collectorate on the 21st July 1914. He applied for delivery of possession to the Collector on the 15th January 1915; the order for issue of writ was made on the 8th April 1915 and possession was delivered by beat of drum in the customary manner on the 25th April 1915. The plaintiff thereupon instituted the present suit on the 26th September 1916 for confirmation or recovery of possession on the allegation that the proceedings were throughout fraudulent and had been controlled by the second and third defendants, who had managed to purchase the property in the name of the first defendant. The Subordinate Judge has decreed the suit. He has held, first, that the second and third defendants deliberately defaulted to pay the Government dues; secondly, that they have purchased the disputed share, which is worth at least Rs. 5,000, for an insignificant sum; thirdly, that the notice under section 10 of the Public Demands Recovery Act, 1895, was not duly served and that the proceedings were consequently without jurisdiction; fourthly, that the proceedings, specially those subsequent to the sale, were fraudulent and were concealed from the plaintiff. On the present appeal, the first defendant has assailed these conclusions as erroneous in fact and in law.

As regards the first point, we feel no

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doubt that the Boses deliberately defaulted to pay the Government dues. It was their duty, as tenure-holders under the plaintiff, to pay the cesses due on his share; it was also their duty to pay the cesses in respect of their own share. They intentionally withheld payment so that the property might be brought to sale; they must accordingly be deemed to have intended what they must have known would be the normal consequence of their default.

As regards the second point, the Subordinate Judge has found that the purchase at the sale held by the Collector was made nominally by the first defendant, but really for the benefit of the Boses. We see no reason to doubt the correctness of this conclusion. We have been pressed with the view that, as observed by Lord Shaw in *Muhammad Mahbub Ali Khan v. Bharat Indu* (1), the Court must rest its decision, not upon suspicion but upon legal evidence established by legal testimony. But the Court need not approach the transaction with that scrupulous rigour which, in other systems of jurisprudence, may demand the existence of the clearest positive evidence that the *ex facie* owner of a property holds the same for the interest of another. It may further be conceded that, as observed by Mr. Amir Ali in *Nriyamoni Dassi v. Lakhan Chunder Sen* (2), the vital test in cases of this class is, what is the source from whence the consideration came (see also *Bilas Kunwar v. Desraj Ranjit Singh* (3) and *Parbati Dasi v. Baikuntha Nath Das* (4), which recall the earlier pronouncements in *Dhurm Das Pandey v. Shama Soondri Dibiah* (5), and *Gopeekrist Gosain v. Gunga-*

persaud Gosain (6). In the present case, however, the sum paid for purchase at the sale was so small that it might, without difficulty, have been provided by either the Boses or Sen, both of whom, it is conceded, are men of considerable means. The endeavour made by Sen to establish that he withdrew from the Bank a sum of Rs. 100 for the purpose has the appearance of an attempt to create evidence, and does not justify the inference that he must have provided the purchase-money. It need not further be questioned that, as pointed out in *Upendra Nath Nag v. Bhupendra Nath Nag* (7), the Court should take into consideration the question of possession. In the present case, however, the interval between the alleged delivery of possession and the institution of the suit is so short that the production of evidence of possession of a conclusive character is hardly feasible. The entries in the official records, no doubt, stand, as might be expected, in the name of the person declared as the purchaser; that is a feature common to cases of this class and cannot be treated as a decisive factor. We must consequently examine the surrounding circumstances. It is undeniable that the Boses intentionally committed default. They knew that the inevitable consequence would be a sale of their share as also of the share of the plaintiff. They made no attempt whatever to pay up the small sum due, so as to avert the sale. They made no attempt to offer bids at the sale. They took no steps to have the sale set aside either by application to the Collector or by recourse to a suit. The first defendant opportunely made his appearance on the scene. He had no connection with the property. He could not explain how he was apprised of the impending sale; he still denies that he is a habitual frequenter at Collectorate sales; in the expectation of an opportunity to make speculative purchases. He had fortunately no competitors at the sale and was able to buy a valuable property for less than a fiftieth of its value. We agree with the Subordinate Judge that, in such circum-

(1) 53 Ind. Cas. 54; 23 C. W. N. 321; (1919) M. W. N. 507 (P. C.).

(2) 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.).

(3) 30 Ind. Cas. 299; 42 I. A. 202; 37 A. 557; 22 C. L. J. 516; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; (1915) M. W. N. 757 (P. C.).

(4) 22 Ind. Cas. 51; 19 C. L. J. 129; 18 C. W. N. 428; 15 M. L. T. 66; (1914) M. W. N. 42; 12 A. L. J. 79; 16 Bom. L. R. 101; 26 M. L. J. 248 (P. C.).

(5) 3 M. I. A. 229; 6 W. R. P. C. 43; 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 271; 18 E. R. 484.

(6) 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 19 E. R. 20.

(7) 32 Ind. Cas. 267; 21 C. W. N. 280.

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stances, the inference might legitimately be drawn that the Boses purchased the property in the name of Sen, and they have not moved an inch with a view to challenge the propriety of the sale, because their interest has not been affected by the event. A sale so contrived cannot prejudice the interest of the real owner. A co-sharer who has defaulted to pay the Government dues and has thereby brought about the sale of the estate, cannot be permitted, if he purchases the estate at the sale, to hold it for his own benefit to the exclusion of his co-owner; see *Ram Prasad Singh v. Pawan Singh* (8), *Janki Singh v. Debi Nandan Prasad* (9), *Harendra Lal Roy v. Purna Chandra* (10), *Faizar Rahman v. Maimuna Khatun* (11). The view that a joint tenant who deliberately makes default in payment of the Government revenue due on account of his share, should not be allowed to use the machinery provided by law for the realisation of the dues of the State to injure the interest of his co-sharer, has now been approved by the Judicial Committee in the case of *Deonandan Prasad v. Janki Singh* (12), which overruled the decision in *Deorga Singh v. Sheo Pershad Singh* (13) and affirmed the decision in *Janki Singh v. Debi Nandan Prasad* (9). The position is similar when a tenant, in violation of his agreement, defaults to pay, on behalf of his immediate landlord, the dues of the superior holder and thereby brings about a sale of the interest of his landlord; see *Harendra Lal Roy v. Salimullah* (14), *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan* (15); *Sreenath Ghose v. Huronath Dutt Chowdhury* (16) and other cases reviewed in *Uma Charan Mandal*

v. Midnapore Zemindary Company (17), which was reversed by the Judicial Committee on a different point, *Midnapore Zemindary Company v. Uma Charan Mandal* (18); see also *Satish Kantha Roy v. Satis Chandra* (19). The essence of the matter is that the co-owner or the lessee who thus acts in breach of his obligation, contractual or fiduciary, cannot be permitted to profit by his own wrong to the detriment of the person whose interest it was his duty to protect. From this point of view, the plaintiff is clearly entitled to succeed in this litigation.

As regards the third point, the Subordinate Judge has held that the notice issued under section 10 of the Public Demands Recovery Act, 1895, was not served upon the plaintiff. His view is amply justified by the evidence on the record. The evidence of service is not only unsatisfactory, but is calculated to give rise to grave suspicion as to the genuineness of the proceedings. There is no escape from the conclusion that though the return sets out that service was effected on the plaintiff personally on the 25th February 1913 at a place called Bakai, he was on that date at Dacca.

We hold, accordingly, in concurrence with the Court below, that the allegation of service of notice under section 10 is entirely false. The legal consequence of such omission to serve the notice was determined by a Full Bench of this Court in the case of *Purna Chandra Chatterjee v. Dinabandhu Mukerjee* (20); see also the decision of the Judicial Committee in *Mahomed Abdul Hal v. Gujraj Sakai* (21), affirming *Gujraj Sakai v. Secretary of State* (22) and *Baijnath Sahai v. Ramgat Singh* (23), affirming *Baij Nath v. Ramgat Singh* (24). The decision of

(8) 21 Ind. Cas. 354; 18 C. L. J. 97.

(9) 7 Ind. Cas. 772; 15 C. W. N. 776.

(10) 14 Ind. Cas. 368; 15 C. L. J. 132.

(11) 20 Ind. Cas. 510; 18 C. L. J. 111; 17 C. W. N. 1233.

(12) 39 Ind. Cas. 346; 44 I. A. 30; 44 C. 573; 25 C. L. J. 259; 15 A. L. J. 154; 32 M. L. J. 206; 21 C. W. N. 473; 1 P. L. W. 294; (1917) M. W. N. 254; 21 M. L. T. 240; 5 L. W. 526; 19 Bom. L. R. 410 (P. C.).

(13) 16 C. 194; 8 Ind. Dec. (N. S.) 129.

(14) 7 Ind. Cas. 21; 12 C. L. J. 336.

(15) 10 M. I. A. 540; 5 W. R. P. C. 83; 1 Suth. P. C. J. 635; 2 Sar. P. C. J. 198; 19 E. R. 1076.

(16) 18 W. R. 240; 9 B. L. R. 220.

(17) 26 Ind. Cas. 182; 20 C. L. J. 11; 19 C. W. N. 270.

(18) 52 Ind. Cas. 497; 24 C. W. N. 201; 37 M. L. J. 199; 17 A. L. J. 1004; (1919) M. W. N. 817; 26 M. L. T. 489; 22 Bom. L. R. 7; 11 L. W. 371 (P. C.).

(19) 55 Ind. Cas. 689; 30 C. L. J. 475; 24 C. W. N. 662.

(20) 34 C. 811; 5 C. L. J. 696; 2 M. L. T. 371; 11 C. W. N. 756 (F. B.).

(21) 20 I. A. 70; 20 C. 826; 6 Sar. P. C. J. 291; 17 Ind. Jur 271; 10 Ind. Dec. (N. S.) 555 (P. C.).

(22) 17 C. 414; 8 Ind. Dec. (N. S.) 815 (P. C.).

(23) 23 I. A. 45; 23 C. 775; 7 Sar. P. C. J. 15; 12 Ind. Dec. (N. S.) 514 (P. C.).

(24) 5 C. L. J. 687.

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the Full Bench shows that when notice has not been served under section 10 of the Public Demands Recovery Act, 1895, the sale must be deemed to be a nullity, a sale wholly without authority. In such circumstances, the plaintiff need not ask that the sale be set aside; he is entitled to recover possession upon the footing that the sale has not affected his title, and the suit is governed by Art. 142 of the Schedule to the Indian Limitation Act: see also *Mohiuddin v. Pirthichand Lal Choudhury* (25). This renders inevitable the conclusion that there is no answer to the claim put forward by the plaintiff. The defendant-appellant has consequently been driven to urge that as the sale in this case was held on the 30th September, 1913 after the Public Demands Recovery Act, 1913, had come into operation on the 1st July 1913, the position of the plaintiff must be tested with reference to the provisions of the Statute of 1913 and not to those of the Statute of 1895. This view is clearly untenable. The Public Demands Recovery Act, 1913, cannot be construed to have retrospective operation so as to destroy rights which had previously accrued. The notice issued under section 10 of the Public Demands Recovery Act, 1895, was not served, and yet the proceedings were carried on as if the notice had been served. The right thereupon accrued to the plaintiff to treat the proceedings as taken without jurisdiction and without legal authority. In such circumstances, the principle enunciated by the Judicial Committee in *Colonial Sugar Refining Co. v. Irving* (26) is clearly applicable. In that case the right of appeal from the Supreme Court of Queensland to His Majesty in Council was taken away by the Australian Commonwealth Judiciary Act and in lieu thereof was substituted an appeal to the High Court of Australia. It was ruled that a right of appeal to the King in Council in a suit pending when the Judiciary Act was passed and decided by the Supreme Court afterwards was not taken away. Lord Macnaghten observed as follows:—

“As regards the general principles applicable to the case, there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well-founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And, therefore, the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to well-known general principle that the Statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.”

To the same effect are the decisions in *Munjuri Bibi v. Akkel Mahmud* (27) and *Gopeshwar Pal v. Jiban Chandra* (28). The decision of the Judicial Committee in *Soni Ram v. Kanhatya Lal* (29), as to the law of limitation which governs the legal effect of an acknowledgment does not conclude the matter; it merely shows that the law of limitation applicable to a suit is *prima facie* the law in force at the date of the institution of the suit. But this is, as shown in *Budhu Kumar v. Hafiz Hussain* (30), subject to the reservation

(25) 31 Ind. Cas. 664; 19 C. W. N. 1159.

(26) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

(27) 19 Ind. Cas. 793; 17 C. L. J. 316; 17 C. W. N. 889.

(28) 24 Ind. Cas. 37; 41 C. 1125; 19 C. L. J. 549; 18 C. W. N. 804.

(29) 19 Ind. Cas. 291; 40 I. A. 74; 35 A. 227; 17 C. L. J. 488; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 15 Bom. L. R. 89; 35 A. 227; 25 M. L. J. 131 (P. C.).

(30) 20 Ind. Cas. 821; 18 C. L. J. 274.

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that there may be circumstances connected with the new Statute which furnish an indication that the Legislature never intended it to affect retrospectively existing causes of action: *Bisseshur Sanamat v. Jasoda Lal Chowdhury* (31), *Makar Ali v. Sarfaddin* (32), *Tirumalaisami Naidu v. Subramaniam Chettiar* (33), *Mohideen Ibrahim v. Mahamed Meera Levvai* (34), and *Alaji Iseek Sahib v. Vengu Chetty* (35). Similar observations apply to the decision of the Full Court in *Jogodanund Singh v. Amrita Lal* (36), which ruled that section 310 (A) of the Civil Procedure Code, 1882, had retrospective operation, contrary to the decision of the Full Bench in *Lal Mohan v. Jogendra Chunder Roy* (37); *Uzir Ali v. Ram Komal* (38) and *Girish Chundra Basu v. Apurba Krishna Dass* (39). In the case before us, section 37 of the Public Demands Recovery Act, 1913, bars the jurisdiction of the Civil Court only where the question relates to the making, execution, discharge or satisfaction of a certificate duly filed under the Act, or relates to the confirmation or setting aside of a sale held in execution of such certificate. The expression "certificate-debtor" used in sections 36 and 37 is defined in section 3 (1) to mean a person named as debtor in a certificate filed under the Act; in this connection, reference should also be made to section 7 which refers to certificates filed under sections 4 and 6 of the Act. In our opinion, there is abundant indication in the provisions of the new Statute that it was not intended to have retrospective operation so as to extinguish or modify causes of action which might have already accrued by reason of failure to serve the notice issued under section 10 of the Public Demands Recovery Act, 1895; for section 36 must be read along with section 3 (1). We hold accordingly

that the Subordinate Judge has correctly found that the plaintiff is entitled to relief on the footing that the sale which was held without service of notice on the plaintiff under section 10 has not affected his title.

As regards the fourth point, the Subordinate Judge has held that the proceedings, specially those subsequent to the sale, were fraudulent and were concealed from the plaintiff. This is fully supported by the evidence. It is significant that no attempt was made to take delivery of possession until more than a year-and-a-half had elapsed from the date of the auction-sale, and the purchaser did not pay the Government Revenue until two years after his alleged auction-purchase. The intention plainly was that more than a year should elapse after the sale, so that if a suit should be brought, it might be met by the bar of limitation under section 36 of the Public Demands Recovery Act, 1913. But even if that Statute had been applicable, section 56 would have entitled the plaintiff to the benefit of section 18 of the Indian Limitation Act. We feel no doubt that the view taken by the Subordinate Judge on this part of the case, as on the others, is correct.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs payable by the appellants to the plaintiffs-respondents.

B. N.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 333 OF 1922.

February 28, 1923.

Present:—Mr. Justice Krishnan.

SRIRANGAM MUNICIPAL COUNCIL,

REPRESENTED BY ITS CHAIRMAN

K. SINGAM IYENGAR—PETITIONER

versus

BODI *alias* ANGANA NAIDU—

RESPONDENT.

Madras District Municipalities Act (IV of

- (31) 19 Ind. Cas. 391; 40 C. 704; 17 C. W. N. 622.
- (32) 70 Ind. Cas. 606; 36 C. L. J. 1321 27 C. W. N. 183; (1923) A. I. R. (P. C.) 85.
- (33) 45 Ind. Cas. 109; 40 M. 1009.
- (34) 17 Ind. Cas. 437; 23 M. L. J. 487; 12 M. L. T. 431; (1912) M. W. N. 1130.
- (35) 60 Ind. Cas. 66; (1920) M. W. N. 736; 12 L. W. 639.
- (36) 22 C. 767; 11 Ind. Dec. (N. S.) 509 (F. B.).
- (37) 14 C. 636; 7 Ind. Dec. (N. S.) 422 (F. B.).
- (38) 15 C. 383; 7 Ind. Dec. (N. S.) 839 (F. B.).
- (39) 21 C. 940; 10 Ind. Dec. (N. S.) 1259 (F. B.).

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1884) s. 45—Lease of right to collect fees or tolls—Written contract, absence of, effect of—Suit to recover money due by lessee, maintainability of—Implied contract.

The right to collect fees or tolls for slaughtering cattle in a slaughter-house was leased by the plaintiff Municipality to the defendant and the latter enjoyed the right for the period of the lease but no written contract was executed as required by section 45 of the Madras District Municipalities Act of 1884. In a suit by the Municipality to recover the lease amount:

Held, that, although no claim could be made on the basis of a written contract, the plaintiff Municipality was entitled to a decree inasmuch as the defendant had enjoyed the right for the period contracted for and was liable as on an implied contract.

Lawford v. Billericay Rural Council, (1903) 1 K. B. 772; 72 L. J. K. B. 554; 88 L. T. 317; 51 W. R. 630; 67 J. P. 245; 1 L. G. R. 535; 19 T. L. R. 322. *Douglass v. Rhyl Urban Council*, (1913) 2 Ch. 407; 82 L. J. Ch. 537; 109 L. T. 30; 77 J. P. 373; 11 L. G. R. 1162; 57 S. J. 627; 29 T. L. R. 605, followed.

Young v. Mayor of Leemington Corporation, (1883) 8 A. C. 517; 52 L. J. Q. B. 713; 49 L. T. 1; 31 W. R. 925; 47 J. P. 660, *Raman Chetti v. Municipal Council of Kumbakonam*, 30 M. 290; 2 M. L. T. 294, *Ramaswamy Chetty v. Municipal Council, Tanjore*, 29 M. 360, distinguished.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of Small Causes, Trichinopoly, in Small Cause Suit No. 4055 of 1921.

Mr. N. Rajagopalachariar, for the Petitioner.

JUDGMENT.—In this case the defendant bought in auction the right to collect fees or tolls for slaughtering cattle in the slaughter-house of the plaintiff Corporation. This suit is for the balance money due from him. The suit has been dismissed by the lower Court on the ground that no written contract was executed as required by section 45 of the old District Municipalities Act, IV of 1884, which was in force. It is argued before me that though no claim could be made on the basis of the written contract, a decree should have been given at any rate on the footing of executed consideration, the defendant having been found to have enjoyed the right of collecting the toll for the whole year.

There is no doubt a conflict of authority on the point. So far as the English Law is concerned it must now be taken as settled

by *Lawford v. Billericay Rural Council* (1) in favour of such decrees being given. The learned Judges refer to *Young v. Mayor of Leemington Corporation* (2) which was taken to have laid down the opposite view and point out that the question was expressly reserved there. In *Douglass v. Rhyl Urban Council* (3) Joyce, J., holds that the case in *Lawford v. Billericay Rural Council* (1) settles the English Law on the point.

As regards the authorities in our High Court the case in *Raman Chetti v. Municipal Council of Kumbakonam* (4) does not really deal with this question. The observation in *Ramaswamy Chetty v. Municipal Council, Tanjore* (5) is based on *Young v. Mayor of Leemington Corporation* (2) which has now been explained away and is in the nature of an *obiter*. I do not propose to refer to the other Indian cases. I think the plaintiff Municipality is entitled to a decree as sued for on the footing that defendant has enjoyed the right of collecting the toll for the whole year contracted for and is liable as on an implied contract.

The civil revision petition is allowed and the decree of the lower Court is set aside and a decree given to the plaintiff as sued for with costs in this Court and the lower Court.

V. N. V.

Petition allowed.

(1) (1903) 1 K. B. 772; 72 L. J. K. B. 554; 88 L. T. 317; 51 W. R. 630; 67 J. P. 245; 1 L. G. R. 535; 19 T. L. R. 322.

(2) (1883) 8 A. C. 517; 52 L. J. Q. B. 713; 49 L. T. 1; 31 W. R. 925; 47 J. P. 660.

(3) (1913) 2 Ch. 407; 82 L. J. Ch. 537; 109 L. T. 30; 77 J. P. 373; 11 L. G. R. 1162; 57 S. J. 627; 29 T. L. R. 605.

(4) 30 M. 290; 2 M. L. T. 294.

(5) 29 M. 360.

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PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 34 AND 35
OF 1920.

February 21, 1923.

Present:—Sir Dawson Miller, Kt., Chief
Justice and Mr. Justice Foster.IN FIRST APPEAL NO. 34 OF 1920.
RAM DHEYAN SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

BHULOTAN SINGH *alias* MANGAL,
PRASAD SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.IN FIRST APPEAL NO. 35 OF 1920.
DEO BIHARI SINGH AND OTHERS—
DEFENDANTS—APPELLANTS

versus

LOKE NATH SINGH AND OTHERS—
PLAINTIFFS—RESPONDENTS.*Bengal Tenancy Act (V.III of 1885);*
ss. 22, 86, 87—*Transfer of Property Act (IV of*
1882), s. 54—*Ijaradar—Advance of takkavi to*
tenants—Transfer of occupancy rights in lieu of
takkavi loan—Sale—Surrender—Abandonment—
*"Acquire", in s. 22, meaning of.*An *ijaradar* made *takkavi* loans to certain occu-
pany tenants. The latter finding themselves
unable to pay the loans gave up their holdings
to the *ijaradar*.*Held*, that the transaction amounted neither
to surrender nor to abandonment of the holdings
but to a sale of the occupancy rights of the tenants
in favour of the *ijaradar*. [p. 708, col. 2.]The word "acquire" in section 22 of the Bengal
Tenancy Act before its amendment by the Act
of 1907, implied the accrual to a *raiyyati* tenancy
of rights conferred by the Statute rather than the
transfer of rights by another tenant. [p. 709,
col. 1.]*Ramsrup Mahto v. H. Manner*, 4 C. L. J. 209
and *Pierpont Morgan v. Ramjee Ram*, 56 Ind. Cas.
366; 5 P. L. J. 302; (1920) Pat. 168; 1 P. L. T.
310, followed.*Raghubar Mahto v. Manners*, 11 Ind. Cas. 389;
13 C. L. J. 568, dissented from.Appeals from a decision of the Additional
Subordinate Judge, Gaya, dated the
25th August 1919.Messrs. N. C. Sinha and S. N. Rai,
for the Appellants.Messrs. S. M. Mullick and H. P. Sinha,
for the Respondents.

JUDGMENT.

Miller, C. J.—I have had an op-
portunity of perusing the judgment about
to be delivered by my learned brother.
I agree with the conclusions at which he
has arrived and have nothing to add.Foster, J.—These appeals arise out of
two suits which were tried together and
decided by the Subordinate Judge of Gaya
in his judgment dated the 26th August
1919. The two suits came to be num-
bered 40 of 1919 and 41 of 1919, but in fact
they were instituted before that year.
The plaintiffs in Suit No. 40 are defendants
in Suit No. 41 and the defendants in Suit
No. 41 are plaintiffs in Suit No. 40. Both
parties are interested in Dardha, a large
village which has come under Settlement,
the Record of Rights having been finally
published in October 1914; and each party
has sued for a declaration that cer-
tain of the entries in that record are in-
correct. The suit now registered as No.
40 of 1919 was instituted in 1915 by repre-
sentatives of the three branches of a family
having a common ancestor. The most
prominent persons of this family at the time
of the Record of Rights were Bhikhari Singh
and Raj Keshwar Singh in one branch,
Sheobalak Singh and Lokenath Singh in
another, and Ram Kewal Singh in the third.
These persons have been for convenience
sake called the plaintiffs in the judgment of
the Trial Court, though they are defendants
in the second suit; and the defendants,
though plaintiffs in the second suit, are called
defendants throughout. The second suit
was instituted in 1917. Both parties have
interest as landlord in the village, but
the plaintiffs are also possessed of extensive
tenancies under direct cultivation.Both the suits impeached as incorrect
a very large part of the Record of Rights
of village Dardha, but the Subordinate
Judge in each party's case allowed only
one of the least important of the claims and
dismissed the rest. So with two very small
exceptions the Record of Rights was upheld.
Those whom it is convenient to call defend-
ants are the appellants in each suit;
and the so-called plaintiffs, as respondents,
have filed a cross-appeal in connection with
the appeal in the second suit. The two
appeals and the cross-appeal cover much
less ground than the original suits, and,
moreover, many points have been abandoned
in the course of argument. For the better
understanding of the matters still in con-
troversy it is necessary to make an outline

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of the various interests shown in the Record of Rights of Dardha village.

There are 14 *Khewats* in the Record of Rights showing the interests of the proprietors and tenure-holders in the village. The proprietary interest of the whole village is held by the family of Khawaja Hasan Jan (*Khewats* Nos. 1 to 3). Under the proprietor are two *mokarrari* shares, 8-annas each, one of which was held at the time of the Settlement by Bibi Guna. The other 8-annas *mokarrari* had been sub-let in *darmokarrari* and Bibi Guna had acquired the sub-lease. So Bibi Guna had 8-annas *mokarrari* share and 8-annas *darmokarrari* share, and this 16-annas interest was leased to the plaintiffs by her predecessors-in-interest and by herself in successive terms under *thicca* lease since the year 1874. The last term ended in 1918 during the pendency of these suits. Bibi Guna transferred her 16-annas *mokarrari* and *darmokarrari* interest to the plaintiffs and defendants; the plaintiffs acquired 4-annas of this in 1906 and the defendants the residue in 1912. So at the time of the final publication of the Record of Rights (14th October 1914) and at the time of the institution of these suits (1915 and 1917), the plaintiffs who were originally *thiccadars* of the 16-annas interest were in possession of the village as *darmokarraridars* of 4-annas share, and as *thiccadars* of 12-annas share paying rent for that 12-annas share to the defendants; and the lands held by the plaintiffs in these two capacities were shown in the Record of Rights as follows: (a) within the *thicca* tenure (*Khewat* No. 8), there is *khata* No. 82, a small area of road side land on which stood a *mahua* tree in the possession of Sheobalak Singh, one of the plaintiffs; (b) also in the *thicca khewat*, a large area (*khata* No. 3) shown as *bakasht thiccadar*; (c) a still larger area held by cultivating tenants under the *thiccadars*. The lands in possession of the cultivating tenants include seven tenancies in connection with which disputes have arisen between the parties. There are six permanent tenures, having rent not fixed in perpetuity, and one occupancy holding: all these stand in the names of one or other of the plaintiff's family in *khewats* Nos. 9 to 14 comprising *Khatas* Nos. 83 to 89 and 67.

The tenures are as follows:—

(1) *Khewat* No. 9. Tenure-holder Ram Kewal Singh 35'33 acres, produce rent detailed in *khatas* Nos. 83 and 84.

(2) *Khewat* No. 10. Tenure-holder Bhi-khari Singh, 9'89 acres, cash-rent, *khata* No. 85.

(3) *Khewat* No. 11. Tenure-holder Bhi-khari Singh, 35'72, produce rent, *khata* No. 86.

(4) *Khewat* No. 12. Tenure-holder Sheo-balak Singh 5'22 acres, *khata* No. 77, cash rent.

(5) *Khewat* No. 13. Tenure-holder Sheo-balak Singh 31'76 acres, *khata* No. 88, produce rent.

(6) *Khewat* No. 14. Tenure-holder Sheo-balak Singh 11'41 acres, *khata* No. 89, produce rent.

The single occupancy holding is a well and orchard standing in the name of Sheo-balak Singh and described as free of rent. Its area is 1.64 acres and it is recorded in *Khata* No. 67.

It will be convenient to take the defendants' two appeals in their order and then to come to the plaintiffs' cross appeal.

Appeal No. 34 concerns the six permanent tenures and part of the occupancy holding set out above, as well as the *mahua* tree which I have mentioned; and Appeal No. 35 concerns the remainder of the occupancy holding. I proceed to decide the questions raised.

APPEAL NO. 34.

(1) The contention as to *Khatas* Nos. 83 and 85, which are recorded as permanent tenures bearing rent not fixed in perpetuity and which at first the appellants claimed should be *bakasht thiccadars*, has been abandoned, and it is agreed that the Record of Rights should stand as it is.

(2) A similar claim in respect of *Khata* No. 86 has been pressed. It is necessary for the understanding of this point of appeal to have a clear idea of what took place in the Settlement. In *khanapuri* and attestation there were many disputes between the parties, and the most serious was as to the extent of the plaintiffs' *raiya* holding. The plaintiffs had been *thiccadars* since 1874 and were in direct possession of a considerable area in the village, and no doubt few people could speak with certainty

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as to the state of affairs forty one years ago, so as to identify the old *raiya*ti holding of this family. If the identity can be ascertained, a very substantial foundation will be found for coming to a decision in this dispute. The oral evidence shows that it is common ground that since 1874 the plaintiffs' cultivation has greatly increased: the plaintiffs say the increase was due to purchase, but the defendants assert that a large part of it was due to reclamation, by which they imply uncultivated land *bakasht thiccadar* was brought under cultivation; and it is also contended that the few purchases definitely asserted were such as could not convey any personal title to the plaintiffs. It is clear that the cultivating tenancy of the plaintiffs can amount only to their original *jote* plus what they have legally acquired in their personal capacity; and the residue would have to be considered to be held by the plaintiffs in the capacity of *thiccadars*, and so subject to the superior landlords' reversion. Now at the attestation the defendants admitted only certain land, about 55 *bighas* in area, to be the ancient ancestral *jote* of the plaintiffs, and this admission was accepted: I refer to the dispute No. 70 of the Dispute List, order dated the 14th February 1914. The admission was restricted to *bhaoli* lands, and there were no admissions as to *nakdi*. In July 1914 the Settlement proceedings reached the stage of objections under section 103-A of the Bengal Tenancy Act and Mr. Harihar Prasad, Assistant Settlement Officer, was deputed to make a local investigation. His report is on the record, and it appears to be a most painstaking work. What led to this proceeding is disclosed in the evidence of Siri Lal, an elderly man, who was servant of Dost Mohammad, who, we see from Raj Keshwar Singh's deposition and the lease, Exhibit 2-B, had a one-third share (*mokarrari*) in the village in 1871 and afterwards. Enquiries were made of Siri Lal and he found amongst his deceased master's records a bundle of papers including a measurement *khasra*. These papers were produced at a late stage in the Settlement, and this is suggested as a ground for distrusting them. The measurement *khasra* has been exhibited: it is of 1873, and is an elaborate list of the *bhaoli* tenancies of the village showing

the kind of crops grown, the rough area and the locality (*kita*). No substantial grounds have been urged for distrusting its authenticity, nor in fact has the document ever been seriously impugned. No doubt, the attestation proceedings show that Bibi Guna had no old papers in her custody, but that would hardly throw doubt on evidence that her husband's former co-sharer had some old estate records. The Settlement Authorities made use of the measurement *khasra* and other papers, and for some days Mr. Harihar Prasad was engaged in the presence of the parties and their Pleaders in identifying the plaintiffs' old *raiya*ti plots of 1873 with the Settlement plots, using the old measurement *khasra* for the *bhaoli* lands and some old leases produced by the plaintiffs for the *nakdi* lands, besides ascertaining what the plaintiffs had acquired by inheritance and purchase. The results are shown in his report Exhibits 35 and 36. I should mention that it had been already decided that as the plaintiffs held more than 100 *bighas*, it was to be presumed, under the provisions of the Bengal Tenancy Act that they had the status of the tenure-holders in respect of lands belonging to their ancient *jote* and their subsequent acquisitions. The defendants in their appeal urge that the Settlement Authorities came to a wrong conclusion in using the measurement *khasra* and removing land from the *khata* "*bakasht of thiccadars*" to the *khata* "*bakasht of tenure-holders*": on the other hand, the plaintiffs in their cross-appeal want more *bakasht* for their tenures on the basis of this measurement *khasra*. It is urged that the road-cess returns Exhibits M and C show that the plaintiffs as *thiccadars* in 1886 and 1902 admitted a less area of *raiya*ti lands than now claimed: but an examination of the entries of the holdings of Fakir Singh and Ram Kewal Singh in Exhibit M, and of Bhikhari Singh and Ram Kewal Singh in Exhibit C shows the reverse.

I find no reason for accepting the defendant-appellant's contention that *khata* No. 86 should be declared to be the *thiccadars'* *bakasht*.

(3) I come now to *khata*s Nos. 87 and 88, which are *nakdi* and *bhaoli* tenures of Sheobalak Singh. These are made up of lands said to have been partly inherited

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from the husband of *Musammât Sundari Koer* and partly to have been purchased from *Musammât Talukraj Koer* and three cultivators *Sibnarain*, *Isar* and *Chaka Lal*.

The acquisitions from *Musammats* are not any longer impeached and it is agreed that the Record of Rights shall remain as it is in this portion of *khatas* Nos. 87 and 88: But in respect of the lands acquired from *Sheonarain*, *Isar* and *Chaka Lal*, the appeal is pressed, and it is contended that the plaintiffs could only acquire them as "*bakashi thiccadars*." Now the evidence shows that these three persons were tenants of *Dardha* to whom the plaintiffs had made *takkavi* loans for agricultural purposes; and that they found themselves unable to meet their debts and gave up their lands instead. The defendants have called the village *Patwari Sarju Lal*, son of *Chaka Lal*, as a witness, and he has denied that his father's lands were so transferred. As the learned Subordinate Judge points out, quite justifiably in my opinion, this witness's cross-examination, shows that he is untruthful and the plaintiffs' evidence remains un rebutted. The plaintiffs attempted to prove some entries said to have been made by these three tenants in the plaintiff's cash-book, but as the documents purported to transfer the lands and were not stamped or registered, they were excluded. *Sibnarain* owed Rs. 118 and gave up his lands in 1890; *Isar's* debt was Rs. 77 and he gave up his lands in 1893; and *Chaka* did the same in 1902 for a debt of Rs. 269. As to the legal effect of these transfers, it is important to note that, when they were made, the Transfer of Property Act, 1882, and the Bengal Tenancy Act of 1885 were in force, but not the Act of 1907 amending (*inter alia*) section 22 of the Bengal Tenancy Act of 1885. The learned Vakil for the defendants contends, first of all, that these transactions were surrenders or abandonments of holdings, and that the provisions of section 54 of the Transfer of Property Act preclude any contention that they were sales, at least where the value was more than Rs. 100. To treat them as surrenders in the sense of section 86 of the Bengal Tenancy Act would be to ignore the important fact that the *takkavi* advances were from the plaintiffs' private funds, and that the transactions were between the plaintiffs

as creditors and the three tenants as debtors, and not between landlords and tenants as such. It should be noted that the question of transferability of holdings was not raised in the Trial Court and no evidence was adduced. A reference to the Settlement dispute list will show that both plaintiffs and defendants at that time relied on their purchases and the plea of non-transferability was not raised then. I think we have no reason for allowing the issues to be complicated with this new question, and the plea itself appears to me to have no material on the record to support it. I do not think these *takkavi* transactions were surrenders. Nor do I think they fulfil the legal requirements of an abandonment; for the tenants did not leave the lands without notice to the landlords. The learned Vakil for the defendants is on somewhat firmer ground when he relies on section 54 of the Transfer of Property Act. But on the other side it is pointed out that the burden of proof that the entry in the Record of Rights is incorrect rests on the defendants; and these defendants have against them the fact that as between the plaintiffs and the tenants, *Sibnarain*, *Isar* and *Chaka Lal*, the former could point to the fact that the consideration in each case was a debt due to them, that they obtained possession with the consent of the tenants, and that they have been in possession ever since. So, it seems to me, as between the parties to these transactions, there has been such part performance on both sides as to leave to the tenants no room, in equity, for recovery of the lands. The cases in point are *Mahomed Musa v. Aghore Kumar Ganguli* (1), *Salamat-uz Zamani Begam v. Masha Allah Khan* (2) and *Puchha Lal v. Kunj Behary Lal* (3).

The last objection to these transactions urged by the defendant-appellant is that the plaintiffs as *ijaradars* were debarred by section 22 of the Bengal Tenancy Act from acquiring a right of occupancy. As

(1) 28 Ind. Cas. 630; 42 C. 801 at pp. 816, 817, 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

(2) 43 Ind. Cas. 645; 40 A. 187; 16 A. L. J. 98.

(3) 20 Ind. Cas. 803; 19 C. L. J. 213; 18 C. W. N. 445.

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it stood at the time of these transfers, the section provided that a person holding as an *ijaradar* shall not while so holding acquire a right of occupancy in any land comprised in his *ijara*. In the amending Act of 1907 the words "by purchase or otherwise" were added. But before the amendment the word "acquire" was held to mean "acquire under the law," words used in section 21 and evidently meaning, by force of the Statute: *Ramrup Mahto v. H. Manners* (4). The correctness of this decision was doubted by Mukherji, J., in *Raghubar Mahto v. Manners* (5), a judgment passed after the amendment. In *Pierpont Morgan v. Ramjee Ram* (6), the former decision was followed. The following consideration seems to me to point to the correctness of the first and third of these decisions. The word "acquire" in respect of occupancy rights is really used in the Act; but in the preceding section 21, sub-section (2), it occurs "shall be deemed to have acquired a right of occupancy under the law then in force." but it appears to be carefully avoided in section 22, sub-section (2) in the sentence commencing "if the occupancy right in land is transferred to a person." It would appear then, from the context, that the word "acquire" implies the accrual to a *raiyyati* tenancy of rights conferred by the Statute rather than the transfer of rights by another tenant.

The learned Vakil for the plaintiffs points out that this last point is not material, for if the plaintiffs could not acquire occupancy rights by purchase, they would at least acquire non-occupancy rights, which by virtue of section 21 of the Tenancy Act would at once on the termination of the *thicca* lease ripen into occupancy rights.

The result of all this discussion of the third point taken in appeal appears to me to be that the learned Vakil for the appellants, in asking us to declare the Record of Rights incorrect, has propounded legal arguments based on section 54 of the Transfer of Property Act and sections 86, 87 and 22 of the Bengal Tenancy Act, but, on the other

hand, there are weighty reasons based on legal principles which debar us from conceding that the plaintiffs hold these lands as *thiccadars*, subject to reversion to the superior landlord on expiration of their lease. In my opinion, the appeal should fail on this point.

(4) The next point urged concerns the lands in *khata* No. 89, which were *raiyyati* settlements taken in two short term leases ten years and two years before the first *thicca* lease of 1874. It is agreed by both parties that the lands shall be declared to be a non-occupancy *nakdi* holding and not 'bakasht malguzar.'

This matter comes into the cross-appeal also.

(5) It is urged that the houses of *khata* Nos. 67 and 84 are homestead of *raiyyats* of the village under the *thiccadars* and not houses standing on lands belonging to the *raiyyat* (*khata* No. 67) or the tenureholder (*khata* No. 84). It should be noted that part of the plots of *khata* No. 67 and all the plots of *khata* No. 84 are shown as sites of houses in the possession of certain persons. The contention has been abandoned as regards *khata* No. 67, but is pressed as regards *khata* No. 84. It is also to be noted that the occupants of these houses are defendants in the case, but they do not support the principal defendants' claim. On the other hand, some of them have filed written statements supporting the plaintiffs' case and the Record of Rights. The oral evidence on the defendants' side is surprisingly meagre. Deobehari Singh says he did not see the houses built, but he saw the *raiyyats* live in them and repair them. This is not very convincing, for we want evidence that the sites of the houses are the *raiyyati* land, held by *raiyyats* as their homestead, under the village landlord. The other witnesses do not supply this information, nor is there definite evidence that the plaintiffs did not, as they allege, grant the materials. Now, the houses mentioned in this *khata* were under dispute in the settlement. The dispute list (*tanaza* No. 36) shows that as regards plots Nos. 772 and 774 of *khata* No. 84 the defendant Deobehari Singh, who appears to have been representing the defendants' interest, admitted that he had no right over the houses

(4) 4 C. L. J. 209.

(5) 11 Ind. Cas. 389; 13 C. L. J. 568.

(6) 56 Ind. Cas. 366; 5 P. L. J. 302 (1920) Pat. 168; 1 P. L. T. 310.

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and that he had no right on which to found a dispute. As regards most of the other plots of this *khata* the disputes are Nos. 50, 52 and 53, and the *khanapuri* and attestation officers looked into the matter and passed decisions adverse to the defendants' claim. The attestation officer found that in this village it is the custom for tenants to build on their lands houses for their own labourers. All this shows that the entries in the Record of Rights were not made without investigation. The plaintiffs have always had extensive cultivation of their own, apart from their *thicca* interest, and it is not surprising to find that they have built houses for their labourers. After considering the defendants' evidence, I do not think it can be regarded as sufficient to rebut the Record of Rights, fortified as it is by oral evidence of ownership on the plaintiffs' side.

(6) Both parties appear to have misapprehended the Record of Rights as to the entry in *khata* No. 82, which is plot No. 67r, and is a village path. The entry in the margin is "*Mahua* tree, in possession of Sheobalak Singh resident of the village, plum trees 3" . . . (et cetera). The claim of the defendants was based on a supposition that all the trees were entered in the name of Sheobalak Singh, and they contended that after his name should be added the word "*thiccadar*." The only entry in this part of the *khata* to which exception can be taken by the defendants is in respect of the *mahua* tree. The oral evidence consists merely in a statement of each party's case and there is no particular evidence about the *mahua* tree except that it is about five years old. I do not find any ground for discrediting the Record of Rights.

The only matter of contention in Appeal No. 35 was as regards four plots in *khata* No. 67, comprising an orchard and a well; but this claim has been withdrawn.

I turn now to the cross-appeal of the plaintiffs, which has reference to Suit No. 40 and Appeal No. 35. This involves three claims which I shall discuss in order (a) that certain land entered in *khata* No. 3 as *bakasht thiccadar* should be declared to be

part of the ancestral *batal* holding of the plaintiffs; (b) that certain other lands, mostly from *khata* No. 3 should be declared to be part of the ancestral *nakdi* holding of the plaintiffs; (c) that two plots Nos. 296 and 321 of *khata* No. 3 should be entered as in the possession of Raj Keshwar Singh as *mokarraridar*. On the last point the parties agree that the plaintiffs have *darmokarrari* rights in the two plots, and the contest is concluded. The two other points raise the question of the extent of the plaintiffs' old holdings on the produce-rent and cash-rent. The two claims have a common ground, as will be seen in the following general summary of the plaintiff's contentions as I have understood them:—

"We had extensive ancestral *raiya* lands which in our long period of *thicca* lease since 1874 almost lost their identity, but still we were entitled to them as against the landlords' right of reversion on determination of our *thicca* term. Fortunately we were able to secure the old measurement *khassra* of 1873 to identify our *bhaoli* lands, and we discover old leases to show that we were entitled to certain *nakdi* lands. The Assistant Settlement Officer Mr. Harihar Prasad in the proceedings under section 103, A went to the spot and identified the plots which we are now claiming under these two heads as our ancient *bhaoli* and *nakdi* holdings, but his superior Mr. Duncan must have overlooked these details, or the Settlement staff made mistakes, and the result is that the lands were not so recorded in the final publication. Then the learned Subordinate Judge in his judgment agreed with Mr. Harihar Prasad's identifications, but by oversight he failed to give us a decree, probably under the impression that Mr. Harihar Prasad's note had been followed *in toto* in the Record of Rights as finally published."

I proceed to consider the two claims in detail:

(a) The claim is that certain plots and parts of plots entered in *kha'a* No. 3 as *bakasht* of the *thiccadars* should be declared to be the ancestral *batal raiyati jote* of the plaintiffs. They amount to 32 *bhigas* 8 *kathas* 15 *dhurs* and are only a portion of the original Sche-

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dule I of the plaint in Suit No. 40, the claim being now restricted to those plots which were identified on the spot by Mr. Harihar Prasad in the proceedings under section 103-A of the Bengal Tenancy Act. The defendant's reply is that the fact that these plots were not included in the Record of Rights, finally published three months after Mr. Harihar Prasad's investigation, shows that Mr. Duncan, his superior officer, did not accept the identifications. But we have no clear evidence as to Mr. Duncan's opinion, and the defendants' argument would be more convincing if they could have pointed to some reason why this tract of 32 *bighas* odd should be differentiated from the rest of the *bhacchi* lands identified by Mr. Harihar Prasad. An attempt was, in fact, made in this direction in respect of six plots; on the notes put against these plots Mr. Harihar Prasad has not specifically mentioned what he means by 'identity' for he has not mentioned expressly the old measurement *khasra*. The argument does not impress me for the context shows clearly what is meant.

In this matter little assistance can be got from the oral evidence, in which no details are stated. The area of the old *batai* holding and the plots comprised in that area can only be ascertained by the old records. The question whether the plots comprising the 32 *bighas* odd are parts of the plaintiffs' ancient holding can be answered only by the measurement *khasra* of 1280 *Fasli*, provided that it is authentic and trustworthy. I have discussed this question before and shown how the *khasra* was produced and followed in Settlement, and how little the defendants have to say against its authenticity or veracity. It is on the record, and my opinion is that it would be a most difficult task to fabricate such a record of the conditions of the village holdings existing more than 40 years ago, without betraying the forgery. The learned Subordinate Judge has recorded an emphatic opinion. He says, Mr. Harihar Prasad's "judgment and notes are very careful and extensive documents written after a thorough and scrutinizing investigation of the locality and the consideration of the documents produced by the parties before him." "The Assistant Settlement

Officer believed the papers to be genuine and acted upon them. He went to the very lands with the *chitta* and other papers and verified the entries by comparison with the actual lands. This was his advantage and he embodied the result in his note Exhibit 36. I compared the notes by looking at the maps of the village, and found the result arrived at by the Assistant Settlement Officer to be absolutely correct. The Record of Rights based on these notes must, therefore, remain unaltered." It is not understood how on this finding of complete accuracy, Mr. Harihar Prasad's note was not followed completely by the learned Subordinate Judge, and I can only consider the final order in the judgment so far as it omitted a declaration as to the plaintiffs' title to 32 *bighas* odd of *bhaoli kashit*, to be made by oversight or under a misapprehension. So I arrive at the conclusion that the plaintiffs should succeed in obtaining a declaration as to this area, which is defined in their cross-appeal read with their original Schedule and Mr. Harihar Prasad's note.

(b) The claim concerns 40 *bighas* odd, alleged to be the ancestral holdings, on cash-rent, of the plaintiffs. This area comprises the whole of the plaintiffs' Schedule II. It may be noted at once that out of this area nine *khasra* plots having an area of 18 *bighas* 5 *kathas* 2 *dhurs* are now outside the dispute, for the parties have agreed that these plots, Nos. 241 to 494 of the Schedule, which belong to *khata* No. 89, shall be recorded as the non-occupancy *nakdi* holding of the plaintiffs. These were claimed as coming under the *patta* of 1278 *Fasli*. Another matter to note is that 5 *bighas* 13 *kathas* 18 *dhurs* of *khata* No. 83 have already on the defendants' admission been recorded as the plaintiffs' *bhaoli* lands, but the plaintiffs contend that they are *nakdi* lands settled with them as such under the *patta* of 1261 *Fasli*. Some tabulation of the areas is necessary to make the position clear. It should be remembered that the two *pattas* of 1278 comprise one holding demised by two co-sharers.

A. The area lying within *khata* No. 3 entered as *bakasht thiccadar* is 16 *bighas*

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2 *kathas* 13 *dhurs* made up of :—

	bighas.	kathas.	dhurs.
<i>Kita</i> Lodipur ..	8	1	9
<i>Kita</i> Kurarpur ..	1	0	0
<i>Kita</i> Nagahia ..	3	18	3
<i>Kita</i> Dih Ke Utter ..	3	3	1
	16	16	9

The plaintiffs show *pattas* for these areas, with the exception of *Kita* Dih Ke Utter plots Nos. 666 and 670 of *khata* No. 3. Deducting the area of these two plots, we are left with the Lodipur, Kurarpur and Nagahia lands having a Survey area of 12 *bighas* 19 *kathas* 12 *dhurs*. The *pattas* show of course a rough measurement, but Mr. Harihar Prasad identified the plots, and the difference in area is insignificant.

	bighas.	kathas.	dhurs.
1261 F. <i>Patta</i> Lodipur ..	6	11	9
1278 F. <i>Patta</i> Lodipur ..	1	10	0
1278 F. <i>Patta</i> Kuarpur ..	1	0	0
1278 F. <i>Patta</i> Nagahia ..	3	15	0
	12	16	9

B. The area of *Khata* No. 83 claimed as *nakdi* is 5 *bighas* 13 *kathas* 18 *dhurs* out of the Harnathpur Ahar Ke Pit area, and is said to be included in the *patta* of 1261 *Fasli*. This was identified by Mr. Harihar Prasad as plot No. 1307.

C. Then there is the area of *khata* No. 89, 18 *bighas* 5 *kathas* 2 *dhurs* which is now not disputed. This comes under the *pattas* of 1278 F.

Adding A, B and C we get—

	bighas.	kathas.	dhur.
A (1) ..	3	3	1, <i>Kita</i> Dih Ke Utter.
(2) ..	12	19	12, <i>Kitas</i> Lodipur, Kuarpur and Nagahia.
B. ..	5	13	18, <i>Kita</i> Harnathpur Pit.
C. ..	18	5	2, <i>Khata</i> No. 89.
	40	1	13

I proceed now to a more particular examination of the evidence. The *pattas* of 1261 *Fasli* and 1278 *Fasli* were produced late in the Settlement at the

stage of section 103A proceedings. The *patta* of 1261 *Fasli* stands in the names of Radhu Singh and Ugrah Singh, so at once the question arises, how and when did these lands pass to the plaintiffs? To this question I can find no definite reply. From the evidence of Raj Keshwar Singh, plaintiff, I gather that Radhu had a son Rupnath, and Rupnath's son was Harihar whose widow Dakho Kuer was alive at the time of trial of this case. Radhu was Raj Keshwar's grandfather's cousin, but it is not asserted that the plaintiffs succeeded to the lease-hold properties as heirs of Radhu or his successors. In fact, Jagdeo Singh another plaintiff and also Raj Keshwar himself depose that Dakho Kuer sold her lands to the plaintiff. Then Ugrah the other lessee of this *patta* of 1261 *Fasli* had a son Thakur, and Thakur's son was according to defendant Deobehari Singh's evidence Deonath, who is still alive. Raj Keshwar deposes that Thakur was in some way related to his aunt, and Thakur Singh's widow made over her lands to him: the time is nowhere stated. There is in fact no evidence to show acquisition of the land of this *patta* by the plaintiffs in their private capacity, as distinct from their position as *thiccadars*. Their evidence merely amounts to this: they hold the lands and they have possession of the instrument of lease, a lease to others than themselves.

As to the lands of *khata* No. 83—5 *bighas* 13 *kathas* 18 *dhurs*—I have already noted that these lands stand in that *khata* because the defendants admitted them to be the plaintiffs' *bhaoli* lands; the plaintiffs' contention in appeal is that these are not *bhaoli* but *nakdi* lands settled with them by the *patta* of 1261 *Fasli*. In my opinion this contention should prevail, for when the defendants have gone so far as to admit that this tract is held by the plaintiffs as part of their *raiya* tenancy, when the plaintiffs have shown that so long ago as 1261 *Fasli* the lands were subject to cash rent, and when the defendants have no evidence to show that the rent was *bhaoli*, there is no other reasonable conclusion but that this part of *khata* No. 83 is held on cash-rent, at the rate mentioned in the *patta*.

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I come now to the lands of *patta* of 1278 *Fasli* which, as I have already shown in the table above, comprise about 6 *bighas* 5 *kathas* in *Kitas* Lodipur, Kuarpur and Nagahia. The plots were identified by Mr. Harihar Prasad and there is nothing on the record to discredit his identifications. The learned Subordinate Judge checked the identifications with the village map and found them correct. These leases which are of 1278 *Fasli* have an appearance of genuineness and the only points urged against accepting them are those I have already discussed, namely, their late production at the time of the settlement and the argument, already shown to be incorrect, as to the extent of the plaintiffs' holdings, deduced from the plaintiffs' old road-cess returns. In my opinion these leases can be accepted as genuine and as showing that at the time when the plaintiffs first took the *thicca* lease (from 1874) they had possession of a non-occupancy holding at least to the extent of the area found by Mr. Harihar Prasad; for this is all that has been identified on the map and not already conceded by the Settlement Authorities.

In my opinion the interest of the plaintiffs in these lands must be held to be the same in extent and quality at the end as at the beginning of the *thicca* lease, and so the lands must be a non-occupancy holding. I rely on *Thomas Savi v. Panchanun Roy* (7), a case decided on the basis of the tenancy law existing between 1869 and 1885. The Tenancy Acts that have followed, in 1885 and subsequent years, have, in no way, disturbed this decision, but have rather confirmed it. The case of *Jasimuddin v. Beni Madhab Das* (8) rests on a special provision as to *chur* lands (section 180 of the Bengal Tenancy Act), and is not applicable to this case.

As to the area of 3 *bighas* 3 *kathas* of *Kita Dih Ke Utter*, plot's Nos. 666 and 670 of *khata* No. 3, the plaintiffs' difficulty is that they have no evidence to show how they came to hold this area in *nakdi kasht*. The sole evidence that these lands were ever *nakdi kasht* of the plaintiffs is to be found in the Schedule

annexed to a petition of compromise filed in Court by the parties of this case who were then litigating. The compromise included among the properties there dealt with a certain *jagir*, and of that *jagir* the south boundary is described in the Schedule annexed to the compromise to be "Sheobalak Singh's *nakdi*." Mr. Harihar Prasad noted the results of his investigation in the last paragraph of his report thus:—

"These lands are claimed as *nakdi manrosi* but not under any *patta*. In the *sulehnama* dated the 27th June 1911 made between the parties and filed in the Court of the Sub-Divisional Officer of Aurangabad regarding a contiguous plot of land (No. 321) to the north of these plots the southern land is stated to be the *nakdi kasht* of the objector. The other *gotias* of the objector too have got their ancestral *kasht* lands at this place and are in possession. The rent is Rs. 9-6-0 exclusive of cesses as stated by the objector. The defendant says that he made the admission in the *sulehnama* under coercion. There is no evidence of this. These plots will also be entered as objector's *nakdi* with a *jama* of Rs. 9-6-0 exclusive of cesses."

In his evidence Raj Keshwar Singh, one of the plaintiffs, who has come into the witness-box evidently for the purpose of stating the whole of the plaintiffs' case, says nothing specific about this area and in fact omits it from his list of *nakdi* lands. So there is no evidence oral or documentary of a lease of these lands, and in my judgment the statement of a boundary in a compromise petition is not sufficiently strong evidence by itself to rebut the Record of Rights.

In my opinion the appeals and the cross-appeals should succeed or fail as set out in the following statement:

APPEALS Nos. 24 AND 35.

A. The claim in respect of *khata* Nos. 67, 82, 84, 85, 86, 87 and 88 will be dismissed.

(B). 5 *bighas* 13 *kathas* 18 *dhurs*, plot No. 2-1307 of *khata* No. 83 should be declared to be plaintiffs' *raiyyati nakdi kasht* (*kaimi*). The rest of this *khata* No. 83 is not found to be incorrect and the appeal fails.

(C) The lands comprised in *khata* No. 89 are declared to be non-occupancy *raiyyati*

(7) 25 W. R. 503.

(8) 19 Ind. Cas. 635; 17 C. W. N. 881.

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nakdi holding and not *bakasht malguzar*. This is according to the agreement of the parties: in other respects the Record of Rights is not declared correct.

CROSS-APPEAL.

(A) The following plots, in whole or part, as shown in the plaintiffs' First Schedule annexed to his plaint should be declared to be the plaintiffs' *bhaoli raiyati kashit (batai)* with occupancy rights:—

Plots Nos. 1241, 1227, 1207, 1005, 596, 597, 237, 266, 288 and 338.

The situation and identity of these *bhaoli* lands are to be as fixed by Mr. Harihar Prasad, Assistant Settlement Officer in his statement (Exhibit 36 of this case) dated the 16th July 1914.

(B) *Khata* No. 89 should be declared to comprise the non-occupancy *nakdi* holding of the plaintiffs.

(C) The areas identified by Mr. Harihar Prasad in his statement (Exhibit 36) as parts of plots Nos. 1005, 237, 1241 and 1229 and as the *nakdi kashit* settled with the plaintiffs in the *patta* of 1278 Fasli are declared to be the non-occupancy *raiayati nakdi* holding of the plaintiffs. These areas, are within the *Kitas* Lodipur, Kuarpur and Nagahia.

(D) The rest of the claim for the declaration of the plaintiffs' *nakdi kashit* should be dismissed, excepting the area of 5 *bighas* 13 *kathas* 18 *dhurs* of *khata* No. 83 herein before declared to be *nakdi raiyati kashit*.

(E) Plots Nos. 296 and 321 of *khata* No. 3 should be declared to be in possession of Raj Keshwar Singh as *mokarraridar*, as agreed by the parties.

I feel some hesitation in, awarding either parties their costs. The learned Subordinate Judge directed that the parties should bear their own costs. No doubt the plaintiffs have succeeded to some extent in their claim, but it is to be remembered that at the time of the settlement they were undoubtedly in possession of old village records which they did not produce or only produced at the eleventh hour. The result was that the Record of Rights was not as complete and accurate as it might be. Moreover, both parties have in this litigation put forward excessive and unreasonable claims. I would make no order as to costs.

Z. K.

Order accordingly.

CALCUTTA HIGH COURT.

CIVIL RULE No. 272 OF 1922.

August 28, 1922.

Present:—Justice Sir Thomas Richardson, Kt., and Mr. Justice B. B. Ghose.

THE ASSAM BENGAL RAILWAY CO., LTD.—DEFENDANT—PETITIONER

versus

RADHIKA MOHAN NATH—PLAINTIFF—OPPOSITE PARTY.

Railways Act (IX of 1890), ss. 77, 140—Suit against Railway Company for compensation for non-delivery of goods—Notice, service of—Notice on Traffic Manager, if sufficient—“Loss,” if includes non-delivery.

Where a person sues a Railway Company for damages on account of the non-delivery of goods consigned to it for carriage, he must give notice as provided in section 77 of the Railways Act, and where the head-quarters of the Railway Company are in England, such notice should be given to the Agent of the Company in India. A notice served on the Traffic Manager of the Company is not sufficient in law. [p. 716, cols. 1 & 2.]

(Case-law reviewed.)

A claim for compensation for non-delivery of goods includes the case of the loss of the goods just as much as the case of the detention of the goods. [p. 717, col. 2.]

Where detention is not pleaded or put in issue a claim *simpliciter* for compensation for non-delivery of goods against a Railway Company must be understood as including or involving a claim for the “loss” of the goods within the meaning of section 77 of the Railways Act. [p. 717, col. 2.]

Per B. B. Ghose, J.—The word “loss” used in section 77 of the Railways Act is wide enough to include all cases where the goods are not forthcoming and, therefore, includes a case of non-delivery. [p. 719, col. 1.]

Rule against an order of the Judge of the Court of Small Causes, Munshigunj, in (S. C. C.) Suit No. 1929 of 1921.

Babu Upendra Kumar Roy, for the Petitioner:—The defendant is the petitioner. The plaintiff, opposite party, brought a suit against us in the Small Cause Court at Munshigunj for compensation for non-delivery of a parcel containing medicines. They served a notice on the Traffic Manager of the defendant Company which has been held to be a good notice by the Court below. My submission is that under sections 77 and 140 of the Indian Railway Act notice must be served on the Agent of our Company. See *East Indian Railway Company v. Madhu Lal* (1), *Radha Kissen v. East Indian Railway*

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Company (2), *East Indian Railway Company v. Ram Autar* (3). In all these cases it has been distinctly laid down that notice must be given to the Agent. In the present case there is no evidence to show that the Agent got the notice. The Court below has held without any evidence to support that matters of this kind are referred to the Traffic Manager. I submit that would not do inasmuch as that would be directly going against the law. See *Kala Chand Shaha v. Secretary of State* (4). The case relied on by the Court below in *Woods, Agent to the Assam-Bengal Railway Company v. Meher Ali* (5) is distinguishable. The offer by the Traffic Manager to pay Rs. 18 was made without prejudice. I submit the Court below ought to have summarily dismissed the suit on the ground of non-service of notice as contemplated by the Act.

Babu *Jitendra Kumar Sen Gupta*, for the Opposite Party:—My submission is that the findings of the Court below that matters of this kind are referred to the Traffic Manager by the Agent for settlement and the fact of the Traffic Manager having agreed to pay Rs. 18 as compensation in settlement of the claim are sufficiently conclusive to show that the Agent received the notice and that there was no defect in the notice served. The case of *Woods, Agent to the Assam Bengal Railway Company v. Meher Ali* (5) is directly in point. My further submission is that even if the notice be held to be bad, no notice at all was necessary. We sent the parcel to the Steamer Company to be delivered at a station of the defendant Railway Company. We complained to the Steamer Company who referred us to the Railway Company. Therefore, the case does not fall within the provisions of section 77 of the Indian Railways Act. There was no loss within the meaning of that section. See *East Indian Railway Company v. Kali Charan-Ram Prashad* (6), *Gheabhai Purni*

v. East Indian Railway Company (7). Our case is that they have not delivered the parcel. There is some distinction between loss and non-delivery. I would rely on Arts. 30, 31 of the Indian Limitation Act for the distinction of the two expressions. "Loss" does not mean "non-delivery."

Babu *Upendra Kumar Roy*, in reply:—The point now raised is new. They did not put their case on that basis in the primary Court, so there is no force in their contention. The case of *East Indian Railway Company v. Kali Charan-Ram Prashad* (6) does not apply. The observations there are mere *obiter dicta*.

JUDGMENT.

Richardson, J.—The opposite party obtained a decree in the Small Cause Court at Munshigunj against the petitioner, the Assam Bengal Railway Company, for compensation for non-delivery of a parcel of medicines. The goods were entrusted by the opposite party as consignor to a Steamer Company for carriage to a station on the Assam Bengal Railway. It was thus the Steamer Company which delivered the goods to the Railway Company. This Rule, obtained by the Railway Company, calls upon the opposite party to show cause why the decree should not be set aside on several grounds of which the following are material:—

1. "For that the Court below has erred in law in holding that notice to the Traffic Manager was notice to the Agent of the defendant Company within the meaning of sections 77 and 140 of the Indian Railways Act, IX of 1890, and the said Court ought to have held that the plaintiff's suit was fit to be dismissed for want of notice."

2. "For that in the absence of any finding that the Traffic Manager had any authority to accept notice on behalf of the Agent or that the Agent in this particular case had any knowledge directly or indirectly of the plaintiff's claim within the statutory period of six months the Court below is wrong in decreeing the suit."

3. "For that the Court below has misconceived the legal effect of the Traffic Manager's communication and without prejudice to the rights of the Company

(2) 21 Ind. Cas. 970; 19 C. W. N. 62.

(3) 38 Ind. Cas. 502; 20 C. W. N. 696.

(4) 38 Ind. Cas. 844; 21 C. W. N. 751.

(5) 3 Ind. Cas. 479; 13 C. W. N. 241 4 M. L. T. 427.

(6) 69 Ind. Cas. 103; (1922) Pat. 145; 3 P. L. T. 213; (1922) A. I. R. (Pat.) 106.

(7) 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525.

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and this has materially affected the decision of the case on the merits."

As to these pleas the question is whether the learned Subordinate Judge correctly applied the law to the facts found by him. What he says in his judgment is this :—

"Upon the evidence I find that the plaintiff gave notice of his claim to the Traffic Manager who offered to pay Rs. 18 to him in satisfaction of the claim. Under the rules, the Traffic Manager settles all claims and the Agent refers some claims to him for settlement. Under the circumstances I hold that notice to the Traffic Manager is notice to the Agent as held in *Woods, Agent to the Assam Bengal Railway Company v. Meher Ali* (5) and the notice was given within 6 months' time as laid down in the law."

It has frequently been held in this Court under section 140 of the Act, that in the case of a Railway Company the head-quarters of which are in England, the notice required by section 77 should be given to the Agent of the Company in India. The case of *Woods, Agent to the Assam Bengal Railway Company v. Meher Ali* (5) on which the learned Judge relies has been distinguished more than once in language appropriate to the present case. See *East Indian Railway Company v. Madhu Lal* (1); *Radha Kissen v. East Indian Railway Company* (2) and *East Indian Railway Company v. Ram Autar* (3). Here also there is no evidence that claims of this kind are usually referred by the Agent to the Traffic Manager and there is no finding, as there was in the case of *Woods, Agent to the Assam Bengal Railway Company v. Meher Ali* (5), that notice has in fact reached the Agent. In *Madhu Lal's case* (1) it was pointed out that the learned Judges who decided *Woods, Agent to the Assam Bengal Railway Company v. Meher Ali* (5) did not lay it down as matter of law that service on the Traffic Manager was a sufficient compliance with the Act and that the decision was based on the particular facts of the case. Reference may also be made to *Kala Chand Shaha v. Secretary of State* (4). In my opinion the view of the learned Judge that notice to the Traffic Manager was notice to the Agent is erroneous in law.

The case of *Radha Sham Basak v. Secretary of State* (8) cited for the opposite party is distinguishable. The question which arose there is not the question which we have to determine.

As to the offer made by the Traffic Manager to the opposite party, the learned Judge does not refer to the fact that the offer was made without prejudice. In any case, the offer in itself cannot show that the Traffic Manager had authority to receive the notice on behalf of the Agent.

So far the petitioner is entitled to succeed, but for the opposite party an attempt was made to support the decision of the learned Judge on the ground that in the present case no notice under section 77 was necessary.

It was contended, in the first place, that the case was not within section 77 by reason of the fact that the goods were handed to the Railway Company for carriage not by the opposite party but by the Steamer Company. It is not easy, however, to see how the claim made by the opposite party against the Railway Company can be maintained at all unless it be on the footing that in handing the goods to the Railway Company, the Steamer Company acted as his Agent. It was said that the Steamer Company referred the opposite party to the Railway Company. If that be so, the explanation no doubt is that the Steamer Company took up this position, that as regards the Railway Company the Steamer Company was merely an Agent acting on behalf of the opposite party as principal.

In the second place, it was argued that in the present case there was no "loss" of any goods within the meaning of section 77 of the Act and that for that reason there was no necessity to give any notice of the claim to the Railway Company. It does not appear to have been contended in any previous case in this Court that no notice is required of a claim for compensation in respect of the non-delivery or short delivery of goods entrusted to a Railway Administration for carriage. But that is not of itself a sufficient answer.

Section 77 of the Act so far as it is material provides:—"A person shall not be entitled to compensation for the loss, des-

(8) 34 Ind. Cas. 130; 20 C. W. N. 799; 44 C. 6; 23 C. L. J. 547.

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truction or deterioration of animals or goods delivered to be so carried," that is carried by Railway, "unless his claim to the compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the animals or goods for carriage by Railway."

I will assume that the word "loss" in this section means loss by the Railway Administration. The argument is that goods not delivered or short delivered are not "lost" and reliance was placed on the judgment of Jwala Prasad, J., in *East Indian Railway Company v. Kali Charan-Ram Prashad* (6). The learned Judge referred to the distinction which appears in Arts. 30 and 31 of the Schedule of the Limitation Act between claims against a carrier on the one hand for compensation of losing or injuring goods and on the other for compensation for non-delivery of or delay in delivering goods. In the first case limitation runs from the time when the loss or injury occurs and in the second case from the time when the goods ought to be delivered. In my opinion, with respect, these two Articles of the Limitation Act throw little, if any, light on the construction of section 77 of the Railways Act. There may be reasons for the presence of both Articles in the Limitation Act but they may still be overlapping. Where there is an agreement by a carrier to deliver goods at a fixed time or within a reasonable time, a claim for goods lost may be drawn as a claim for their non-delivery.

The reasoning of the learned Judge then proceeds on the assumption, mistaken, as I venture to think, that a claim for non-delivery necessarily imports that the Railway Company are consciously and deliberately withholding goods in their possession, which they might deliver if they chose to do so.

As it seems to me, a claim for non-delivery without more, merely asserts that the goods were not delivered at the agreed time or within a reasonable time. Such a claim asserts nothing as to the cause of the non-delivery.

In *Ghelabhai Punsli v. East Indian Railway Company* (7) there was no question as to the construction of section 77 of the Railways Act. The question was as to the right of

the Railway Company to exemption from liability under a Risk-Note in Form B. The decision is based on the judgment of Pallet, C. B., in the Irish case of *Curran v. Midland G. W. Railway Company of Ireland* (9) which also turned on a special contract between the consignor and the Railway Company. *Curran's case* (9) has recently been the subject of comment in the House of Lords in *Smith Limited v. Great Western Railway* (10). But for the present purpose it is unnecessary to examine these cases. The question discussed was a question of the burden of proof turning on the state of the evidence at the conclusion of the trial upon an issue raised between the parties which it was necessary to decide one way or the other.

In the present case there is no finding that the goods were detained by the Railway Company. It is true also that there is no finding that the goods had, as the Company alleged, been stolen from the godown. As the case seems to have been framed and placed before the Court, it was not necessary to deal with these matters. Damages were awarded merely for the non-delivery of the goods.

I have indicated that, in my view, a claim for compensation for non-delivery includes the case of the loss of the goods just as much as the case of the detention of the goods. If that be so, it seems to follow that the statutory notice is a condition precedent to a verdict being taken on that alternative footing, because on that footing the goods may have been lost.

If it be conceded, though I do not decide, that where goods are wrongfully detained by a Railway Company, no notice is necessary under section 77, a plea by the Company of want of notice must at least be met on that ground and the Court must be asked to find that the goods were being detained and were not lost when they ought to have been delivered.

Where detention is not pleaded or put in issue a claim *simpliciter* for compensation for non-delivery must be understood as including or involving a claim for the loss of the goods within the meaning of section 77.

(9) (1896) 2 Ir. R. 183; 2 Ir. L. R. 739.

(10) (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359.

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The result is that, in my opinion, the Rule should be made absolute and the suit against the Company dismissed with costs of the Court below and of this Rule (hearing-fee four gold *mohurs*).

Ghose, J.—I agree. The current of decisions in this Court is that notice under section 77 of the Railways Act should be served on the Agent. In the case of *Woods, Agent to the Assam Bengal Railway Company v. Meher Ali* (5) the learned Judges expressly say that they did not desire to differ from those decisions. It was apparently found as a fact in that case that the Agent was aware of the notice, and it was held, under the circumstances of the case, that the Agent had the required notice. If that is so, the decision was in accordance with *Secretary of State v. Dip Chand* (11) where it was held that the plea of want of notice would be sufficiently met if it were shewn that the notice served on the Traffic Superintendent reached the Manager within six months of the delivery of the goods. There is no such allegation or finding in this case. The notice served on the Traffic Manager was not, therefore, sufficient in law.

I do not think that there is much substance in the argument advanced by the learned Vakil for the opposite party in support of the decision of the lower Court, that no notice under section 77 of the Railways Act was necessary in the present case as the goods were not delivered by the plaintiff to the Railway Company for being carried by the Railway. If this contention is accepted I think it would cut the ground on which the claim against the Railway Company rests, and the Railway Company would not at all be liable for the value of the goods. The learned Vakil urged that the Steamer Company was really liable to the plaintiff and the Railway Company is only liable because they took upon themselves the liability of the Steamer Company to pay damages for the breach of their contract. The plaintiff, however, did not bring his suit on that basis, and if he had done so there might have been various grounds for defence on behalf of the Railway Company. The liability of the Railway Company must, therefore, depend on the fact that there was delivery

of the goods to the Railway Company, either by the Steamer Company acting as agents of the plaintiff, or by the plaintiff to the Steamer Company who received delivery of the goods as agents of the Railway Company. The plaintiff, therefore, cannot get rid of the obligation to give notice of his claim on this ground.

It is next urged by the learned Vakil for the opposite party that no notice under section 77 was necessary as the plaintiff sued for non-delivery of the goods and not for loss. For this distinction reliance is placed on the case of *East Indian Railway Company v. Kali Charan-Ram Prashad* (6). I find some difficulty in understanding the facts of the case as reported. It is stated at page 147* of the report: "The Court below has found that the goods in question were lost not on account of a running train robbery, nor on account of any theft, but on account of the wilful neglect on the part of defendant's servants." Thus, there was a finding that the goods were lost, and in such a case it cannot be questioned that notice is necessary. But there is another passage at page 148* which runs thus:—"The lower Court has disbelieved the plea set up by the defendant of the loss of the goods in the manner alleged by the Company and has expressly held that it was a case of non-delivery of the goods to the plaintiff." The learned Judge, however, held that, although no notice was necessary, the plaintiff had actually given notice, which according to him was good notice under section 77 of the Act. He cited a number of cases in support of his opinion that the notice served was sufficient. It may, however, be pointed out, in passing, that the cases of the Calcutta High Court cited do not seem to support his proposition. The observations, therefore, in the judgment that notice under section 77 was not necessary in the case of non-delivery of goods, are mere *obiter*. In conclusion the learned Judge declined to exercise his discretionary power of revision in favour of the Company as in his opinion justice had been done.

Reference has been made to Arts. 30 and 31 of the Limitation Act in support of

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the contention that there is a distinction between loss and non-delivery. That distinction may be necessary for the purpose of fixing the starting point for the period of limitation for suits under different circumstances. Art. 30 applies only to a suit for compensation against a carrier for losing or injuring goods, and difficulty was actually experienced in applying the appropriate Article to suits for damages for non-delivery before the amendment of the Limitation Act, I shall refer to later on. It can, therefore, be hardly argued by reference to those Articles that the word 'loss' in section 77 of the Railways Act excludes 'non-delivery of' the goods. The words 'non-delivery of' in Art. 31 of the Limitation Act were first introduced by way of amendment in the Limitation Act of 1877, by section 3 of Act X of 1899. By section 2 of the same Act addition of a new section 10 to the Carriers Act of 1865 was made. Section 9 of the Carriers Act provides that, "In any suit brought against a common carrier for the loss, damage or non-delivery of goods it shall not be necessary for the plaintiff to prove....." Under the new section 10 notice was required to be given as is provided in section 77 of the Railways Act. The word 'non-delivery' does not appear in section 10, but it seems to me that it was not intended to exclude the necessity of giving notice in the case of non-delivery, although a different Article was found necessary for the purpose of limitation of suits. The case might have been different if the suit was for damages for wrongful detention of the plaintiff's goods. But in such a case as that, the plaintiff must prove that the goods are with the Railway Company which have been wrongfully detained by them otherwise his suit must fail. The word 'loss' used in section 77 is, in my opinion, wide enough to include all cases where the goods are not forthcoming and, therefore, includes a case of non-delivery. It may also be observed that under section 72 of the Railways Act, subject to the other provisions of the Act, the liability of the Railway Company is that of a bailee under sections 152 and 161 of the Indian Contract Act. Section 161 of the Contract Act runs as follows:—"If, by the fault of the bailee, the goods are not returned, delivered

or tendered at the proper time, he is responsible to the bailor for any loss, or destruction or any deterioration of the goods from that time." It seems to me that if any person asks for damages for any loss on account of goods not being delivered against a Railway Company, he is, under the provisions of section 72, bound to give notice under section 77.

In order to see whether the contention of the opposite party can find any support in the case of *Curran v. Midland G. W. Railway Company of Ireland* (9) and the case of *Ghelabhai Punsi v. East Indian Railway Company* (7) which followed the Irish case, we have examined those cases as also the case of *Smith Limited v. Great Western Railway Company* (10) in which *Curran's case* (9) was distinguished and commented on. *Curran's case* (9) turned upon the question of burden of proof with reference to the special contract entered into between the parties and cannot, therefore, be of any assistance in deciding the question whether the word "loss" in section 77 of the Railways Act excludes the case of 'non-delivery'.

I am, therefore, of opinion that it was incumbent on the plaintiff who sues the Railway Company for damages for non-delivery of goods to give notice as provided in section 77 of the Railways Act. I desire, however, to make it clear that I do not intend to express any opinion as to the meaning of the word "loss" where it is contained in a Risk-Note or any other document which should be construed with reference to the context. I agree with the order proposed by my learned brother.

B. N.

Rule made absolute.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2929
OF 1920.

December 13, 1922.

Present :—Justice Sir N. R. Chatterjea, Kt.,
and Mr. Justice Cuming.

ANNADAMOYI DEBI AND OTHERS

—APPELLANTS

versus

SAUDAMINI DEBYA—RESPONDENT.

Landlord and tenant—Stipulation for exorbitant interest on rent in arrears—Sale of tenancy for arrears of rent—Purchaser without notice of stipulation, position of.

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The purchaser of a holding at a sale for arrears of rent held at the instance of the landlord, purchases it with the ordinary incidents of a tenancy. A stipulation for the payment of interest at an unusual and an exorbitant rate on the rent in arrears is not an incident of a tenancy. [p. 720, col. 2.]

Where a holding is put up to sale for arrears of rent at the instance of the landlord without any notice in the sale proclamation that there was a written contract for the payment of interest at a very high rate, a purchaser would be justified in purchasing the holding on the assumption that the ordinary rate of interest was payable, and the landlord is not entitled to recover from such purchaser the rate of interest stated in the written contract. [p. 721, col. 2; p. 722, col. 1.]

Tiluk Chandra Roy v. Jasoda Kumar Roy, 11 C. W. N. 215, *Madhumala v. Alfazaddi Kazi*, 2 Ind. Cas. 415; 13 C. W. N. 962; 10 C. L. J. 45 and *Abdul Hamid v. Abdul Majid*, 32 Ind. Cas. 710, distinguished.

Appeal against a decree of the District Judge, Bakerganj, dated the 25th September 1920, modifying the decree of Additional Munsif, Perozepore, dated the 30th July 1919.

Dr. Sarat Chandra Basak (with him Babu Bepin Chandra Bose), for the Appellant.—The plaintiffs are the appellants. The appeal arises out of a suit for rent. The question is as to the rate of interest payable by the defendants. The *kabuliyat* was executed in 1882 before the passing of the Bengal Tenancy Act. The Court below has allowed interest at the rate of 12½ per cent. I submit the mere fact that the defendant is an auction-purchaser would not disentitle me from claiming interest at the stipulated rate. Refers to *Raj Narain Mitter v. Panna Chand Singh* (1), *Kali Nath Sen v. Trailokhya Nath Roy* (2), *Tiluk Chandra Roy v. Jasoda Kumar Roy* (3), *Madhumala v. Alfazaddi Kazi* (4) and *Abdul Hamid v. Abdul Miji* (5). My submission is that no distinction should be drawn between private purchases and purchases at auction-sale.

Babu Brojo Lal Chackravarty (with him Babu Susil Kumar Bose), for the Respondents.—I submit the learned Judge has quite correctly disallowed the interest at the rate

claimed which is unusual and exorbitant. See *Kali Nath Sen v. Trailokhya Nath Roy* (2) and *Alim v. Satis Chandra Chaturdhuri* (6). The cases cited by the appellant are all distinguishable and do not apply. The distinction between a private sale and an auction-sale is vitally important inasmuch as in the latter case the purchaser is absolutely in the dark as to the incidents of the tenancy. The purchaser, therefore, in justice and equity cannot be bound by unusual stipulations of which he knew nothing at the time of the purchase.

Dr. Basak, replied in brief.

JUDGMENT.—The only question involved in this appeal is, whether the plaintiff-landlord is entitled to interest on overdue instalments at the rate of 75 per cent. per annum.

The Court of Appeal below has found that interest at 75 per cent. is an unusual and exorbitant rate and that it was an unconscionable bargain at its inception. It accordingly allowed simple interest at 12½ per cent. per annum.

The plaintiff has appealed to this Court and it is contended that as the *kabuliyat* was executed in May 1882 before the passing of the Bengal Tenancy Act, the defendant is liable to pay interest at the rate stipulated in it.

No doubt, the *kabuliyat* having been executed prior to the passing of the Bengal Tenancy Act, the provisions of section 67 are not applicable to the case; but the defendant purchased the holding at a sale for arrears of rent held at the instance of the landlord, the plaintiff. As a purchaser at the rent sale, the defendant purchased it with the ordinary incidents of a tenancy.

It was pointed out by Banerji, J., in the case of *Kali Nath Sen v. Trailokhya Nath Roy* (2) that "a stipulation for the payment of interest at an unusual and an exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent;" and again "the distinction between usual and unusual term of a contract of tenancy is a distinction which should be taken into consideration in determining whether the incident in question continues to attach to the tenancy,

(1) 30 C. 213; 7 C. W. N. 203.

(2) 26 C. 315; 3 C. W. N. 194; 13 Ind. Dec. (N. S.) 805.

(3) 11 C. W. N. 215.

(4) 2 Ind. Cas. 415; 13 C. W. N. 962; 10 C. L.

J. 45.

(5) 32 Ind. Cas. 710.

(6) 24 C. 37; 12 Ind. Dec. (N. S.) 690.

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notwithstanding its sale for arrears of rent, and it is a distinction which has been given effect to by this Court in certain cases, of which I may refer to the following, namely, *Deendyal Paramanick v. Juggeshur Roy* (7) and *Alim v. Satis Chandra Chaturdhurin* (6)."

On behalf of the appellant, we have been referred to the case of *Raj Narain Mitter v. Panma Chand Singh* (1) where the auction-purchaser of a *dur-putni* tenure was held to be bound by the stipulation contained in the *dur-putni* lease as to the payment of interest on arrears of rent, such a stipulation where there is nothing unusual in it being part of an ordinary incident of a tenure. It was also held that the auction-sale of a tenancy does not involve any new contract between the auction-purchaser and the landlord, a question upon which an opinion was expressed by one of the Judges (Rampini, J.) in the case of *Kali Nath Sen v. Trailokhya Nath Roy* (2); the other Judge Banerji, J., expressing no opinion on the point. As stated above, however, in the case of *Raj Narain Mitter v. Panma Chand Singh* (1), the tenancy was a *dur-putni*, i.e., a permanent tenure and not a *raiya* holding and it was upon that ground that Banerji, J., distinguished the cases *Alim v. Satis Chandra Chaturdhurin* (6) and *Kali Nath Sen v. Trailokhya Nath Roy* (2).

It is unnecessary to refer to cases relating to permanent tenures, because the holder of a permanent lease may not be entitled to the indulgent consideration which might be extended to a *raiya*. So far as cases governed by the Bengal Tenancy Act are concerned, section 179 expressly provides that nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent *mukarrari* lease on any terms agreed on between him and his tenant.

The learned Pleader for the appellant also relied upon the cases of *Tiluk Chandra Roy v. Jasoda Kumar Roy* (3) and *Madhumila v. Alafzaddi Kazi* (4).

These cases, no doubt, related to *raiya* holdings but the defendants in both the cases were private purchasers from the original tenant; and, apart from the provisions (7) *Marsh* 252; 2 *Hay* 21.

of the Bengal Tenancy Act, they would be bound by the contract in the same way as the original tenant was.

We were also referred to the case, of *Abdul Hamid v. Abdul Miji* (5) where the original *kabuliyat* which was executed prior to the passing of the Bengal Tenancy Act provided for interest at the rate of 75 per cent. on overdue instalments and there was subsequently a *solenama* between the landlord and the tenant by which there was some variation of the rent. The question was whether the *solenama* created any new contract of tenancy. It was held that the *solenama* did not create any new contract of tenancy and the plaintiff was entitled to get interest at the rate stipulated. But there the defendant was the original tenant and there was no question of purchase at a sale for arrears of rent at the instance of the landlord.

It is contended by the learned Pleader for the appellant that no distinction should be drawn between the case of a private purchaser and a purchaser at a rent-sale.

But there is a distinction between these two cases. In the case of a private transfer, the transferee can and should call for the title-deed of the vendor; and if there is a lease providing for interest at a high rate, the purchaser becomes aware of such a contract before his purchase. He, therefore, purchases with full knowledge of the terms of the lease and he cannot, in these circumstances, complain that the rate of interest is an exorbitant one. In the case of a rent-sale, on the other hand, the purchaser ordinarily cannot have any knowledge of the terms of the contract between the landlord and the tenant, unless the landlord chooses to specify in the sale proclamation any incident of the tenancy or refer to the contract under which the tenancy is held.

In these cases, we may observe, there was no such notification by the landlord. Many agricultural tenancies in this country are held without any written contract at all and if the landlord does not in the sale proclamation refer to any written contract under which interest at a very high rate is payable, the purchaser has no means of knowing the terms of the contract; and when a holding is put up to sale at the instance of the landlord himself without any such notifications, the purchaser may

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be justified in purchasing the holding on the assumption that the ordinary rate of interest is payable, interest under the Bengal Tenancy Act being payable at 12½ per cent. and before the passing of the Bengal Tenancy Act at 12 per cent. under Act VIII of 1869.

For reasons stated above, we think that the decision of the lower Appellate Court is correct and that the appeal must be dismissed with costs.

W. C. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS.
1655 AND 1747 OF 1920.

August 7, 1922.

Present.—Justice Sir Asutosh Mookerjee,
Kt., and Mr. Justice Chotzner.

IN NO. 1655—KALIPADA DAS—
DEFENDANTS—APPELLANTS

IN NO. 1747—RAJA SATI PRASAD
GARGA BAHADAR AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

IN NO. 1655—RAJA SATI PRASAD
GARGA BAHADAR AND ANOTHER—
PLAINTIFFS—RESPONDENTS

IN NO. 1747—KALIPADA DAS—
DEFENDANT—RESPONDENT.

Hindu Law—Mitakshara—Manager, position—
Suit for rent by manager—Minor co-parceners,
whether necessary parties—Landlord and tenant—
Joint landlords—*Suit for rent*—Bengal Tenancy
Act (VIII of 1885), s. 188, application of.

The ordinary rule no doubt is that all persons in whom the right to any relief exists should be joined as plaintiffs. But this rule is not of general application. There are several statutory exceptions to the rule, and there is no reason why there should not be other exceptions based not on any legislative provision but on the substantive law applicable to the parties. The case of the manager of a Hindu joint family is such an exception. [p. 724, col. 2; p. 725, col. 1.]

A suit for rent instituted by the managing members of a joint Mitakshara family is not of necessity bound to fail, merely because the infant co-parceners have not been placed on the record as joint plaintiffs or *pro forma* defendants. [p. 726, col. 2; p. 727, col. 1.]

(Case-law reviewed.)

Where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit. [p. 726, col. 1.]

Where a suit is brought by or against a manager of a joint Hindu family in his representative capacity, the other members of the family are not necessary parties to the suit, which will consequently not fail by reason of their non-joinder. [p. 724, col. 1.]

The tendency of modern decisions is in favour of recognition of the representative character of the manager, though the question must be decided in each individual case or special class of cases, subject to the operation of relevant statutory provisions if any, such as the one embodied in section 188 of the Bengal Tenancy Act. [p. 725, col. 2.]

The provision contained in section 188 of the Bengal Tenancy Act has no application to the institution of a suit for arrears of rent, which is not something that the landlord is required or authorised to do by the Act. [p. 723, col. 1.]

Appeals against the decree of the District Judge, Midnapore, dated the 19th March 1920, modifying that of the Subordinate Judge, Midnapore, dated the 22nd December 1917.

Babus Mahendra Nath Ray and Gopendra Nath Das, for the Defendants.

Dr. Dwarka Nath Mitter and Babu Probodh Chandra Chatterjee, for the Plaintiffs.

JUDGMENT.—These two appeals are directed against the decree in a suit for arrears of rent. The defendant holds a tenure in the *zemindari mahal* Tamruk situated in the District of Midnapore. The plaintiffs, who are two brothers governed by the *Mitakshara* Law, own twelve-and-a-half annas share in the *zemindari* and are *patnidars* under the proprietors of the remaining three-and-a-half annas share. The plaintiffs are consequently the immediate landlords of the defendant as a tenureholder, and as such they instituted the present suit on the 12th December 1916, for recovery of arrears of rent due from him. On the 12th February 1917 the defendant filed a written statement setting forth various objections to the claim. On the 28th February 1917 he filed an additional written statement contending that the suit could not proceed, inasmuch as the minor son of the first plaintiff, born on the 16th November 1916, had not been joined as a co-plaintiff. On the 20th December 1917 he filed a supplementary written statement objecting that the suit could not proceed as the minor son of the second plaintiff, born on the 15th April 1917, had not been joined as a co-plaintiff. The Trial Court held that the plaintiffs were competent to maintain the suit without joining their minor sons as co-plaintiffs, and, after dealing with the objections on the merits, decreed the claim in part. Upon appeal, the District Judge held that the plaintiffs could not maintain

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the suit for the entire rent in the absence of their sons, but he decreed the claim in respect of twelve-and-a-half annas share, inasmuch as the plaintiffs had been registered under the Land Registration Act as proprietors in respect of that share. Both the parties were dissatisfied with this decree. The plaintiffs have appealed (No. 1747 of 1920) on the ground that they were competent to maintain the claim for the entire rent as managers of a joint *Mitakshara* family, even though their minor sons were not brought on the record. The defendant has appealed (No. 1655 of 1920) on the ground that section 60 of the Bengal Tenancy Act had been misconstrued and misapplied by the District Judge and the claim should have been dismissed in its entirety. We shall consider, first, the appeal preferred by the plaintiffs.

It may be observed at the outset that the plaintiffs, who are members of a joint *Mitakshara* family, are joint landlords within the meaning of section 188 of the Bengal Tenancy Act, which provides that where two or more persons are joint landlords, anything which the landlord is, under the Act, required or authorised to do, must be done, either by both or all those persons acting together, or by an agent authorised to act on behalf of both or all of them. This provision has no application to the institution of a suit for arrears of rent, which is not something that the landlord is required or authorised to do by the Bengal Tenancy Act: See *Pramada Nath Roy v. Ramani Kanta Roy* (1). This renders inapplicable the decisions in *Sati Prosad v. Radha Nath* (2) and *Sati Prosad Gorga v. Sanatan Dhara* (3), where, in cases instituted by the present plaintiffs, it was ruled that section 188 governed a suit for alteration of rent on alteration of area under section 52 and a proceeding for settlement of fair and equitable rent under section 105. The case before us, which is not subject to the operation of section 188, must consequently be determined with reference to what Sir Arthur Wilson called "the general principles of legal procedure," in *Pramada Nath Roy v. Ramani Kanta Roy* (1).

(1) 35 I. A. 73; 35 C. 331; 7 C. L. J. 132; 12 C. W. N. 249; 10 Bom. L. R. 66; 18 M. L. J. 43; 3 M. L. T. 151 (P. C.).

(2) 18 Ind. Cas. 197; 16 C. L. J. 427.

(3) 61 Ind. Cas. 549; 25 C. W. N. 33.

The proposition that in suits relating to transactions affecting a joint Hindu family, all the members thereof need not always be joined, was foreshadowed by Sir James Colville in *Jogendra Deb Roy Kut v. Funindro Deb Roy Kut* (4), when he observed that cases sometimes occur "wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit." This assumes that, in respect of the subject-matter of the litigation, the members of the family had no conflicting interest *inter se*. This principle has been reiterated by the Judicial Committee in two recent decisions. In *Kishen Parshad v. Har Narain* (5) where the Judicial Committee reversed the decision of the Allahabad High Court in *Shamrathi Singh v. Kishen Prasad* (6), Lord Robson observed as follows:

"The Indian decisions as to the powers of the managing members of an undivided Hindu joint family are somewhat conflicting. It is, however, clear that where a business like money-lending has to be carried on in the interests of the family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the business. Without a general power of that sort, it would be impossible for the business to be carried on at all."

Again, in *Sheo Shankar Ram v. Jaddo Kunwar* (7), where the Judicial Committee affirmed the decision of the Allahabad High Court in *Jaddo Kuar v. Sheo Shanker Ram* (8) Lord Moulton observed as follows:

(4) 14 M. I. A. 367; 17 W. R. 104; 11 B. L. R. 244; 2 Suth. P. C. J. 517; 3 Sar. P. C. J. 32; 20 E. R. 824.

(5) 9 Ind. Cas. 739; 38 I. A. 45; 33 A. 272; C. L. J. 345; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 21 M. L. J. 378; 13 Bom. L. R. 359 (1911) 2 M. W. N. 395 (P. C.).

(6) 29 A. 311; 4 A. L. J. 194; A. W. N. (1907) 58.

(7) 24 Ind. Cas. 504; 41 I. A. 216; 36 A. 383; 20 C. L. J. 282; 18 C. W. N. 968; 16 M. L. T. 175; (1911) M. W. N. 593; 1 L. W. 645; 12 A. L. J. 1173; 16 Bom. L. R. 810 (P. C.).

(8) 7 Ind. Cas. 902; 33 A. 71; 7 A. L. J. 945.

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"There seems to be no doubt upon the Indian decisions, from which their Lordships see no reason to dissent, that there are occasions, including foreclosure suits, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound. It is quite clear from the facts of this case and the findings of the Courts upon them, that this is a case where this principle ought to be applied. There is not the slightest ground for suggestion that the managers of the joint family did not act in every way in the interests of the family itself."

These pronouncements by the Judicial Committee weaken the effect of the decisions in *Bal Kishan Lal v. Topeswar Singh* (9), *Lala Suraj Prosad v. Golab Chand* (10); *Debi Prosad v. Dharamjit* (11) and *Bissonath Prosad Malita v. Brindesri Prosad Singh* (12), which had already been doubted by the Full Bench in *Bidya Prosad Singh v. Bhupnarain Singh* (13), namely, that all the co-parceners are necessary parties to a suit on a mortgage of a joint family property, so that if a decree is passed in such a suit without their being joined as parties, the decree is not binding on them and they are entitled to sue for declaration that their interests are not bound thereby. The opinion expressed by the Judicial Committee, namely, that where a suit is brought on a mortgage by or against a manager of a joint Hindu family in his representative capacity, the other members of the family are not necessary parties to the suit, which will consequently not fail by reason of their non-joinder, harmonises with the rule enforced in Allahabad in *Hori Lal v. Nimman Kunwar* (14); *Madan Lal*

v. Kishen Singh (15); in Madras in *Sheikh Ibrahim v. Rama Aiyar* (16), and in Patna in *Abdul Rahman v. Shib Lal Sahu* (17); *Bajinath Goenka v. Daleep Narain Singh* (18); *Muhammad Sadiq v. Khedan Lal* (19); *Girwar Narain Mahton v. Makhbulunnissa* (20) and *Raghunandan Singh v. Parmeshwar Dayal Singh* (21). In Bombay, a similar result has been reached by a circuitous process, for, although it has been held that all the co-parceners are necessary parties to a suit brought on a mortgage by or against the manager, the decree in a suit, not so constituted against all the members, but brought against the manager alone in his representative character, when executed, passes the interest of the other co-parceners also in the property, though the sale may be avoided by them on the ground that they were not liable to the debt contracted by the manager; see *Ramchandra Narayan v. Shripatrao Tukojirao* (22); *Laxmam Nilkant v. Vinayak Keshav* (23); *Chimana Sada Shiv v. Sada Barka* (24); *Ramakrishna Narayan v. Vinayak Narayan* (25); *Madhusudan Shivaram Kanvinde v. Bhanu Atramaram Lad* (26). The true position is tersely put by Benson and Sundara Aiyar, J.J., in *Sheikh Ibrahim v. Rama Aiyar* (16).

"The ordinary rule no doubt is that all persons in whom the right to any relief exists, should be joined as plaintiffs. But this rule is not of universal application. The language of section 26 of the Civil Procedure Code, 1882, corresponding to O. I, r. 1, of the present Code, is 'that all persons

(15) 15 Ind. Cas. 138; 34 A. 572; 9 A. L. J. 844.

(16) 10 Ind. Cas. 874; 35 M. 685; 21 M. L. J. 508; (1911) 1 M. W. N. 442.

(17) 63 Ind. Cas. 570; 2 P. L. T. 572; 6 P. L. J. 650; (1922) Pat. 81; 4 U. P. L. R. (Pat.) 13; (1922) A. I. R. (Pat.) 252.

(18) 58 Ind. Cas. 489; (1920) Pat. 261; P. L. T. 582.

(19) 36 Ind. Cas. 197; 1 P. L. J. 154; 2 P. L. W. 365.

(20) 36 Ind. Cas. 542; 1 P. L. J. 468.

(21) 39 Ind. Cas. 779; 2 P. L. J. 306; 1 P. L. W. 636; (1917) Pat. 137.

(22) 33 Ind. Cas. 771; 40 B. 248; 18 Bom. L. R. 33.

(23) 33 Ind. Cas. 956; 40 B. 329; 18 Bom. L. R. 52.

(24) 7 Ind. Cas. 990; 12 Bom. L. R. 811.

(25) 5 Ind. Cas. 967; 34 B. 354; 12 Bom. L. R. 219.

(26) 18 Ind. Cas. 385; 15 Bom. L. R. 36.

(9) 14 Ind. Cas. 845; 15 C. L. J. 446; 17 C. W. N. 219.

(10) 28 C. 517; 5 C. W. N. 640.

(11) 22 Ind. Cas. 570; 41 C. 727; 19 C. L. J. 437.

(12) 17 Ind. Cas. 577; 40 C. 342; 17 C. W. N. 1025.

(13) 29 Ind. Cas. 629; 42 C. 1068; 21 C. L. J. 543; 19 C. W. N. 849.

(14) 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819.

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may be joined in one suit as plaintiffs, in whom the right to any relief..... is alleged to exist, whether jointly, severally, or in the alternative.....' Section 30 of the Code of 1882, corresponding to O. I. r. 8, lays down the general rule of procedure where one or more persons wish to sue on behalf of or for the benefit of themselves and other persons having the same interest in a suit. But it cannot, in our opinion, be laid down that in no case has a person a right to sue on behalf of himself and others, where the procedure laid down in section 30 is either not applicable or has not been taken advantage of. There are several statutory exceptions to the rule, and there is no reason why there should not be other exceptions based not on any legislative provision but on the substantive law applicable to the parties. The judgment of the Judicial Committee, in *Kishen Parshad v. Har Narain* (5), already referred to, shows that the case of the manager of a Hindu family is such an exception."

This view does not militate against the decisions of the Judicial Committee in *Balwant Singh v. Rockwell Clancy* (27), and *Ganesha Row v. Tulja Ram* (28). In the first case, Sir John Edge held that a mortgage by the elder of two brothers was void as against the minor younger brother, even though the mortgage was for discharging the father's debts, inasmuch as the elder brother did not profess to represent the younger brother in the transaction, and acted on his assumed position as absolute owner. In the second case, Mr. Ameer Ali held that where a minor co-parcener has in fact been joined as a party to a litigation, represented by the manager as his guardian *ad litem*, leave of the Court in accordance with the statutory procedure is essential to the validity of a compromise by the manager on behalf of the minor; see *Upendra Nath Biswas v. Shib Kumari*

Debi (29). On the other hand, the Judicial Committee held in *Gulab Singh v. Raja Seth Gokuldas* (30) that a manager would be acting within his powers and authority, if, in order to save the heavily encumbered joint family estate, he placed the same under the charge of the Court of Wards. It is, we think, fairly obvious that even if we assume, contrary to the opinion expressed in *Daya Shankar v. Hub Lal* (31), that the manager of a joint family cannot, as a universal rule, be deemed entitled to sue or liable to be sued on behalf of the family, *Padmakar Vinayak Joshi v. Mahadev Krishna Joshi* (32); *Kashinath v. Chinnaji* (33); the tendency of the modern decisions, specially those of the Judicial Committee, is in favour of recognition of the representative character of the manager, though, no doubt, the question must be decided in each individual case or special class of cases, subject to the operation of relevant statutory provisions, if any, such as the one embodied in section 188 of the Bengal Tenancy Act. An instructive example is afforded by the decision in *Bhola Roy v. Jung Bahadur* (34), where it was ruled that the plaintiff, who alone had always collected rent as the head of the joint *Mitakshara* family, was himself competent to maintain the suit, even though he had an infant nephew. The addition of the infant as co-plaintiff raised in that case, a question of limitation; it was ruled, that this did not affect the right of the original plaintiff to continue the suit and to recover the amount due. A stricter view had been previously adopted in *Mir Tapurah Hossein v. Gopi Narayan* (35), where it was ruled that when rent is due to the members of a joint Hindu family, it is not open to the manager alone to maintain a suit for rent without joining the other members,

(29) 52 Ind. Cas. 616; 23 C. W. N. 634.

(30) 19 Ind. Cas. 521; 40 I. A. 117; 40 C. 784; 17 C. L. J. 619; 17 C. W. N. 918; 15 Bom. L. R. 613; (1913) M. W. N. 542; 14 M. L. T. 55; 9 N. L. R. 117; 25 M. L. J. 179 (P. C.)

(31) 27 Ind. Cas. 497; 37 A. 105; 13 A. L. J. 21.

(32) 10 B. 21; 10 Ind. Jur. 188; 5 Ind. Dec. (N. S.) 396.

(33) 30 B. 477; 8 Bom. L. R. 268.

(34) 22 Ind. Cas. 798; 19 C. L. J. 5.

(35) 7 C. L. J. 251 at p. 260.

(27) 14 Ind. Cas. 629; 39 I. A. 109; 34 A. 296; 15 C. L. J. 475; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422; (P. C.)

(28) 19 Ind. Cas. 515; 40 I. A. 132; 36 M. 295; 18 C. L. J. 1; 17 C. W. N. 765; 11 A. L. J. 589; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150 (P. C.).

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either as plaintiffs or as defendants, except when the tenant has dealt with such managing members as sole landlords. In support of this view, reliance was placed, amongst other decisions, on *Shamrathi Singh v. Kishan Prasad* (6), which, as we have seen, has been overruled by the Judicial Committee on appeal: *Kishan Pershad v. Har Narain* (5); see also *Muhammad Sadiq v. Khedan Lal* (19); *Romesh Chandra Mandal v. Bhuyan Bhaskar Mahapatra* (36). The decision in *Harihar Pershad Singh v. Mathura Lal* (37) also harmonises with the less stringent view, though in that case, as in *Bhola Roy v. Jung Bahadur* (34), the minor member had been placed on the record represented by the adult managing member as guardian *ad litem*. That, however, is, in most cases, really a matter of form, though it has the appearance of substance. As explained in *Sham Kuar v. Mohanunda Sahoy* (38) a guardian cannot be appointed under the Guardians and Wards Act, 1890, in respect of the property of a minor who is a member of a joint Hindu family governed by the *Mitakshara* law and possessed of no separate estate. In such an event, if the minor is added as a party to the suit, the manager would represent himself and his minor co-parceners as his guardian *ad litem*. But precisely the same result is reached, if the manager be deemed to have instituted the suit or to have defended the claim in his representative character, and, as pointed out in *Krishna Jiva Tewari v. Bishnath* (39), where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants, it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit: *Hori Lal v. Nimman Kunwar* (14); *Madan Lal v. Kishen Singh* (15); *Sheo Dulare v. Brij Bhukhan* (40).

It is well established that the manager of a joint Hindu family has power to acknowledge a debt and pay interest thereon so as to bind all the members including

minors: *Saroda Charan Chuckerbutty v. Durga Ram De Sinha* (41); *Chidambaram Chetti v. Ramaswami Chettiar* (42); and he may give a discharge under section 7 of the Indian Limitation Act: *Banwari Lal v. Sheo Sankar Misser* (43). It is competent to him to agree to a reference to arbitration on behalf of himself and his minor co-parceners: *Harendra Lal Roy Chowdhury v. Nahwa Salimullah Bahadur* (44); *Uppara Chinngappa v. Gaddam Chinna Hanumanna* (45). He is equally competent to enter into a compromise, beneficial to his minor co-parceners, with a view to put an end to a threatened litigation: *Bai Rewa v. Jethabhai Vithaldas* (46). A decree obtained against him in a suit to which the other members are not parties, may be operative against the latter under certain circumstances, provided the matter was one in which the manager sued was entitled to represent the whole family; *Amrita Sundari v. Sherajuddin Ahamed* (47); *Balki v. Brojobashi* (48); *Jijamba Bai Sahib v. Sagniram Jathai Row Sahib* (49). It is equally well settled that in a joint Hindu family all the members need not join in granting leases; the manager can grant leases and sue for rents on behalf of the family: *Ayyappa v. Venkatakrishnamarazu* (50); *Parthasarathi Aiyangar v. Rangasawmy Aiyangar* (51) he can also recognise the transferee of a non-transferable holding; *Golapdi Meah v. Purna Chandra Dutta* (52).

In these circumstances, we are not prepared to hold that a suit for rent instituted by the managing members of a joint *Mitakshara* family must of necessity fail, merely because the infant co-parceners have not

(36) 39 Ind. Cas. 225; 1 P. L. W. 346.
 (37) 8 C. L. J. 256; 35 C. 561; 12 C. W. N. 598.
 (38) 19 C. 301; 9 Ind. Dec. (N. S.) 646.
 (39) 16 Ind. Cas. 392; 34 A. 615; 10 A. L. J. 217.
 (40) 25 Ind. Cas. 849; 1 O. L. J. 656.

(41) 5 Ind. Cas. 484; 37 C. 461; 11 C. L. J. 484; 14 C. W. N. 741.
 (42) 26 Ind. Cas. 911; 27 M. L. J. 631.
 (43) 1 Ind. Cas. 670; 13 C. W. N. 815.
 (44) 7 Ind. Cas. 21; 12 C. L. J. 336.
 (45) 50 Ind. Cas. 471; (1915) M. W. N. 425; 9 L. W. 314.
 (46) 4 Ind. Cas. 133; 11 Bom. L. R. 1064.
 (47) 29 Ind. Cas. 156; 19 C. W. N. 565.
 (48) 14 Ind. Cas. 333; 16 C. W. N. 1019.
 (49) 14 Ind. Cas. 374; 22 M. L. J. 45.
 (50) 15 M. 484; 2 M. L. J. 219; 5 Ind. Dec. (N. S.) 680.
 (51) 38 Ind. Cas. 645; 4 L. W. 654.
 (52) 41 Ind. Cas. 37; 21 C. W. N. 774; 27 C. L. J. 129.

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been placed on the record as joint plaintiffs or *pro forma* defendants. In the case before us, there is manifestly no substance in the objection taken piecemeal by the defendant. He held the tenure under the plaintiffs and had always paid rent to them, and cannot be maintained with any show of reason that he would have been secured immunity from a possible claim by the infants if they had been brought on the record and represented by their respective fathers as guardian *ad litem*.

The result is, that the appeal by the plaintiffs is allowed, the decree of the District Judge set aside, and the decree of the Subordinate Judge restored with costs here and in the lower Appellate Court. The appeal by the defendant must as a corollary stand dismissed with costs.

Appeal No. 1747 allowed.

B. N. *Appeal No. 1655 dismissed.*
N. H.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1502 OF 1920.

December 13, 1922.

Present:—Mr. Justice Oldfield and Mr.

Justice Ramesam.

POTHANE PUTHAN VITTEL KUNHU

POTHU NASSIAR AND ANOTHER—

DEFENDANTS NOS. 5 AND 6—APPELLANTS
versus

ADRASSERI RARU NAIR AND OTHERS—

PLAINTIFF AND DEFENDANTS NOS. 1

to 4—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Bona fide purchaser for valuable consideration from fraudulent transferee, whether protected.

A bona fide purchaser for valuable consideration from a fraudulent transferee without notice of the fraud is protected under the proviso to section 53 of the Transfer of Property Act. [p. 728, col. 1.]

Basti Begam v. Banarsi Prasad, 30 A. 297; 5 A. L. J. 305; A. W. N. (1908) 116, dissented from.

(English and American cases reviewed.)

Second appeal against a decree of the District Court, South Malabar, in Appeal Suit No. 747 of 1919, presented against a

decree of the Court of the Principal District Munsif, Tirur, in Original Suit No. 469 of 1918.

Mr. C. Madhavan Nair, for the Appellants.

Mr. K. P. Ramakrishna Aiyar, for the Respondents.

This second appeal came on for hearing on the 21st, 25th, 27th of July and 3rd of August 1922: the Court delivered the following.

JUDGMENT.

Oldfield, J.—I agree with the order proposed by my learned brother and can add nothing to his reasons for it.

Ramesam, J.—The facts out of which this second appeal arises may be briefly stated as follows:—The plaintiff obtained on the 31st March 1914 a decree in Original Suit No. 500 of 1912 against the present defendants Nos. 3 and 4 and in execution of the decree attached the suit properties. The defendants Nos. 1 and 2 relying on a sale-deed (Exhibit III dated 5th October 1914) preferred a claim objecting to the attachment (Miscellaneous Petition No. 328 of 1918). The claim was allowed on 21st February 1918 (Exhibit A). The present suit was filed on 10th August 1918 for a declaration that the sale under Exhibit III was made with intent to defraud creditors and cannot affect plaintiff's right to attach the properties. On 24th February 1918 (three days after the disposal of the claim petition) the property was purchased from defendants Nos. 1 and 2 by defendants Nos. 5 and 6 under Exhibit VI. They contend that they are *bona fide* purchasers for consideration and without notice of the intention to defraud, if any, on the part of the parties to Exhibit III. The Courts below have held that Exhibit III was executed as alleged by the plaintiff. As to defendants Nos. 5 and 6, they held, relying on *Krishnappa Chetty v. Abdul Khader Sahib* (1) that their sale under Exhibit VI was void against plaintiffs as being made *pendente lite* and did not express any opinion on the question whether they are *bona fide* purchasers for value. Defendants Nos. 5 and 6 appeal. The finding that Exhibit III is voidable by the plaintiff is not challenged in appeal.

(1) 25 Ind. Cas. 11; 38 M. 535; 26 M. L. J. 449.

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It is contended on behalf of the appellants that the case in *Krishnappa Chetty v. Abdul Khader Saheb* (1) is not correctly decided; that it has been dissented from in *Pethu Aiyar v. Sankaranarayana Pillai* (2) and that a finding should be called for from the lower Appellate Court on the question whether defendants Nos. 5 and 6 are *bona fide* purchasers for value.

It is contended for the respondent that, even if the sale to defendants Nos. 5 and 6 is not vitiated by the doctrine of *lis pendens*, it is unnecessary to have a finding on its *bona fides* as the proviso to section 53 of the Transfer of Property Act does not protect *bona fide* purchasers for consideration from a fraudulent transferee but protects only *bona fide* purchasers from the first transferor. In support of this contention he relied on *In Basti Begam v. Banarsi Prasad* (3). The conclusion stated at page 308 of that case—"Basti Begum took the transfer subject to all defects in the title of her transferor and cannot in equity set up the fictitious document against a *bona fide* mortgage. The fictitious instrument received, we think, no new force against the plaintiff from the transfer. The proviso to section 53 of the Transfer of Property Act, which was relied on by Mr. Dillon, does not appear to us to help his client. That proviso was intended to safeguard rights which have been already acquired—" seem to support the respondent, though the last sentence is not quite intelligible. In this case, the first transaction is a mortgage, but, as I do not see any reason to distinguish between a mortgage and a sale or between a mortgage of immoveable property and one of moveables in the application of section 53 of the Transfer of Property Act, the case requires further consideration. A number of English cases were cited in it. In the first one *Halifax Barking Company v. Gledhill* (4), the provisions of 13 Eliz., Ch. V., were referred to; but the confusion of Kay, J., does not support the conclusion in *Basti Begam v. Banarsi Prasad* (3) and no reasons are

given in the latter to show how the former was intended to be got over. I will refer to this case again. The other cases cited in *Basti Begam v. Banarsi Prasad* (3) fall into two groups:—In the first group, consisting of *Cockell v. Taylor* (5), *Ogilvie v. Jeaffreson* (6), *Parker v. Clarke* (7) the second transaction, though *bona fide* did not prevail; in the second group, consisting of *French v. Hope* (8), *Bickerton v. Walker* (9) and *Rice v. Rice* (10), the second transaction was upheld on the ground that it was a *bona fide* transaction for consideration without notice of the prior equity. In all these six cases there is no question of the application of 13 Eliz., Ch. V., or 27 Eliz., Ch. IV. The earlier transactions in the first three cases were not valid even as between the parties—Collett was defrauded by Taylor in *Cockell v. Taylor* (5) Ogilvie was defrauded by his Solicitor in *Ogilvie v. Jeaffreson* (6) and Cruchley executed the mortgage while in prison and under the undue influence of Thomas in *Parker v. Clarke* (7). In each of the other three cases the first transaction was perfectly valid—there being no fraud or undue influence vitiating it. The second transferees obtained valid titles by estoppel. It seems to me these six cases are illustrative of the rule now embodied in India in section 41 of the Transfer of Property Act. In the first three cases there was not the free consent of the original owner so as to confer a title by estoppel on the second transferee. I do not think it is necessary to say, as Kekewich, J., thought in *French v. Hope* (8), that *Parker v. Clarke* (7) was overruled by *Bickerton v. Walker* (9). I may also add that the Vice-Chancellor's summary of the facts in *Ogilvie v. Jeaffreson* (6) shows that the second transferee in that case cannot be regarded as a *bona fide* purchaser for value. However this may be, I do not think any of these cases are a guide in the discussion

(5) (1851) 15 Beav. 103; 21 L. J. Ch. 545; 51 E. R. 475; 92 R. R. 328.

(6) (1860) 2 Giff. 353; 6 Jur. (N. S.) 970; 8 W. R. 745; 128 R. R. 148; 66 E. R. 147.

(7) (1861) 30 Beav. 54; 7 Jur. (N. S.) 1267; 9 W. R. 877; 132 R. R. 180; 54 E. R. 800.

(8) (1887) 56 L. J. Ch. 363; 56 L. T. 57.

(9) (1886) 31 Ch. D. 151; 55 L. J. Ch. 227; 53 L. T. 731; 34 W. R. 141.

(10) (1854) 2 Drew. 73; 23 L. J. Ch. 289; 22 L. T. (O. S.) 208; 2 W. R. 139; 100 R. R. 431; 2 Eq. R. 341; 61 E. R. 646.

(1) 38 Ind. Cas. 778; 40 M. 955; 32 M. L. J. 374; (1917) M. W. N. 284; 5 E. W. 519; 21 M. L. T. 377.

(2) 30 A. 297; 5 A. L. J. 305; A. W. N. (1908) 116.

(4) (1891) 1 Ch. 31; 60 L. J. Ch. 181; 63 L. T. 623; 39 W. R. 104.

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of section 53 of the Transfer of Property Act. It seems to me that the conclusion in *Basti Begam v. Banarsi Prasad* (3) is not justified by the cases cited in it.

The case of *Doe d. Bothell v. Martyn* (11), is similar to the case above cited and does not help us. On the other hand, there are a number of other English cases on 13 Eliz., Ch. V, and 27 Eliz., Ch. IV, which will now be considered. I will divide them into two groups.

(a) Those decided with reference to 27 Eliz., Ch. IV (1), *Prodgers v. Langham* (12) where it was held that the feoffee for valuable consideration from the first feoffee whose feoffment was coverious has a good title against a second feoffee from the original owner. This case was followed by Lord Eldon in *George v. Milbanke* (13) cited below.

The case of *Lloyd v. Attwood* (14) seems to decide differently (see especially, Turner, L. J., 655 and Knight-Bruce, L. J., 647); but in that case the two Misses Attwood parted with the title-deeds and their mortgage has lost its priority by reason of their laches and the Misses Medley who obtained a sub-mortgage and could have asked for and known the absence of the title-deeds cannot be regarded as *bona fide* transferees for value. Nor did Turner, L. J., and Knight-Bruce, L. J., regard them as *bona fide* transferees for value. I doubt if the passage in May on Fraudulent Conveyances, page 254, relating to this case, is justified, especially in view of the cases cited at page 253.

(b) Cases decided on 13 Eliz., Ch. V.

(1) *George v. Milbanke* (13). For the purposes of the decision the fact that until the Voluntary Conveyances Act of 1893, all voluntary conveyances, though made without a fraudulent intention, were void against creditors, does not make a difference. This case supports the appellant.

(2) *Payne v. Mortimer* (15). In this case

(11) (1805) 1 Bos. & Pul. (N. R.) 332; 127 E. R. 492; 8 R. R. 821.

(12) (1657) 1 Sid. 133; 82 E. R. 1014.

(13) (1803) 9 Ves. Jun. 190; 7 R. R. 157; 32 E. R. 575.

(14) (1859) 3 De G. & J. 614; 5 Jur. (N. S.) 1322; 33 L. T. (O. S.) 209; 121 R. R. 252; 29 L. J. Ch. 97; 44 E. R. 1405.

(15) (1859) 4 De G. & J. 447; 28 L. J. Ch. 716; 5 Jur. (N. S.) 749; 7 W. R. 646; 124 R. R. 334; 45 E. R. 173.

Turner, L. J., says: "Lord Eldon, however, in *George v. Milbanke* (13), did not put the case upon the Statute of Elizabeth. He had regard, no doubt, and indeed the report shows, although but obscurely, that he had regard to the provision in the Statute which protects alienees for value only in the case of absence of notice, and he puts the case upon the ground of the assignee for value having a better equity than the general creditors of the settlor. That principle seems to me to reach the present case."

(3) *Halifax Banking Company v. Gledhill* (4). On the facts, the settlor's reservation of an interest not being tainted by intent to defraud creditors—the point does not seem to arise, but Kay, J.'s opinion is in favour of the appellant. He also seems to think that Turner, L. J.'s opinion in *Payne v. Mortimer* (15) is to the same effect.

(4) *In re Mouat* (16). The opinion of Sterling, J., at p. 834 in favour of the appellant is only an *obiter dictum*.

(5) *Morewood v. South Yorkshire Railway & River Dun Company* (17). The opinion of the Court (Pollock, C. B., and Watson Bramwell, B.B.), is in favour of the appellant.

Generally, I am unwilling to refer to American decisions. But, having regard to the paucity of authority in India and the somewhat inconclusive nature of the English cases, I now refer to two of the American cases. In *Lee v. Abbe* (18) and in *Anderson v. Roberts* (19) it was held that *bona fide purchasers* from a fraudulent grantee without notice of the fraud will be protected. I agree with the remarks of Spencer, C. J., at page 241, "again, the proviso is general, it exempts any conveyance upon good consideration and *bona fide*, to any person not having notice of the fraud or collusion, from the effects of the enacting clause. And why should not its benefits be extended to any *bona fide purchaser* for valuable consideration, whether he purchases from the fraudulent grantor

(16) (1899) 1 Ch. 831; 68 L. J. Ch. 590; 47 W. R. 5; 6; 80 L. T. 406.

(17) (1858) 3 H. & N. 798; 28 L. J. Ex. 114; 117 R. R. 981; 157 E. R. 690.

(18) (1796) 2 Root 359; 1 Am. Dec. 78.

(19) (1820) 18 Johnson 513; 9 Am. Dec. 235.

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or the fraudulent grantee? I trust it has sufficiently appeared that the fraudulent grantee takes the entire interest of the fraudulent grantor, and that the deed is voidable at the instance of the creditor, not legally and strictly void." He then refers to Marshall, C. J.'s decision in *Fletcher v. Peck* (20) to show that a *bona fide* purchaser from the fraudulent grantor, is protected and proceeds: "It is in vain that we search for any difference between a conveyance by a fraudulent grantee, where the intention was to deceive subsequent purchasers, and a conveyance by a fraudulent grantor, where the intention was to defraud present or future creditors." He then refers with approval to *Prodgers v. Langham* (12).

I am, therefore, of opinion that the appellants' contention is right and that we must have a finding on the question whether they are *bona fide* purchasers for consideration and without notice of the fraud relating to Exhibit III. The question of *lis pendens* will be decided, if necessary, after the finding is returned. The finding will be returned with reference to the evidence on record. Six weeks are allowed for finding and ten days for objections.

In compliance with the order contained in the above judgment the District Judge of South Malabar, at Calicut, submitted the following

FINDING.—Plaintiff obtained a decree in Original Suit No. 509 of 1912 against defendants Nos. 3 and 4 for possession of certain property and for rent. He executed the decree and obtained delivery of the property on 4th October 1914. On the next day, 5th October 1914, defendants Nos. 3 and 4 assigned the suit property to defendants Nos. 1 and 2 under a deed, Exhibit III. Subsequently, plaintiff attached this property and defendants Nos. 1 and 2 preferred a claim. Their claim was allowed in an order passed on 21st February 1918 (Exhibit A). On 24th February 1918 defendants Nos. 1 and 2 assigned the three items of property in respect of which the claim had been allowed and one other item to defendants Nos. 5 and 6 (the appellants) by a registered deed (Exhibit VI).

2. The assignment deed executed by defendants Nos. 3 and 4 to defendants

Nos. 1 and 2 (Exhibit III) has been found to be a fraud on the present plaintiff, and I am now directed to submit a finding on the evidence on record on the following issue, viz., "whether defendants Nos. 5 and 6 are *bona fide* purchasers for consideration and without notice of the fraud relating to Exhibit III".

3. I think that there can be no doubt that the defendants Nos. 5 and 6 purchased the property for consideration. The consideration recited in the document is the redemption of two mortgages of Rs. 150 and 100 respectively and a cash payment of Rs. 250. The two mortgages are evidenced by Exhibit IV and Exhibit V and are proved by Krishna Menon (D.W. No. 2) who attested both of them. He says that the mortgages were executed for full consideration and that the mortgagee of Exhibit IV was in possession of the mortgaged property by virtue of the mortgage. He does not say if the other mortgagee obtained possession. This witness's evidence is not impeached. That defendants Nos. 5 and 6 redeemed these mortgages is evidenced by the surrender deeds (Exhibits VIII and IX) executed by the mortgagees on 18th April 1918 and 27th March 1918. The sixth defendant, examined as D. W. No. 1, also says that he and fifth defendant paid the consideration for Exhibit VI in full and have since been in possession of the property and have been paying the Government revenue thereon. The title-deeds, Exhibits I, II and III, were produced in the suit by defendants Nos. 5 and 6. I cannot see any suspicious features in the transaction between defendants Nos. 1 and 2 and defendants Nos. 5 and 6. The fact that the property was purchased only three days after the claim petition was allowed is not, to my mind, suspicious. The fact that the claim was allowed might well lead defendants Nos. 5 and 6 to conclude that the title of defendants Nos. 1 and 2 was good and so induce them to conclude the sale. Defendants Nos. 5 and 6 are not related to any of the other defendants. It is argued that the consideration paid was inadequate. The rent is said to be 37 *paras* of paddy and I am asked to capitalise this at 4 per cent., and so arrive at a value of a little over Rs. 500 as against the sum of Rs. 500

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paid for the property. But this is not a safe conclusion to draw. Interest on his money is not the only consideration which influences a purchaser. Moreover, even the defendants Nos. 5 and 6 did make a good bargain it does not follow that they are not *bona fide* purchasers.

4. It has next to be considered whether defendants Nos. 5 and 6 had notice. They certainly had notice, Exhibit III, but it does not follow that they had notice of the fraud, and I do not think that they can be assumed to have had notice either actual or constructive of the fraud relating to Exhibit III. The persons to whom they would naturally go for information are defendants' witnesses Nos. 1 and 2 and the mortgagee Narayanan Nair who held the document, Exhibit III. None of these persons was likely to tell them anything that would lead them to think that a fraud had been committed. Defendants' witnesses Nos. 1 and 2, of course, would not do so and Narayanan Nair naturally would not as he was to get his mortgage redeemed by them. The document itself (Exhibit III) which defendant No. 6 says he saw would tell him nothing. Even if he knew of the claim petition, this too would, I think, tell him nothing; on the other hand, the order allowing the claim would lead him to think that title of the claimants was good. I do not think that the defendants were bound to pursue the matter of the claim petition and ascertain what objections to the claim were raised by the decree-holder and unless they did this, they would not know the defect in their vendor's title.

5. In the result my finding is that the defendants Nos. 5 and 6 are *bona fide* purchasers for consideration and without notice of the fraud relating to Exhibit III.

This second appeal came on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—The lower Court was called on to find on the question whether the appellant (fifth and sixth defendants) were *bona fide* purchasers for consideration without notice of the fraud involved in Exhibit III. In returning its finding it has dealt separately

with the question whether the fifth and sixth defendants were *bona fide* purchasers and whether they had notice. The attempt to separate these two questions is not usually sound. For it is seldom possible to form an adequate or correct opinion of the conduct of a transferee without considering whether his good faith extends to his possession of actual or constructive notice, with reference to the whole circumstances of the case. It is, however, sufficient for us to deal with the portion of the finding which relates to the fifth and sixth defendants' possession of notice. For the lower Court has, in our opinion, entirely mistaken the legal position created by the facts.

The lower Court says that the fifth and sixth defendants would not, even if they made enquiries, have obtained information from the first and second defendants' witnesses or the mortgagee Narayanan Nair, because the first and second defendants' witnesses of course would not disclose any fraud, and Narayanan Nair equally would not do so, as he was to get his mortgage redeemed by them. The lower Court then goes on:—"The document which the defendant No. 6 says he saw would tell him nothing" and that may be correct. But then it goes further and says that the defendants were not bound to pursue the matter of the claim petition and ascertain what objections to the claim were raised by the decree-holder. This, in our opinion, is entirely wrong. The decree-holder, the person who was alleging fraud in connection with Exhibit III, was the person, to whom enquiries as to any objections to the title to the property would naturally be addressed, and he would certainly be in the best position to say what objections in the shape of fraud were available against the title. The lower Court says also that, even if the sixth defendant knew of the claim petition, that would tell him nothing; on the other hand, the order allowing the claim would lead him to think that the title of the claimants was good. This is an absolute misrepresentation of the effect of the order, Exhibit A; and, even if this were the only objection to the lower Court's finding, we should be unable to accept that finding on account of it. Exhibit A, after stating the facts and the case of the decree-holder as being that Exhibit III evidences a fraudulent

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lent and collusive transaction, goes on to say that the claimant must establish his case in a regular suit properly framed for the purpose. That statement is presumably made with reference to authority, as it then stood, that a transfer can be impeached as fraudulent, not by way of a plea in defence, but in a suit properly framed for the purpose. True, the next sentence in Exhibit A, is to the effect that the claimants have established a *bona fide* title to the properties, whatever that may mean. But it is clear that the effect of Exhibit A, as a whole, was simply to decide in favour of the continuance of the attachment and that the order did not, and indeed could not, do more than make the title to the attached property contingent on the result of the suit, if any, which might be brought within a year. That being the real effect of Exhibit A, and the possession being with the fifth and sixth defendants, they have on their own showing failed to make any enquiry of the person who could have given them the best information as to the defects in the title. We cannot hold that they were transferees in good faith without notice. We must, therefore, reject the lower Court's finding.

The result is, that the appeal fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

LAHORE HIGH COURT.**MISCELLANEOUS FIRST CIVIL APPEAL**

No. 2735 OF 1922.

March 27, 1923

Present:—Mr. Justice Abdul Raof.
UMRAO BAKHSH alias NOOR MUHAMMAD KHAN—OBJECTOR—APPELLANT
versus

Malik NUR MUHAMMAD KHAN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal, delay in filing—Sufficient cause—Appeal filed in wrong Court—Bona fide mistake.

Mere carelessness or oversight of the appellant or his Counsel in presenting an appeal in a wrong

Court, which by the exercise of due diligence could have been avoided, cannot be recognised as a sufficient reason for excusing the delay in filing the appeal in the proper Court under section 5 of the Limitation Act. [p. 735, col. 1.]

Sant Singh v. Qaim, 118 P. R. 1908 and *Sarat Chander Bose v. Saraswati Devi*, 34 C. 216; 5 C. L. J. 380, relied upon.

A legal adviser's mistake in order to justify an extension of the period prescribed for presenting an appeal, must be a *bona fide* one, and nothing can be deemed to have been done in good faith which is not done with due care and attention. [p. 734, col. 2.]

Ahmad Hassan v. Shams-ul-nisa, 45 Ind. Cas. 542; 10 P. L. R. 1918; 69 P. W. R. 1918 and *Resal Singh v. Shadi*, 43 Ind. Cas. 317; 95 P. R. 1917; 174 P. W. R. 1917; 13 P. L. R. 1918, followed.

Miscellaneous first appeal from an order of the Junior Subordinate Judge, Karnal, dated the 4th February 1922.

Lala Mool Chand, R. B., and Mr. *Ghulam Rasul*, for the Appellant.

Messrs. *Shamair Chand and Sagar Chand*, for the Respondents.

JUDGMENT.—This is an execution first appeal which has arisen out of proceedings in execution of a decree. A preliminary objection is taken to its hearing on the ground that it was presented beyond time and is barred by limitation. The following facts must be stated to show how the appeal has arisen:—

On the 14th June 1915 the Marwar Bank in liquidation obtained a decree for sale against one Sher Muhammad Khan for Rs. 11,702-12-2. On the 9th of August 1917 the Marwar Bank assigned the decree to Nur Muhammad Khan and Abdul Aziz, the balance then due under the decree being Rs. 7,000. The assignee executed the decree and sold the mortgage property and realised a part of the decretal money leaving a balance of Rs. 4,395 still due. For the recovery of this amount the house in dispute was attached. This execution was taken against Umrao Bahadur Khan and Muhammad Alam Khan, the sons and legal representatives of Sher Muhammad Khan, who had died in the meantime. They objected to the attachment of the house on the allegation that it did not belong to the deceased judgment-debtor, their father, but that it was their own exclusive property. These objections were disallowed by an order dated the 4th of February 1922, which is the subject-matter

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of this appeal. The objectors lodged an appeal against this order on the 1st of March 1922 in the Court of the District Judge of Karnal. The District Judge, by an order dated the 25th of August 1922 returned the memorandum of appeal, holding that the appeal did not lie to his Court and ought to have been presented to the High Court. Accordingly, the appeal was presented to this Court on the 16th of October 1922, long after the expiry of the period within which it ought to have been filed. Along with the memorandum of appeal an affidavit was filed explaining the delay which had taken place in presenting the appeal. In the affidavit it is stated that "the memorandum of appeal was handed over to the appellant on the 29th of August 1922, so that the appellant may present the same to the High Court and the appellant has not been negligent in the prosecution of the appeal in any way. I further swear that for about six months the appeal had been pending in the Court of the District Judge, Karnal, and that the appellant had no knowledge before this time that the appeal had to be presented to the High Court."

In reply to the preliminary objection Mr. Mool Chand, Counsel for the appellant, has contended that sufficient cause has been shown for the delay and that this Court should extend the period of limitation under section 5 of the Indian Limitation Act. I have to decide whether the cause shown is sufficient for extending the period of limitation under the said section. The only excuse put forward in the affidavit for not filing the appeal within time in this Court is that the appellants had no knowledge before the order of the District Judge returning the memorandum of appeal that it had to be presented to the High Court. Mr. Mool Chand has contended that in the warrant for attachment the amount of the decree was shown to be only Rs. 4,395 and this had led to the mistake of filing the appeal in the Court of the District Judge, Karnal. The following facts will show that there is no truth or substance in this explanation:—

(1). On the assignment of the decree to Nur Muhammad Khan and Abdul Aziz the latter applied to have their names substituted on the execution record in place

of Marwar Bank. Sher Muhammad Khan, the original judgment-debtor, objected to this application but his objection was overruled on the 4th of October 1917. Sher Muhammad Khan appealed to the Chief Court against the order overruling his objection. During the pendency of this appeal Sher Muhammad Khan died and the present appellants got their names substituted on the record in place of the name of their father and prosecuted the appeal which was eventually dismissed on the 22nd of March 1918.

(2) On the 16th of August 1918 the present appellants objected to the sale of the mortgaged property on the ground that it belonged to them, and that Sher Muhammad Khan had wrongly mortgaged it as his property and a decree for its sale had wrongly been passed. This application was presented by Mr. Baij Nath, a Vakil, at Karnal. It is necessary to mention this, because the same learned Vakil had also presented the appeal to the District Judge against the present order. On the 18th of December 1918 these objections were overruled. The appellants then presented an appeal to the Chief Court. This appeal was dismissed on the 14th of March 1919. The appellants then filed a suit for a declaration and valued their suit at Rs. 10,000 representing the amount of the decree. The suit was dismissed on the 11th of February 1920 and an appeal filed against this order is still pending in this Court.

(3) The mortgaged property was eventually sold, and on the 13th of December 1920 the sale was confirmed. Against this order the appellants filed an appeal to the High Court which was accepted on the 15th of March 1921, and the case was remanded for a re-decision. The Execution Court again decided against the objectors and the sale was again confirmed by an order made on the 14th of October 1921. The appellants again filed an appeal in the High Court which was dismissed in due course.

These facts clearly show that the appellants were perfectly aware that the valuation of the suit in which the decree under execution had been passed was over Rs. 5,000 and that an appeal in the execution proceedings would, therefore, lie to the High

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Court. They themselves from time to time had been appealing to the High Court against various orders passed against them and they could have been under no honest and *bona fide* mistake when filing the appeal to the District Judge. In the case of *Sarat Chander Bose v. Saraswati Debi* (1) a Division Bench of the Calcutta High Court, under circumstances almost similar to those disclosed in the present case, at page 218 made the following pertinent remark:—"Now, under section 21 of Act XII of 1887, an appeal from a decree or order of a Subordinate Judge lies to the District Judge, only when the value of the original suit in which or in any proceedings arising out of which, the decree or order was made, did not exceed Rs. 5,000, and the appeal lies to the High Court in all other cases. The test, therefore, which a litigant or his legal adviser has to apply when the *forum* of appeal in an execution case has to be ascertained, is what was the value of the original suit. It is not suggested in the affidavit, filed on behalf of the appellants, who are themselves Pleaders of distinction, that they were not aware, or misunderstood the effect, of this provision of the law; or that they had not materials before them sufficient to enable them to know the value of the suit. Indeed, the petition of objection, which they filed in the Court below on the 29th August 1905, furnishes ample evidence, that they had before them at that time, the decrees made by the Subordinate Judge and by this Court in the original suit; the first of these papers shows, on the face of it, that the value of the original suit was Rs. 15,260 while the second paper shows that the appeal against the original decree was preferred to this Court. It is manifest, therefore, that there was no reasonable excuse whatever for the mistake which, it is alleged, the appellants committed. In their affidavit it is stated, that as maintenance had been allowed by the decree at Rs. 108 per year, it did not strike the appellants and their legal advisers, that the value of the original suit was more than Rs. 5,000. This is obviously an indication that there was carelessness

on the part of the appellants; if they had looked into the papers, with the contents of which they appear to have been quite familiar, there would not have been any room for the erroneous impression. We are unable to hold, therefore, that the appellants have made out sufficient cause within the meaning of section 5 of the "Limitation Act."

I have taken the liberty of quoting this passage because every word of what was stated by the learned Judges of the Calcutta High Court applies with equal force to the facts of the present case. In fact, from the facts stated above it is clear that the appellants were fully aware of the nature of the suit and of the *forum* of the appeal. Curiously enough, the excuse put forward in the Calcutta case was also almost exactly the same as is put forward by Mr. Mool Chand in his arguments, namely, that the amount of the decree at the date of the present execution was shown below Rs. 5,000. In order to ascertain the *forum* of appeal, as remarked by the learned Judges of the Calcutta High Court, the appellants and their Vakils ought to have seen what the value of the original suit was. They have been doing this while filing appeals from previous orders to which I have referred. There is no reason why they should have made the mistake of filing the appeal to the District Judge. There was a gross negligence and carelessness both on the part of the appellants and that of their Vakils, Mr. Baij Nath, who appears to have been their legal adviser in all the previous proceedings as well. In the case of *Ahmad Hassan v. Shams-ul-nisa* (2). Mr. Justice Broadway held that, "a legal adviser's mistake, in order to justify an extension of the period prescribed for presenting an appeal, must be a *bona fide* one, and nothing can be deemed to be done in good faith which is not done with due care and attention." A similar rule was laid down in the case of *Resal Singh v. Shadi* (3). In the case of *Sant Singh v. Qaim* (4) a Division Bench of the Chief Court, under

(2) 45 Ind. Cas. 542; 10 P. L. R. 1918; 69 P. W. R. 1918.

(3) 43 Ind. Cas. 317; 93 P. R. 1917; 174 P. W. R. 1917; 13 P. L. R. 1918.

(4) 118 P. R. 1908.

(1) 34 C. 216; 5 C. L. J. 380.

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the circumstances exactly the same as in the present case refused to extend the period of limitation under section 5 of the Limitation Act, holding that "mere carelessness or oversight of the appellant or his Counsel in presenting an appeal in a wrong Court, which by the exercise of due diligence, could have been avoided, cannot be recognised as a sufficient reason for delay under this section." Cases might be multiplied in support of the proposition laid down in the cases already referred to, but it is not necessary to do so. In fact, the circumstances disclosed in the present case are much stronger than those disclosed in the rulings cited before me.

I am clearly of opinion that, under the circumstances established in this case, I will not be justified in extending the period of limitation under section 5 of the Limitation Act. I, therefore, hold that the appeal is barred by time and dismiss it with costs.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 56 OF 1921.

February 2, 1923.

Present.—Mr. Justice Phillips and
Mr. Justice Devadoss.

E. A. JANU SAIT—PLAINTIFF
—APPELLANT

versus

N. RAMASWAMI NAIDU—DEFENDANT
—RESPONDENT.

Contract Act (IX of 1872), ss. 23, 24—Rules framed by Government to control sale of certain goods in interest of public—Agreement to sell in contravention of rules—Public policy—Money paid under agreement, whether can be recovered—Fraud—In pari delicto potior est conditio possidentis, applicability of.

Under the rules framed by the Madras Government relating to control of import and transport of rice, the defendant obtained a license from Government under the terms of which he was forbidden to sell rice to wholesale merchants in the port of entry and was only allowed to sell to retail dealers approved by the Collector of the District. In violation of the terms of that license

the defendant entered into a contract for the sale of rice to the plaintiff who had notice of the rules and who was not an approved retail dealer within the rules. Plaintiff paid the purchase amount to defendant and the rice was delivered to the plaintiff, but, shortly after, the rice was commandeered by Government and plaintiff received only the actually controlled price which was far less than the amount paid by him to the defendant. In a suit by the plaintiff to recover the difference from the defendant as loss sustained by the fraudulent representations of the defendant:

Held, (1) that the contract being in contravention of the Regulations imposed by the Government in the interests of the country and of the general public was opposed to public policy and, under sections 23 and 24 of the Contract Act was void, and no claim could be legally based upon such a contract; [p. 737, col. 1.]

(2) that no claim could be based upon the fraud of the defendant apart from the contract, the plaintiff being aware of the conditions of the sale of rice; and that both parties being *in pari delicto*, the maxim *in pari delicto potior est conditio possidentis* applied, and the Court would not assist the plaintiff to recover in such a case. [p. 737, col. 1.]

Javerbhai Jorabhai v. Gordhan Narsi, 28 Ind. Cas. 442; 39 B. 358; 17 Bom. L. R. 259, Mathura Mohan Saha v. Ramkumar Saha, 35 Ind. Cas. 395; 43 C. 790, 23 C. L. J. 26; 20 C. W. N. 370, relied on.

Appeal against the decree of the Court of the Additional Subordinate Judge, Tanjore, in Original Suit No. 78 of 1919 (Original Suit No. 100 of 1919 Negapatam Sub-Court).

Messrs. T. Narasimha Iyengar and N. Srinivasa Chetty, for the Appellant.

Mr. S. Varadachariar, for the Respondent.

JUDGMENT.

Phillips, J.—The plaintiff and the defendant are both merchants of Negapatam and the plaintiff entered into a contract for the purchase of rice from the defendant on the terms of Exhibits A and A1. At the time when the contract was entered into, namely, July 19, the import of rice was controlled by Government and rules were framed in accordance with which alone import and transport of rice was permitted. The defendant obtained a license from Government to import certain rice from Burma and it was this rice which he agreed to sell to the plaintiff. The rice was delivered to the plaintiff, but, shortly afterwards, 2123 bags were commandeered by Government and the plaintiff received only the actual controlled price, whereas he had paid to the defendant a considerably larger sum. The balance

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of 1320 bags had already been re-sold by the plaintiff and Government took no action in regard to them. The plaintiff now claims damages for loss that he has sustained by this action on the part of Government and alleges that he sustained this loss owing to the fraudulent representations of the defendant.

A question has now been raised in appeal as to whether the plaint contract was not one that was void, as being (1) opposed to public policy and (2) illegal. The question was not raised in the pleadings in the lower Court, but it is evident from the Subordinate Judge's judgment that it was, at any rate, raised at the time of arguments, and when a question of this sort is raised, I think that a Court should take notice of it, even though it does not appear in the pleadings [*vide Scott v. Brown* (1)] and this case can, I think, be disposed of upon this ground. When the contract was entered into, the defendant, under the terms of his license, Exhibit III, was forbidden to sell this rice to other wholesale merchants in the port of entry and he was only allowed to sell to retail dealers in the port of entry who were approved by the Collector of the District. Admittedly, the plaintiff was not one of those approved dealers and he was a wholesale merchant. Thus, these restrictions have been contravened by the sale to the plaintiff. It is contended for the plaintiff that he was not aware of these restrictions, and the lower Court has found in somewhat peculiar language that "there is no doubt that defendant was a party *in pari delicto* so far as his obligations were concerned to the Director of Civil Supplies * * *. But there are no convincing circumstances to show that plaintiff was aware on the date of the suit contract, that defendant was committing a breach of a legal duty by entering into the suit transaction * * * and I am not prepared to hold that both the parties are *in pari delicto* though one of them is and that is the defendant." It is unnecessary to discuss here whether a contract would only be void if the plaintiff entered into it, knowing that it was in breach of public policy, or illegal for I think that, in the evidence on record, there is sufficient to establish plaintiff's knowledge.

(1) (1892) 2 Q. B. 724; 61 L. J. Q. B. 738; 4 R. 42; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213.

The contract, Exhibit A, reads as follows:—"I have settled price with you at the Controller's rate for the rice coming for me by the Viravu Steamer and marked 'N. R.' If perhaps the Madras Director of Supplies should ask the said bags from me and if I should have to give the bags to him, I shall return to you the money you have given me with one per cent. interest." Similar conditions appear in the counterpart executed by the plaintiff to the defendant Exhibit A1. The rates are not specified in these two documents, but a separate document bearing the same date was written by the defendant to the plaintiff in which the rates of the various kinds of rice are set forth. It is plaintiff's case that these were the agreed rates, he being informed by the defendant that they were the Controller's rates; but the defendant states that these rates were only given by him approximately as he did not know the exact rates fixed by the Controller until the 15th of July. On this point I think it is clear that the plaintiff's case is correct and that the rates were agreed upon as per Exhibit B. The defendant knew that he was not allowed to sell to the plaintiff and naturally would want some higher profit than the four annas a bag allowed to him by Government, and, if he entered into such a contract, he would naturally fix the prices at something higher than the controlled rates. Plaintiff being a big merchant in the place, must have known that he could not purchase rice except by permission from Government and, therefore, he was probably very willing to pay defendant these higher rates in order to secure the rice; when there was control of rice imports and rice sales set up in Negapatam as in other places, it is impossible to believe that the plaintiff, who was himself a big rice merchant, did not know these facts. The mention in the contract of the possibility of the rice being taken by the Director of Civil Supplies is quite sufficient to put him upon notice of the control and of the various regulations which had been prescribed with reference to the sale of rice. The plaintiff's contention that he did not know that the rates in Exhibit B were not controlled rates is somewhat futile, for no man of reasonable prudence would have entered into such a large contract without taking some steps to ascertain what were

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the proper rates and it is unlikely that he would have been content with this simple document, Exhibit B. If the plaintiff was aware of the conditions governing the sale of rice, conditions which had been enacted by Government for the good of the country generally; it is obvious that, in entering into this contract in contravention of those conditions, the plaintiff knew, that he was inducing the defendant to sell the rice to him, and that such sale was undoubtedly opposed to public policy; if not actually illegal. No evidence has been let in to show what were the actual Notifications of Government at the time, or whether the license, Exhibit III, was based upon those Notifications; and, therefore, it is perhaps doubtful whether the contract was actually opposed to law, but, when it was in contravention of regulations imposed for the good of the country and the general public, it is clear that the contract was opposed to public policy. Under sections 23 and 24 of the Contract Act the contract is, therefore, void and the plaintiff can base no claim upon it.

It is, however, contended that his action is not based upon the contract but upon the fraud of the defendant; but, even if such fraud had been established and I have held above that I do not think it has been — the plaintiff must have been aware of the conditions governing the sale of rice when he entered into the contract and this plea would still not be good; for, even if the claim is based upon fraud, there can be no claim apart from the contract. When both parties are *in pari delicto* the maxim *in pari delicto potior est conditio possidentis* applies and the Courts will not assist the plaintiff to recover in such a case.

If it were necessary to do so, I would hold that the payment by the plaintiff of the sum of Rs. 3,000 on the 21st of July to the defendant is proved. The lower Court has, no doubt, found that it is proved, but unfortunately only one of the plaintiff's accounts was translated in that Court and, although plaintiff's witness No. 3 in the witness-box produced the accounts and on reference to them mentioned details, the lower Court has held that there was no corroborative proof. We have the evidence not only of the plaintiff's but of plaintiff's witness No. 3 as to the payment and it is strong-

ly corroborated by the plaintiff's accounts which there seems to be no reason to distrust. His omission to examine two of the defendant's *gumastahs* to whom the money was paid cannot have much importance, for although they are said to have left defendant's service, one would have expected defendant to examine them to contradict the alleged payment to them. There is also considerable ground for suspecting the truth of the defendant's accounts, but as this point is not necessary for the determination of the appeal, I will not go into this question in detail but merely state that I consider that the payment of Rs. 3,000 is proved.

The plaintiff's suit must, however, fail and this appeal be dismissed, considering defendant's conduct, each party will bear his own costs.

Devadoss, J.—The plaintiff appeals against the decree of the Temporary Subordinate Judge of Tanjore who dismissed his suit. The plaintiff's case as disclosed in the plaint is that he contracted with the defendant to buy 300 bags of rice at prices noted in Exhibit B; that he incurred certain charges for removing the bags of rice from the wharf to his godown; that a good portion of the rice was commandeered by the Director of Civil Supplies, Madras, and that he sustained loss thereby, and the defendant being guilty of fraud is liable for the loss sustained by him. The defendant's case is that the plaintiff contracted with him to buy imported rice at the rate fixed by the Director of Civil Supplies; that he paid only the price of the rice supplied less a small amount; that he gave delivery at the wharf; that he is not guilty of any fraud, and that he is not liable to make good any loss the plaintiff may have sustained by a portion of the rice sold being commandeered by the Director of Civil Supplies.

The main contention urged by the appellant is that a sum of Rs. 3,000 paid by him on 21st July, 1919 was not given credit to in the defendant's books. According to his case he paid a sum of Rs. 48,996 and the defendant admits all the payments but a sum of Rs. 3,000. The question is whether this sum was paid by the plaintiff to the defendant on 21st July 1919. The plaintiff's evidence is that it was paid to the defendant's clerks on the 21st July 1919 in two sums Rs. 1,000 and Rs. 2,000

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and he is corroborated by his accounts. The defendant's books do not show the receipt of Rs. 3,000. In order to determine whether the amount was paid by the plaintiff or not, we have to see what the rates at which plaintiff contracted to buy the rice imported by the defendant were. If the contract rates were those mentioned in Exhibit B, the plaintiff's case is rendered very probable. In this connection a few facts have to be remembered. At that time there was rice control in this Presidency. The defendant was given a permit or license by the Director of Civil Supplies, Madras, to import rice from Rangoon and, according to the terms of the license, Exhibit III, he could sell only to licensed dealers at the rates fixed by him, and should not sell to any wholesale merchant in Negapatam. The plaintiff was not a licensed dealer and was not authorised to import rice and he could not buy rice in Negapatam from any licensed dealer as he is a wholesale merchant, and according to the terms of the license granted by the Director a wholesale merchant could not buy in Negapatam, rice imported by any rice dealer. Therefore, he must have consented to pay a higher price than the Director's price in order to secure a large quantity of rice which he could sell at a considerable profit.

The defendant having sold to the plaintiff who is not a licensed dealer in contravention of the terms of Exhibit III, the Director of Civil Supplies ordered the forfeiture of the deposit of the Rs. 5,000 made by the defendant and the defendant petitioned the Director as will be seen from Exhibit XII, to reconsider his case and to pass orders cancelling the order of forfeiture by trying to make out that he was not guilty of wilful breach of the conditions of the license. In these circumstances, it is unlikely that he would admit that he sold the rice at the prices mentioned in Exhibit B. His explanation is that Exhibit B gives only tentative prices in order to enable the plaintiff to have the money ready to be paid as soon as the ship bringing the rice arrived in port. Exhibit A is the contract signed by the defendant and Exhibit A1 is the counter-part signed by the plaintiff. If the defendant's case is true, he could very well have mentioned in Exhibit B, that

these prices were only tentative prices and the real prices would be those fixed by the Controller. If his case were true, why was not Exhibit B made a part of Exhibit A or Exhibit A1? It is on a separate sheet of paper which could be suppressed if the parties wished. His explanation, therefore, that these prices were only tentative prices cannot be accepted, and from the conduct of the parties it is quite clear that Exhibit B contains the real contract prices as settled between them, for it is unlikely that the plaintiff would have paid a large sum of money, nearly amounting to half a lakh of rupees, without ascertaining what the prices fixed by the Director were.

Considerable argument was advanced as regards the state of accounts of the defendant. There is a sum of Rs. 3,000 credited on 21st July 1919 in his books for which he does not give a satisfactory explanation. His evidence on that point is very unsatisfactory and, therefore, I have no hesitation in holding that Rs. 3,000 was paid to him by the plaintiff on the 21st of July 1919.

The next point argued is as regards the charge incurred by the plaintiff for removing the bags of rice from the wharf to his godown. The agreement is silent as to the place of delivery. It is not clear why the plaintiff should have paid the charges for removing the bags from the wharf without requiring the defendant to deliver the goods at his godown, or asking him to meet the costs of the removal. There is nothing in the documents to show that the defendant undertook to bear the charges of carting the rice from the wharf to the plaintiff's godown. The plaintiff not being a licensed dealer and knowing he was violating the terms of the license, Exhibit III, he was anxious evidently to remove the bags as soon as they were landed and it is likely that he took delivery at the wharf. There is evidence on the side of the plaintiff that the delivery was to be at the wharf. Whether that was so or not, the plaintiff volunteered the payment of the charges for the removal of the rice from the wharf to his godown and he cannot in law claim them from the defendant.

He claims damages on the ground of loss caused by the rice being commandeered by the Director of Civil Supplies, and his being paid a sum not less than that con-

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tracted for by him. It is unnecessary to deal with this question at length in the view I take of the questions of law in this case. Two questions arise for consideration in this case: (1) Is the contract entered into by the plaintiff with the defendant legal or not? and (2) if it is illegal, can the plaintiff get back the amount paid by him? the defendant evidently did not plead the illegality of the contract as he was trying to get back from the Director of Civil Supplies the amount of deposit made by him for obtaining the license, Exhibit III, which that officer had directed to be forfeited. It is urged by the appellant that this point was not raised before the lower Court. There is some indication in the judgment of the learned Subordinate Judge that this question was argued before him. Otherwise, I fail to see how he could have referred to *Nathu Khan v. Sewak Koori* (2),³ and distinguished it from the present. Whether the point was specifically raised in the lower Court or not, this Court has to see whether the plaintiff should be given any help in getting back the money which he paid under a contract which is illegal, as being opposed to public policy. In *Scott v. Brown* (1) the Court of Appeal held that a contract between two parties for the purchase of shares in order to induce other persons to buy shares believing that the shares were selling at a premium when there was no *bona fide* market for them was an illegal transaction and could be made the subject of an indictment for conspiracy and no action could be maintained in respect of such agreement or purchase of shares. Lindley, L. J., observed at page 728, "no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment

of Lord Mansfield in *Holman v. Johnson* (3).⁴ The facts appearing in the evidence in this case being clear, namely, that the defendant was not authorised to sell to the plaintiff and that he was not authorised to sell at rates higher than those fixed by the Director of Civil Supplies, and the plaintiff was not a person licensed to buy wholesale at Negapatam controlled rice, I have no hesitation in holding that the contract is an illegal one, as being opposed to public policy. The next question is whether the plaintiff should be helped by the Court in getting back the money paid in execution of an illegal contract. No doubt in this Court the respondent relied upon the illegality of the contract in resisting the appellant's claim. His contention is that he is entitled to get relief on the ground that he does not seek to enforce the terms of the contract but only to get back money paid by him to the defendant for a consideration which failed. In *Javerbhai Jorabhai v. Gordhan Narsi* (4) certain alienations were made in contravention of the Bhagdari and Narwadari Tenures Act and the High Court held that, though the alienations were illegal and void as contravening the terms of the Act, yet the money advanced for the alienation could be recovered. Though at first sight it may appear that the case supports the plaintiff's contention, yet, on a close perusal of the judgment, it would be clear that the learned Judges rest their decision on a separate covenant whereby the mortgagor undertook to repay to the plaintiff the amount lent. At page 366* the learned Judges observe: "But there still remains the question whether the plaintiff is not entitled to recover for breach of a separate covenant contained in the deed of mortgage. That covenant was passed by the defendant-mortgagors in the following terms:—'If there should be any hindrance or obstruction concerning the house, or if the house should be taken out of your possession, then we and our property and our heirs and representatives are liable for any loss you may suffer and for your moneys advanced'.... Here the covenant covers as well the cases where hind-

(3) (1775) 1 Cowp. 341; 98 E. R. 1120.

(4) 28 Ind. Cas. 442; 39 B. 358; 17 Bom. L. R. 259.

*Page of 39 B.—[Ed.]

(2) 9 Ind. Cas. 161; 15 C. W. N. 408.

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france or obstruction should occur, in taking possession as the case where possession, after having once been obtained, is afterwards taken away from the purchaser." In the present case there is no separate covenant for the return of any money that may be due to the plaintiff as the difference between the price that might be paid by the Controller of Civil Supplies and the contract price. Whether such a contract would be legal or not it is unnecessary to consider as there is none set up in this case. The next case relied upon by the appellant is *Mathura Mohan Saha v. Ramkumar Saha and Chittagong District Board* (5), where it was held, that "where a Corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons natural and artificial; if one obtained the money, or property of others, without authority, the law, independently of express contract, will compel restitution or compensation." In that case there was no performance of the contract entered into by the Corporation and the learned Judges held that "the relief is granted not upon the illegal contract nor according to its terms, but on an implied contract by the Corporation to return or, failing to do that, to make compensation for property or money which it has no right to retain." In the present case the contract was fully performed by the plaintiff taking delivery of the 300 tons of rice contracted for and he only claims compensation for the difference in price between that paid by him to the defendant and that paid to him by the Director of Civil Supplies. In the first place, there is no covenant by the defendant to make good any loss that might occur to the plaintiff by the rice being commandeered, and in the next, the contract has been fully performed. The plaintiff contracted to buy at the rates mentioned in Exhibit B and paid accordingly. The Director of Civil Supplies commandeered the rice as he was entitled to do and paid the plaintiff its price according to the terms of the license under which the rice was imported. The case might be different if the rice had been commandeered

before the plaintiff took delivery, but when once the contract is completed by delivery, it is difficult to understand how the plaintiff could seek relief against the defendant on the ground that the Director of Civil Supplies commandeered the rice from him. He no doubt relies on the alleged fraud of the defendant in not disclosing the contents of Exhibit I by which the Director of Civil Supplies informed the defendant to hold the goods at his disposal as the shipment was under the license granted to him. Granting that Exhibit I was not shown to the plaintiff, he has no reason to complain. Exhibit I does not import a new condition which is not to be found in Exhibit III. It cannot be contended with any show of reason that the plaintiff was unaware of the contents of Exhibit III. Exhibit III makes it clear that the licensee should hold the quantity imported at the disposal of the Director and the explanation of the clause "that the whole rice imported on this license must be placed at the disposal of the Government" is, that "it can only be sold to merchants or dealers selected or approved, by the Director of Civil Supplies, or some one authorised by him in this behalf." That being so, Exhibit I does not import any new term or put any restriction upon the defendant with regard to his dealing with the imported rice, which was not contained in Exhibit III. It is, therefore, not clear how the plaintiff could contend that the defendant is responsible for the loss sustained by him, by the non-disclosure of the contents of Exhibit I. In *Srinivasa Aiyar v. Sesha Iyer* (6), it was held that "a marriage brokerage agreement is unlawful and void and brokerage paid thereunder is recoverable if the agreement or a substantial part of it is not performed." Oldfield, J., relies upon *Taylor v. Bowers* (7) and observes, "the exception to the general rule, based on the absence of any or of any substantial performance, is clearly recognised without reference to the distinction proposed in a case later than the majority of those relied on by

(6) 41 Ind. Cas. 783; 41 M. 197; 6 L. W. 42; 34 M. L. J. 282.

(7) (1876) 1 Q. B. 291; 45 L. J. Q. B. 163; 34 L. T. 938; 24 W. R. 499.

(5) 35 Ind. Cas. 305; 43 C. 790; 23 C. L. J. 26; 20 C. W. N. 370.

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the learned Judges, in *Taylor v. Bowers* (7) in which the object of the agreement a fraud on creditors would, if persisted in, have resulted in the frustration of the Insolvency Law." The learned Judges gave relief to the plaintiff on the ground that the agreement or a substantial portion of it was not performed. In the case of *Taylor v. Bowers* (7), the facts were "the goods were made over to Alcock for the purpose of defrauding the plaintiff's creditors. But they were made over by Alcock to the defendant without the plaintiff's authority; and not in furtherance of the fraudulent purpose for which they had been assigned to him. And while the fraud on the plaintiff's creditors originally contemplated remained wholly unaccomplished, the plaintiff repudiated what had been done, and claimed to have the goods restored to him, which done, they would have been again available to the creditors." Cockburn, C. J., held: "Now it seems to us well established that where money has been paid, or goods delivered, under an unlawful agreement, but there has been no further performance of it, the party paying the money or delivering the goods may repudiate the transaction, and recover back his money or goods." In the present case, as I have observed, there has been a complete performance of the contract and the case in *Srinivasa Aiyar v. Sesha Iyer* (6) does not help the appellant. In *Bhikambhai v. Hiratal* (8) there was a condition in a lease of tolls that the lessee should not sub-let the tolls without the permission of the Collector. The plaintiff, the lessee, sued the defendant, the sub-lessee, for certain moneys due to him under the sub-lease. The defendant contended that the contract was void and no money was recoverable. The learned Judges held that the restriction as regards the sub-lessee was in the interests of revenue and not for the benefit of the public. They observe at page 625: "The Act imposing tolls is an Act passed for the benefit of the revenue and not an Act for the protection of public morals such as the Abkari and Opium Acts are in this country and the Licensing Acts are in England, and to which different considerations apply." They

gave a decree to the plaintiff on the ground that the defendant was liable to make good the amount due to the plaintiff. But here the rice control was established during War conditions and was continued for the benefit of the public after the War was over on account of the economic conditions prevailing then and it cannot be, therefore, contended that the control was in the interests of revenue and the violation of the rule would not stand in the way of the plaintiff getting relief. It is not suggested for the appellant that the rules under which rice was imported from Rangoon were *ultra vires* or that the rice control was not under proper statutory provisions. Under the Ordinance, promulgated, during the War and afterwards, rice control was established in various parts of the country and the Director of Civil Supplies, Madras, was authorised to issue permits and licenses and the licensees or permit-holders could only deal according to the terms of the license. The rice control was for the benefit of the public and any violation of the rules is opposed to public policy. It is unnecessary to notice all the cases relied upon by the parties as it is quite clear that the Court should not render its aid for the purpose of helping the plaintiff and get back money which he paid under a contract, which was opposed to public policy and, therefore, void. In this case, the contract has been fully completed and the plaintiff who seeks relief on the ground of fraud is not entitled to it, as I find on the evidence that he was not deceived as regards the terms of the license and his conduct in getting rice without a license to buy in Negapatam, was in violation of the rules framed in the interests of the public. This point is fatal to the plaintiff's case and he is entitled to no relief. The defendant's conduct was grossly improper in having sold the rice imported by him under the license granted by the Director of Civil Supplies to an unlicensed person and, therefore, he is not entitled to his costs.

The appeal is dismissed and, in the circumstances of the case, both parties should bear their own costs.

W. N. V.

Appeal dismissed.

(8) 24 B. 622; 2 Eom. L. R. 483; 12 Ind. Dec. (N. S.) 944.

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LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 885 OF 1918.

February 12, 1923.

Present.—Mr. Justice Broadway and Mr. Justice Zafar Ali.

BHAGWAN DAS—PLAINTIFF—APPELLANT

versus

Musammat PARBATI AND OTHERS—
DEFENDANTS—RESPONDENTS.*Hindu Law—Joint family—Separation in food, residence and worship—Partition—Presumption—Enjoyment of family properties by divided member—Ouster—Partial partition.*

From the separation of the members of a joint family in food, residence and worship, owing to the fact that in order to manage the family business and property at different places the members had to go to and to live in those places separately, it does not necessarily follow that the family had divided. [p 744, col. 2.]

Where a member of a Hindu family who is divided in status from the other members is in enjoyment of a portion of the family properties, while other members enjoy other portions, he is not, in law, excluded and ousted from these other portions, so as to disentitle him to his share of those portions, however, long may be their enjoyment by others. [p. 745, col. 1.]

Kumarappa Chettiar v. Saminatha Chettiar, 52 Ind. Cas. 470; 42 M. 431; 36 M. L. J. 612; (1919). M. W. N. 328, relied upon.

A family may remain joint with regard to some properties after a separation in regard to the others. Therefore, the mere fact that there has been a partial partition of the family property does not effect the rights of the parties to sue for partition in regard to other properties which remained undivided. [p. 745, col. 1.]

Ajodhya Pershad v. Mahadeo Pershad 3 Ind. Cas. 9; 14 C. W. N. 221, *Gavrishankar Paraburam v. Atmaram Rajaram* 18 B. 611; 9 Ind. Dec. (N. S.) 916, *Purushottam v. Atmaram Janardan*; 23 B. 597; 1 Bom. L. R. 76; 12 Ind. Dec. (N. S.) 399, *Muthusami Mudaliar v. Nallakulantha Mudaliar*, 18 M. 418; 6 Ind. Dec. (N. S.) 640, relied upon.

First appeal from the decree of the Subordinate Judge, First Class, Hissar, dated the 28th November 1917.

Bakhshi Tek Chand, for the Appellant.
Pandit Nanak Chand and Mr. *Rustomjee*, for the Respondents.

JUDGMENT.—This first appeal arises out of third suit for partition of the properties which once belonged to the joint family composed of Paras Ram, a Jaini Mahajan of Sirsa, and his five sons, (1) Dilsukh, (2) Gaja Nand, (3) Dhan Raj, (4) Balmokand and (5) Lakhmi Chand. The home of the family was at Sirsa but different members of it kept shops and carried

on business at Sirsa, Fazilka, Anupgarh and Minchinabad, respectively. The latter two towns are in Native States. The estate of the family consisted of immovable properties situated in all these towns and also of moveables and outstandings relating to the shops at these places.

Paras Ram died in Sambat 1952. None of his five sons had male issue. Dilsukh (1) died in his lifetime in Sambat 1940. Bhagwan Das, plaintiff, is his adopted son. Ram Kishan, who figures as defendant No. 3, was the adopted son of Lakhmi Chand (5). Gaja Nand (2) died in 1908 or 1909 without adopting any one, but his remaining two surviving brothers have left adopted sons.

The first suit for partition was instituted in 1910 by Ram Kishan, and a preliminary decree was passed in his favour in 1911 declaring him entitled to $\frac{1}{4}$ th share in the family estate. But before actual partition the parties made a compromise in 1912 according to which some properties were agreed to be partitioned and the rest were left joint. Gaja Nand had died prior to the suit.

The second and third suits were both instituted in the Court of the Subordinate Judge, Hissar, on the 21st November and 1st December 1915; respectively—the one by Bhagwan Das and the other by Ram Kishan. The two surviving sons of Paras Ram and the adopted sons of their deceased brothers were impleaded as defendants in both. Bhagwan Das and Ram Kishan admitted each other's claims which shows that they were acting in concert though they elected to sue separately. Ram Kishan's suit was dismissed by the First Court and his appeal to the District Judge was also dismissed. He came in second appeal to this Court and we, by our recent judgment dated the 17th January 1923, accepted his appeal, set aside the orders of the Courts below and directed that a preliminary decree be passed against Bhagwan Das holding him responsible for the rendition of the accounts of the property in suit. We held in that case that "the jointness of this family came to an end in 1912 but that it was specifically agreed that certain property should continue to remain joint as before and that the British Courts had jurisdiction to deal with the suit as instituted including the im-

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moveable property situated in Native States."

On the pleadings of the parties the lower Courts settled the following issues:—

(1) Has not this Court jurisdiction to entertain a suit for partition in respect of the property situate at Anupgarh, Minchinabad and Fazilka?

(2) Is the plaintiff's suit in respect of the whole or any portion of the property in suit barred by time?

(3) What is the extent of the plaintiff's share in the property in suit?

(4) Are the two shops and house, situate at Sirsa, and entered in the plaintiff's list as Nos. 6, 7 and 8 liable to partition and is plaintiff entitled to a share?

(5) Is not the plaintiff entitled to a share in the sale proceeds of the joint family property at Fazilka?

(6) Is not the plaintiff entitled to a share in the private property of Gaja Nand, deceased?

(7) If so, is the suit in respect of Gaja Nand's property within time?

(8) Should all or any portion of the property entered in the defendant's list of date (showing property held by the plaintiff) be included in the suit for partition?

The findings arrived at by the lower Court were:—

(1) That the Court had no jurisdiction in respect of the immovable properties situated in Native States but had jurisdiction with regard to moveable property even if it was beyond the limits of British India.

(2) That though the family had ceased to be joint, the members thereof remained co-owners of the family estate; that, therefore, the defendants' possession was not adverse to plaintiff but that his claim to moveable property was barred by time because Art. 127 of the First Schedule to the Limitation Act of 1908 was not applicable to his suit.

(3) That the plaintiff was entitled to 1/3rd share in the family estate.

(4) That shops Nos. 6 and 7 and house No. 8 belonged to the joint family but that plaintiff's claim with regard to the house and shop No. 7 which had been sold was barred by time.

(5) That his claim to Fazilka property was untenable and was barred by time.

(6) That his claim to Gaja Nand's property was barred by time.

Upon these findings the lower Court passed a decree to the effect "that the plaintiff be given by partition 1/3rd of houses Nos. 1 and 3-6 and that plaintiff shall bring into the hotchpot Rs. 2,000 received by him by sale of a shop at Minchinabad."

Both the parties have appealed each to contest the findings in favour of the other. But the question most strenuously argued before us is that of limitation. Mr. N. C. Pandit contended on behalf of the defendants that, as it was admitted that the family was not joint at the time of the suit, the *onus* of proving that it was joint within 12 years before that was on the plaintiff; that not only had he failed to discharge that *onus* but that there was evidence on the record to the contrary proving that he had been turned out and excluded from the family property for more than 12 years. He cited and relied upon *Ram Ghulam Singh v. Ram Behari Singh* (1), *Obhoy Churn Ghose v. Gobind Chunder Dey* (2), *Sham Lal v. Chhajju Mal* (3), *Mehr Singh v. Devi Dyal* (4), *Bala Bux v. Rukhmabai* (5), *Budha Mal v. Bhagwan Das* (6), *Raghunath Bali v. Maharaj Bali* (7), *Vishnu Ramchandra v. Ganesh Appaji* (8), *Banoo Tewary v. Docna Tewary* (9), *Jaggivandas v. Bai Amba* (10); and Trevelyan's Hindu Law, II Edition, page 216.

(1) 18 A. 90; A. W. N. (1895) 234; 8 Ind. Dec. (N. S.) 765.

(2) 9 C. 237; 7 Ind. Jur. 361; 6 Shome L. R. 51; 4 Ind. Dec. (N. S.) 808.

(3) 19 Ind. Cas. 51; 31 P. W. R. 1913; 76 P. L. R. 1913.

(4) 13 Ind. Cas. 50; 38 P. R. 1912; 32 P. W. R. 1912; 19 P. L. R. 1912.

(5) 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470.

(6) 86 P. R. 1886.

(7) 11 C. 777; 12 I. A. 112; 4 Sar. P. C. J. 642; Rafique & Jackson's P. C. No. 90; 5 Ind. Dec. (N. S.) 1277.

(8) 21 B. 325; 11 Ind. Dec. (N. S.) 220.

(9) 24 C. 309; 12 Ind. Dec. (N. S.) 873.

(10) 25 B. 362; 3 Bom. L. R. 47.

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But we are of opinion that the evidence on the record establishes that the family remained joint till 1910 when Ram Kishen brought his first suit for partition, and that the fact and circumstances from which the lower Court drew the conclusion that plaintiff has separated from the family are insufficient to support it. These facts may be considered one by one.

(1) In a deposition before the District Judge, Minchinabad, Bhagwan Das, plaintiff, stated as below on the 19th March 1906 :—

"I was adopted in Sambat 1940 or Sambat 1941. At that time Dilsukh was not alive. Paras Ram recognized me as the adopted son of Dilsukh * * * * *. The defendant (Balmokand) and his brothers denied the factum of my adoption from Sambat 1958. I had lived with them up to that time and I had a joint board with them. *I have ever since been residing in the joint shops of the defendant and his brothers at Anupgarh.*"

This statement clearly shows that, though after the death of Paras Ram his sons Balmokand and others denied plaintiff's adoption, he continued to enjoy his rights as the adopted son of Dilsukh, and this was undoubtedly true because it is admitted even now that he had been in possession of the family property at Anupgarh and Minchinabad. If he was turned out from the family residence at Sirsa in Sambat 1965 or 1966 it does not follow that he had ceased to be a member of the family especially when he was allowed to carry on the branch of the family business at Anupgarh and to enjoy possession of the family property there and elsewhere.

(2) Though disputes arose between Bhagwan Das and the other members of the family in 1902 or 1904 it does not indicate that disruption of the family was the inevitable consequence thereof. On the other hand, the fact that all the members, including Bhagwan Das, jointly obtained a decree for Rs. 3,650-0-0 against Ujjain Singh indicates clearly that they were joint. (The post-card printed at page 38 of the paper-book was not proved, and, therefore, should not have been taken into consideration by the Court below.)

(3) The document printed at page 39 of the paper-book which is referred to as

an award of certain arbitrators effecting partition of property among the members of the family is neither an award nor an instrument of partition, but is merely a statement of the arrangement made to pay certain debts due by the family firm.

(4) Some members of the family individually brought or defended suits, and acquired or sold properties, but as the family owned property and had branches of its business in different towns, the member representing the family at each town, could do all these things.

A complete reply to this theory of early disruption is, that in the suit of 1910 to which all the members were parties the family was stated to be joint. The lower Court referring to that suit observed :—

"It is true that in the litigation of 1911-1912 it was held that the property of the family was joint and partible, but this finding is to be distinguished from holding that the parties then constituted a joint Hindu family."

But not only the property of the family was held to be joint and partible, but the family itself was stated to be joint, because the District Judge wrote in his judgment dated the 23rd February 1911 (page 19 of the paper-book) that the plaintiff Ram Kishen being a member of the joint family is to get $\frac{1}{4}$ th share. Therefore, it is quite clear that not only the property but the family also was joint till 1910.

From the separation of the members of the family in food, residence and worship it does not follow in this particular case that the family had divided because in order to manage the family business and property at different places the members had to go to, and live in those places separately. But even if it be conceded for a moment that in consequence of the difference that arose among the members after the death of Paras Ram, the family ceased to be joint in the true conception of that term, still the members thereof, as found by the Court below, remained co-owners of the family property and business, and each member was managing the business and possessing the property at each particular place on behalf of the rest.

Such being the facts, it could not be said that plaintiff had been excluded from the family property for 12 years, and Article

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127 of Schedule I to the Limitation Act was clearly applicable to his suit. As disruption of the family took place in 1912 his claim to a share in the immoveable as well as moveable properties was within time. On this point may be referred to *Kumarappa Chettiar v. Saminatha Chettiar* (11) *Muthusami Mudaliar v. Nallakulantha Mudaliar* (12), *Gavrishankar Parabhuram v. Atmaram Rajaram* (13), *Ajodhya Pershad v. Mahadeo Pershad* (14), *Gajraj Singh v. Sadho Singh* (15), which were cited by Mr. Tek Chand on behalf of the plaintiff. In *Kumarappa Chettiar v. Saminatha Chettiar* (11) it was held that when a member of a Hindu family who is divided in status from others is in enjoyment of a portion of the family properties while the others enjoy other portions, he is not in law excluded or ousted from those other portions, so as to disentitle him to his share of those portions, however long their enjoyment by others. In *Ajodhya Pershad v. Mahadeo Pershad* (14), which is a judgment of a Division Bench of the Calcutta High Court, the following were the conclusions arrived at by a reference to *Gavrishankar Parabhuram v. Atmaram Rajaram* (13), *Purushottam v. Atmaram Janardan* (16) and *Muthusami Mudaliar v. Nallakulantha Mudaliar* (12):—

“A family may remain joint in regard to some properties after a separation in regard to the others. Therefore, the mere fact that there had been a partial partition of the family property does not affect the rights of the parties to sue for partition in regard to other properties which remained undivided.

“Twelve years’ limitation applies to a suit for partition in regard to the properties which remained joint under Article 127 of Schedule II of the Limitation Act, 1877.”

If the defendants acquired any properties before the disruption of the family they did so on behalf of the family, and if they alienated any property they have to account for the sale proceeds thereof to plaintiff. Therefore, the decision of the

Court below relating to shop No. 6 is correct.

As regards the price of shop No. 7 and house No. 8 sold by the defendants, and the property of Gaja Nand which came into their possession after his death, they are bound to pay to plaintiff his share therein or to account for it otherwise.

It was too late to deny plaintiff's status as the adopted son of Dilsukh in the grounds of appeal, when, ever since the death of Paras Ram, he had been treated as his adopted son.

As regards the account-books it is clear that each member was in possession of the account-books of the place where he lived and carried on business. So Bagwan Das, plaintiff, must produce the books of Anupgarh, and the defendants those of other places.

The result is, that the defendant's appeal fails and is dismissed with costs, while that of the plaintiff is accepted with costs and, modifying the judgment and decree of the Court below, we direct that Court to frame, in the light of our findings stated above a preliminary decree for partition and rendition of accounts in his favour for plaintiff's 3rd share in the properties referred to above. The plaintiff will also be bound to produce account-books, and account for the properties or moneys that are in his possession.

Z. K.

Order accordingly.

MADRAS HIGH COURT,

CIVIL MISCELLANEOUS PETITION NO. 2076 OF 1922.

February 9, 1923.

Present :—Mr. Justice Odfield and Mr. Justice Venkatasubba Rao.

Sri Sri RAMACHANDRA DEO
MAHARAJULANGAR MAHARAJAH OF
JEYPORE—PETITIONER

versus

Sri RAJAH CHETRUCHERLA GANGA-
RAJU AND OTHERS—RESPONDENTS.

Government of India. Act (5 & 6 Geo. V, C. 61).

(11) 52 Ind. Cas. 470; 42 M. 431; 36 M. L. J. 612; (1919) M. W. N. 328.

(12) 18 M. 418; 6 Ind. Dec. (N. S.) 640.

(13) 18 B. 611; 9 Ind. Dec. (N. S.) 916.

(14) 3 Ind. Cas. 9; 14 C. W. N. 221.

(15) 16 Ind. Cas. 882; 15 O. C. 397.

(16) 23 B. 597; 1 Bom. L. R. 76; 12 Ind. Dec. (N. S.) 399.

MAHARAJAH OF JEYPORE V. CHETRUCHERLA GANGARAJU.

s. 107—*Madras Agency Rules, 1920, r. XIV—Transfer from Agency Commissioner's Court—Power of High Court—District Court, whether Court of superior or equal jurisdiction to that of Agency Commissioner.*

The general power of the High Court to transfer a proceeding from the file of a Court which is not subject to the Civil Procedure Code is conferred by section 107 of the Government of India Act, and is exercisable thereunder subject to the fulfilment of two conditions; (1) that the Court from which the transfer is made is subject to the High Court's appellate jurisdiction, and (2) that the transfer is made to another Court of equal or superior jurisdiction. [p. 746, col. 2.]

Under the Madras Agency Rules of 1920, the High Court has appellate jurisdiction over the Court of the Agency Commissioner and is, therefore, a Court of superior jurisdiction to that of the Agency Commissioner but a District Court is not of "equal or superior" jurisdiction to that of the Agency Commissioner. [p. 747, col. 2.]

Accordingly, under section 107 of the Government of India Act the High Court can transfer a case from the Court of the Agency Commissioner to its own file but not to the file of a District Court. [p. 748, col. 1.]

Maharajah of Jeypore v. Papayamma, 23 M. 329; 8 Ind. Dec. (N. S.) 631, relied on.

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing transfer of Civil Miscellaneous Appeal No. 2 of 1922 on the file of the District Court, Vizagapatam; to the High Court to be tried along with Civil Revision Petition No. 751 of 1921 on it its file, preferred against the order of the Judicial Assistant Commissioner, Waltair, in First Appeal No. of 1921, in Original Suit No. 5 of 1921.

Mr. P. Somasundaram, for the Petitioner.

Mr. Y. Suryanarayana, for the Respondents

ORDER.—In Original Suit No. 5 of 1921 on his file, the Judicial Assistant Commissioner of the Agency Division dismissed an application for the appointment of a Receiver, and the petitioner before us appealed against that order of dismissal to the Agency Commissioner. The Commissioner, on the ground that one of the parties to the proceedings was his ward, obtained an order from this Court, transferring the appeal to the District Court, Vizagapatam. We are now asked to transfer it from that Court to the High Court.

The transfer to the District Court was made by us administratively and without notice to the petitioner, no dispute as to

the correctness or sufficiency of the ground on which it was proposed being possible; and there is accordingly no reason why it should not be reconsidered at his instance. He urges that it should be, because this Court had no power to make it or transfer a case from the file of the Commissioner to that of any Court except the High Court. This contention no doubt involves that our order of transfer to the District Court was *ultra vires* and ineffective and, therefore, the relief required is a transfer from the file of the Commissioner from which the appeal has never been removed in any legal way, to the file of this Court, although that it is not what is actually, asked for in the petition before us. But it is not suggested by respondents that there is any substance in the difference. We, therefore, turn to the law to ascertain our powers in the matter, observing only that neither side disputes the necessity for a transfer to some Court other than that of the Agent with reference to his position as guardian of a party.

The general power of the High Court to transfer from the file of a Court, such as that of the Agency Commissioner, which is not subject to the Civil Procedure Code is conferred by section 107 of the Government of India Act (5 & 6 Geo. V, C., 61) and is exercisable thereunder subject to the fulfilment of two conditions that (1) the Court from which the transfer is made is subject to the High Court's Appellate jurisdiction, (2) the transfer is to another Court of equal or superior jurisdiction. The first of these conditions is, in our opinion, complied with, because under Rule XIV of the Agency Rules at present in force an appeal lies to the High Court from "all decrees passed by the Agency Commissioner upon original suits," and the conclusion founded directly on this comprehensive wording cannot be affected by the fact relied on by respondents as inconsistent with the application of section 107 (1) and, therefore, of the section as a whole; that Rule XIX provides for the submission to the High Court of returns, since that provision may have been made simply for convenience and completeness or with reference to section 107 proviso.

The respondents have referred to the decision in *Maharajah of Jeypore v. Papa-*

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yyamma (1) as negating this Court's power to transfer, not only to the District Court (consistently with the petitioner's contention), but also to its own file. It is not material that this decision was given under section 15, Indian High Courts Act (24 & 25 Vic., C. 104), because that section has been re-enacted in almost identical terms in the section of the Government of India Act above referred to; but it is material to both the points above stated that a different set of Agency Rules was promulgated on 9th November 1920 in the *Fort Saint George Gazette*, Part I, p. 1425 and governs the present case. For, as regards the point at present under consideration, the appellate jurisdiction of this Court was sustained in the judgment of White, C. J., with reference to Rule XIX, and was negated by Benson, J., namely, with reference to the exclusion from the jurisdiction of the class of suits referred to in Rule XXII of the Rules then in force, transfer of a suit of that class being (it may be added) in fact in question. Whilst, however, the former Rule XXI is reproduced without substantial difference in the present Rule XIV, the proviso to the present Rule II (3) which deals with cases of the nature of those dealt with in the former Rule XXII those in which the succession to or an interest in the estate of a Chief is in dispute, differs from it materially, because it entirely excludes such cases from the jurisdiction of the Courts and from trial as suits, was maintained, but the fact on which Benson, J., to some extent relied, the appeal was to the Governor-in-Council and, if it was (as the rule provided) referred to the Sadr or High Court for decision, the decree could be carried into execution only with his permission. No such derogation from the High Courts Appellate Jurisdiction is recognised in the present rules, and accordingly we have not to take into consideration the main ground on which Benson, J.'s, conclusion was based. It may be true that the suit, in connection with which in the present case the appeal to the Commissioner was filed, is (as respondents contend) of the description referred to in the former Rule XXII and in the present Rule II (3). But, if so

that is merely possible ground for objection to the Court's jurisdiction at the trial; it cannot be urged on the present application and is not material to the disposal of the general question of construction at present under discussion. On that question we must hold that the High Court had appellate jurisdiction over the Court of the Agency Commissioner.

The learned Judges in *Maharajah of Jeypore v. Papayamma* (1) were agreed in holding on the second question stated above that a District Court was not of "equal or superior jurisdiction" to that of the Agent (corresponding with the Agency Commissioner in the present Rules), White C. J., referring apparently in this connection, only to an argument based on the policy of the Legislature, on which Benson, J., had relied generally, and also expressing an opinion against the general power of the High Court to transfer suits from an Agency Court to itself. Regarding the merits of this argument, which has also been pressed on us, that the policy of the Legislature is indicated as being against any power of transfer by its provision of Special Statutes and statutory rules adapted to the backward condition of the Agency tracts, to which the developed procedure of the ordinary Courts would be unsuited, it would, with all respect, be sufficient that the true inference from the existence of such provision is in favour of discrimination in the use of the power of transfer, not of its absence and of the absence of any means of protecting an Agency litigant against a disqualified Judge. But we need not pursue this consideration further, because, whatever its weight, when (as those learned Judges thought) the language of the Rules they were construing admitted of doubt or a secondary interpretation, it is inadmissible to control the clearer language with which we are concerned.

The conclusion already reached with reference to the comprehensive wording of Rule XIV, that the High Court has Appellate Jurisdiction over the Court of the Agency Commissioner, in fact precludes all doubts, that the one is superior to the other, the exercise of Appellate Jurisdiction being the clearest test of superiority; and only the position of the District Court remains

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for consideration. In favour of equality (superiority is not alleged) between it and the Court of the Agency Commissioner there is, so far as we have been shown, only the fact that the original pecuniary jurisdiction of both is unlimited. On the other hand, the powers which each can use in disposing of cases differ widely, as the learned Judges have shown in *Maharajah of Jeypore v. Pappayamma* (1), and those differences remain under the rules now in force. There can be no comparison and no question of equality between Courts so differently constituted. The conclusion must accordingly be that the High Court being superior to the Court of the Agency Commissioner, can transfer a case therefrom to its own file, but not to the file of a District Court which is not equal or superior.

This being so, we hold that the appeal numbered as Civil Miscellaneous Appeal No. 2 of 1922 on the file of the District Court of Vizagapatam has never been legally transferred from the file of the Agency Commissioner and transfer it to the file of this Court for disposal.

V. N. V.

*Appeal allowed.***PATNA HIGH COURT.**

APPEAL FROM ORIGINAL DECREE NO. 60
OF 1919.

March 13, 1923.

Present:—Mr. Justice Das and Mr. Justice
Adami.

Musammat BIBI KANIZ ZAINAB *alias*
BIBI MAJO AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

SYED MOBARAK HOSSAIN *alias* KALLO
AND OTHERS—DEFENDANTS—RESPONDENTS.
Mulhanmadan. Law—Shia Law—Wakf, essen-

tials of—Change in character of possession—Limitation Act (IX of 1908), Sch. I, Art. 91, applicability of—Suit for possession and declaration of instrument void—Admissibility of document in evidence—Objection not taken—Waiver—Forgery—Opinion of Court—Commission to examine witnesses—Commissioner, power of, to restrict cross-examination.

According to the Shia Law there are four essential requisites on which the validity of a *wakf* depends:—(1) The *wakf* must be perpetual; (2) it must not be contingent; (3) possession must be given of the thing dedicated, or, in other words, the properties should cease to be the properties of the donor, and (4) the right of the donor should be entirely divested therefrom. [p. 759, col. 1.]

It is, however, lawful for the donor to constitute himself the *mutwalli*, and in such a case a formal change of possession being out of the question, all that is required is not actual delivery of possession, but a change in the character of possession. If the donor continues to exercise his right over the *wakf* property and makes no change in the character of his possession, the *wakf* will not take effect. [p. 759, col. 1.]

A change in the character of possession is essentially a matter of evidence and can only be decided on the evidence in each case. [p. 760, col. 1.]

Art. 91 of Schedule I to the Limitation Act applies to a suit to cancel or set aside an instrument not otherwise provided for. It has no application to a suit for possession and a declaration that an instrument under which the defendant claims is void. [p. 749, col. 2.]

Where no objection is taken in the Trial Court to the admissibility of a document it must be assumed that any objection as to the mode of proof of the document adopted by the party producing it has also been waived. [p. 754, col. 2.]

The question of the mode of proof of a document is a question of procedure and is capable of being waived. [p. 754, col. 2.]

It is unsafe to hold that a document is a forgery on the personal inspection of the document by the Court. [p. 755, col. 1.]

A Commissioner appointed by the Court to examine witnesses has complete power to stop proceedings and to take the direction of the Court whenever it appears to him that the Pleader cross-examining a witness is abusing his position and exceeding the limits of propriety. [p. 765, col. 2.]

A Court in appointing a Commissioner should, in each case, give him instructions so as to make it clear to him that he is not so powerless as it is imagined and that he should exercise his power and stop the proceedings for the purpose of taking the direction of the Court whenever he should think that it is necessary to do so. [p. 765, col. 2.]

Appeal from the decision of the Additional Subordinate Judge, Bhagalpur, dated the 28th November 1918.

Messrs. S. M. Mullick, S. S. Bose, S. Saran, and Sahamat Hussain, for the Appellants.
Messrs. P. K. Sen, Sultan Ahmad, A. Sen, A. K. Roy, Bindheswari Prasad and

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Mohammad Yusuf Hussain, for the Respondents.

JUDGMENT.

Das, J.—The object of the litigation which has culminated in this appeal, was to obtain a declaration that certain *wakfnamas* executed by Musammat Amatunnissa dated the 15th February 1882 and the 7th December 1897, respectively, and a certain deed of management dated the 17th July 1907 are "invalid, void and ineffectual" and that they "have never been acted upon, and are purely nominal." The properties in dispute admittedly belonged to Musammat Amatunnissa and it is the case of plaintiff No. 1 that as the sole heiress of Musammat Asmatunnissa she succeeded to the properties on the death of Musammat Amatunnissa which took place on the 17th July 1907. She alleges that certain "persons (whom she names in the plaint) got up" these deeds with the object of depriving the plaintiff of her inheritance and that, in doing so, they took advantage of the fact that Musammat Asmatunnissa was an illiterate *parda-nashin* lady, but that the endowment was nominal one, and that the *wakfnamas* were never acted upon, and that the possession of Bibi Asmatunnissa as proprietress over the properties continued till her death, and that, in the circumstances, plaintiff No. 1 became entitled to succeed to the properties as the sole heiress of Bibi Asmatunnissa. Plaintiffs Nos. 2 and 3 are the assignees for value of an 8-annas interest of the plaintiff No. 1 in the properties in dispute and a question arose in the Court below whether the plaintiffs Nos. 2 and 3 were *bona fide* purchasers as they alleged to be or whether their alleged purchase was made "for the purpose of spoliation and with a view to foment unjust and improper litigation and whether, in the circumstances, their purchase was "void as being opposed to public policy." That question has been answered by the learned Subordinate Judge in favour of the plaintiffs and no question has been raised before us as to the correctness of the decision of the learned Subordinate Judge on this point.

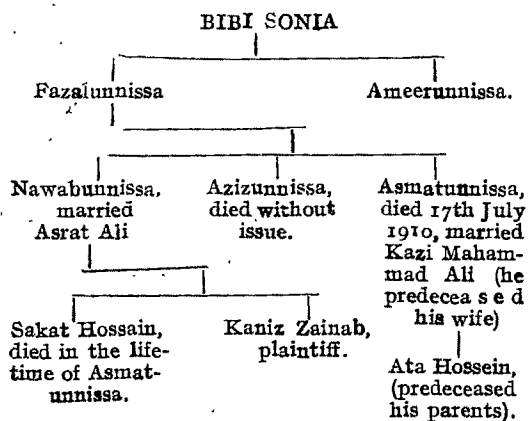
It will be convenient to dispose of a point which was argued with complete success on behalf of the respondents in the Court below. One of the issues framed by the Court

below on the pleadings of the parties ran as follows:—Are the plaintiffs entitled to sue for any relief without seeking to set aside the deeds of endowment dated the 15th February 1882 and 7th December 1897 and the deed of appointment of *mut-walli* dated the 17th July 1907 and is their claim barred by three years limitation? The learned Subordinate Judge has answered the question raised in this issue in favour of the defendants. In other words, he has come to the conclusion that the plaintiff's suit is barred by limitation under Art. 91 of the Limitation Act. The learned Counsel for the respondents has not attempted to support the decision of the learned Subordinate Judge on this point, and, in my opinion, there cannot be the slightest doubt that Art. 91 has no application to the facts of this case. Art. 91 applies to a suit to cancel or set aside an instrument not otherwise provided for. It has no application to a suit for possession and a declaration that an instrument, under which the defendant claims, is void. In the present suit the plaintiffs do not seek to have the instruments executed by Bibi Asmatunnissa set aside. Their case is that those instruments are void and that the Court should declare that they are void. I quite agree that if the instrument is voidable and not void *ab initio*, and is executed by the plaintiff or by his predecessor, the plaintiff cannot elude the operation of Art. 91 by suing as for a declaration; but in determining whether the plaintiff is attempting to elude the operation of Art. 91, it is necessary to consider the plaintiff's case as to the instruments. Now, there can be no doubt that, according to the plaintiffs, these instruments are not voidable, but void *ab initio*. They make the definite case that the instruments were nominal and were not acted upon during the lifetime of Musammat Asmatunnissa as the proprietress over the properties continued until her death. In my opinion, it is impossible to hold that Art. 91 applies to the facts of this case.

I now come to the question whether the plaintiff No. 1 has established her title to the properties in dispute assuming that her case as to the *wakfnamas* is true. The following pedigree will explain the case of the plaintiff as to the relationship between

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her and *Musammat* Asmatunnissa:—



It will be noticed that she claims to be the daughter of Nawabunnissa who, according to her, was the daughter of Fazalunnissa and a sister of *Musammat* Asmatunnissa. If she is right in her contention, that she is the daughter of Nawabunnissa and that Nawabunnissa was the sister of Asmatunnissa then it must follow that, in the events which have happened, she is the sole heiress of *Musammat* Asmatunnissa. The case of the defendants on the question of relationship is set out in paragraphs 5 and 7 of their written statement. Paragraph 5 runs as follows:—

‘That this fact is not at all true that the plaintiff No. 1 is the daughter of *Musammat* Asmatunnissa’s sister. The said plaintiff is never the heiress of *Musammat* Asmatunnissa.’

In paragraph 7 the defendants make the definite case that “*Musammat* Asmatunnissa had no sister of her own named *Musammat* Nawabunnissa.” In my opinion there is no denial in the written statement that the plaintiff No. 1 is the daughter of *Musammat* Nawabunnissa. It is, of course, denied that the plaintiff is the heiress of *Musammat* Asmatunnissa but that denial is based upon the case of the defendants that ‘*Musammat* Asmatunnissa had no sister of her own named *Musammat* Nawabunnissa.’ It is a denial by implication; and if the facts upon which the implication is sought to be raised are found against the defendants, the implication cannot be raised. In their evidence, however, the defendants have

contested the claim of the plaintiff that she is the daughter of *Musammat* Nawabunnissa. Their case, in their evidence is that *Musammat* Nawabunnissa was not the daughter of Fazalunnissa but a daughter of Ameerunnissa and that the plaintiff is the daughter of one Asrat Ali, not by *Musammat* Nawabunnissa but by her co-wife Bibi Aman. It is admitted by the defendants that *Musammat* Nawabunnissa was a wife of Asrat Ali. It is also admitted that the plaintiff is the daughter of Asrat Ali; but it is contended that the plaintiff is the daughter of Asrat Ali not by *Musammat* Nawabunnissa but by Bibi Aman.

In my opinion, the defendants in their written statement have not attempted to answer the point of substance as to the relationship between plaintiff No. 1 and Bibi Asmatunnissa alleged in the plaint, but have denied the relationship evasively. If it were known to them that Nawabunnissa was not the daughter of Fazalunnissa but the daughter of Ameerunnissa, they should have said so definitely in their written statement. If it were known to them that the plaintiff was the daughter of Asrat Ali by Bibi Aman and not by *Musammat* Nawabunnissa, they should have said so definitely in the written statement. Not having said so, it was not open to them to adduce evidence to the effect that the plaintiff was the daughter of Asrat Ali by Bibi Aman. As it is admitted that Nawabunnissa was the daughter of Ameerunnissa, it must follow that the plaintiff is the heiress of Asmatunnissa, provided we assume that the plaintiff is the daughter of Nawabunnissa. It makes no difference so far as the heiresship is concerned whether the plaintiff is the sister’s daughter or a cousin’s daughter. In either case she is entitled to succeed to the properties of Asmatunnissa assuming that she is the daughter of Nawabunnissa and assuming that her case as to the *wakfnama* is true. But as the parties have gone into evidence, I shall deal with that evidence and shall base my decision on the evidence and not on the pleadings.

I may say at once that the oral evidence in the case is weak and that, if I had to decide the case on the oral evidence and ignore the pleadings and the documents, I should find it difficult to differ from the learned Subordinate Judge on this point. The

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plaintiff has examined herself and two witnesses Hosseini Begam and Bibi Jasiman, on commission. She has also examined in Court witnesses Nos. 1, 2, 3, 6, 13, 14, 16, 22, 23, 27 and 30 on this point. Mr. Susil Madhab Mullick accepts the finding of the learned Subordinate Judge that witnesses Nos. 1, 2, 6, 14, 16, 22, 23 and 27 are not reliable. He contends, however, that the ladies examined on commission have given good evidence and that the evidence of P. W. Nos. 3, 13 and 30 should have been accepted by the learned Subordinate Judge. So far as P. W. No. 3 is concerned, I agree with the view of the learned Subordinate Judge that he is not a good witness and that he is thoroughly unreliable. There only remains the evidence of the ladies examined on commission and the evidence of P. W. No. 13 and P. W. No. 30. They undoubtedly support the pedigree upon which the plaintiff relies. The only question is whether we ought to accept their evidence.

With regard to the evidence of the plaintiff, the learned Subordinate Judge says that she is not accurate about the pedigree and that with regard to the number of wives married by her father Asrat Ali there is grave contradiction between her, on one hand, and Jasiman and her step-brother P. W. No. 13, on the other hand. The learned Subordinate Judge further says that she is not always correct about the number of children her father had by his respective wives. It appears that Asrat Ali, her father, married no less than seven wives and had numerous children certainly by one of those wives. But it seems to me that the criticism loses all its force when it is remembered that it is admitted by the defendants that the plaintiff was the daughter of Asrat Ali. There is no object in deceiving the Court as to the number of wives her father married nor as to the number of children her father had by each of his wives. It is more reasonable to take the view that the plaintiff was not aware of all the matrimonial enterprises of her father. It cannot, in my opinion, be urged that, because she did not know how many wives her father had, she could not be expected to know the name of her mother. The evidence of the plaintiff in my opinion, is good evidence, though I agree that it will not be safe to act upon

that evidence unless it has received corroboration. The first witness examined on behalf of the plaintiffs on commission is Husseni Begum. She is the widow of Mamtaj Hussain who was a son of Asrat Ali. She completely supports the plaintiff's case as to the pedigree on which the plaintiff relies. Her evidence, however, is open to the criticism that she cannot give the name of her husband's mother. It may be reasonably argued that her evidence on the pedigree ought to be received with caution since she cannot give the name of her husband's mother. In my opinion, it is quite impossible to rely upon her evidence on the question of pedigree. The next witness examined on behalf of the plaintiff on commission is Bibi Jasiman. She is not a relation; but her mother, after she became a widow, married Asrat Ali and was one of the numerous wives of Asrat Ali. She carefully gives the names of the wives of Asrat Ali and seems to have done well under a very severe cross-examination. She says that, at the time of her mother's marriage, Nawabunnissa was the only wife of Asrat Ali who was living with Asrat Ali, and that the plaintiff was four or five years younger than her. If the plaintiff was born subsequent to the marriage of her mother with Asrat Ali, it is probable that she should know the name of the plaintiff's mother. It is quite true that the witness is in poor circumstances but that is hardly a reason why her evidence should be rejected. P. W. No. 13 is Lafat Hussain, one of the sons of Asrat Ali by Ulfatunnissa Begam. The learned Subordinate Judge rejects his evidence on two grounds, first, on the ground that he has a grudge against the defendants because they prosecuted him for removing a memorial stone from the tomb of Nawabunnissa, and, secondly, on the ground that he admits that he has an old pedigree which he has not produced in Court. In my opinion neither ground is good ground for rejecting his testimony, although each constitutes a good ground for scrutinising his evidence with care. It is admitted that he was acquitted in the criminal case which was lodged against him and, as regards the non-production of the pedigree, all that I need say is that he was not asked to produce the pedigree and no criticism can be levelled against him for not producing it. So far as P. W.

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No. 30 is concerned, I agree with the learned Subordinate Judge that he is not a reliable witness and that his testimony should be rejected. The oral evidence adduced on behalf of the plaintiffs is not very strong and would be wholly insufficient if it stood by itself and if there was no documentary evidence to support her case.

Before coming to the documents, it will be just as well to dispose of the argument of the learned Subordinate Judge that the evidence adduced on behalf of the defendants is superior to that adduced on behalf of the plaintiffs. The defendants have examined eight witnesses on this point, D.Ws. Nos. 1, 2, 3, 7, 9, 11, 12 and 16. The learned Subordinate Judge has rejected the testimony of D.Ws. Nos. 1 and 2 and it is unnecessary for me to deal with their evidence. D.W. No. 3 is not a competent witness and is in no way related to the family of Asrat Ali. On the other hand, his daughter's son is married to the daughter of the defendant Mobarak Ali and he admits that he lives with his daughter. In my opinion, he is not a competent witness and no reliance can be placed on his evidence. Nor is D.W. No. 7 a competent witness. The learned Subordinate Judge says that, though he is not in good circumstances, he is respectable. He admits, however, that he has no personal knowledge of the fact that the plaintiff is the daughter of Bibi Aman, but that he heard it from his mother 20 or 22 years ago. He adds that there was no particular reason for his mother telling him that the plaintiff was the daughter of Bibi Aman and he says that she gave him that information incidentally in the course of a conversation 20 or 22 years ago. His evidence, in my opinion, ought to be rejected. In the first place, he is not a competent witness. In the second place, his evidence is hearsay and should have been rejected by the learned Subordinate Judge for the same reason for which he rejected the testimony of many of the plaintiff's witnesses, including the testimony of Husseni Begum. In the third place, he does not appear to be a respectable witness. He admits in his cross-examination that he made a *bymokassa* of his properties in his wife's favour at a time when he had heavy debts to discharge and that in the litigation which ensued, the Court held that the *bymokassa*

was a fraudulent and a collusive deed. The next witness is D.W. No. 9 who as the son-in-law of Asrat Ali is undoubtedly a competent witness. But he supports the case of the plaintiff on one point, namely, that Nawabunnissa was the daughter of Fazalunnissa and not of Ameerunnissa. In examination-in-chief he says that he heard from his mother-in-law that the plaintiff was the daughter of Bibi Aman but in cross-examination he admits that Nawabunnissa had a daughter whose name he could not remember and he also admits that he cannot say whether the plaintiff is the daughter of Nawabunnissa or of Bibi Aman. The evidence of this witness completely supports the plaintiff on one point and very nearly supports her as to her case that she is the daughter of Nawabunnissa. The learned Subordinate Judge says that he was trying to please both parties and on that ground he rejected his testimony. It is important to remember that he is the only competent witness who has been examined on behalf of the defendants. D.W. No. 11 is defendant No. 4 in the suit. The learned Subordinate Judge says that he is a competent witness, but there is nothing in his evidence which shows that there is any relationship between him and Asrat Ali. He is the son of Asmatunnissa's husband's brother and has nothing whatever to do with the family of Asrat Ali. D.W. No. 12 is defendant No. 6. He was a servant under Asmatunnissa and he says that his duty was to distribute *pan* and tobacco to the visitors. He admits that he has no connection with Asmatunnissa and his evidence does not show that he had any relationship whatever with Asrat Ali. Notwithstanding this, the learned Subordinate Judge says that he is a competent witness. But whether he is a competent witness or not, his evidence does not touch the plaintiff. He says, "It is not true that the plaintiff is the daughter of Asmatunnissa's sister; If she was so, we would have known that." That hardly is sufficient to destroy the case of the plaintiff. The last witness examined on behalf of the defendants is D.W. No. 16 who is a brother of defendant No. 1. It appears that in a criminal case against Enayet Ali, the husband of the plaintiff, he gave evidence in his favour and he stated in the course of his evidence that the plaintiff was the daughter of Asmatunnissa's sister. His

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previous deposition is, therefore, completely in favour of the plaintiff. In his evidence in this case he says that he does not know "exactly" whether the plaintiff is the daughter of Asmatunnissa's sister and then, getting bolder, he says that she is not in fact the daughter of Asmatunnissa's sister. On the whole, the evidence adduced on behalf of the defendants is worthless, the only competent witness having practically supported the case of the plaintiff, and D. W. No. 16 certainly in a previous case having stated that the plaintiff was the daughter of Asmatunnissa's sister. I am unable to support the view of the learned Subordinate Judge that the evidence adduced on behalf of the defendants is superior to that adduced on behalf of the plaintiffs, although, as I have said before, the evidence adduced on behalf of the plaintiff is not by itself very strong.

I now come to the documentary evidence which, in my opinion, establishes the plaintiff's case beyond reasonable doubt. The plaintiff relies upon three documents Exhibits 1, 2 and 3. Exhibit 1 is a registered *hibba* of 1851 executed by Bibi Sonia in favour of Nawabunnissa. By this document *Musanmat* Sonia purported to make a gift of $4\frac{1}{2}$ annas share out of 6 annas of *Mouza* Rampore Debor and the northern half of a large *pucca* house facing east with the tiled thatched houses attached thereto to Bibi Nawabunnissa her "daughter's eldest daughter." There can be no doubt at all as to the genuineness of this document and it follows from this document that Nawabunnissa was the eldest daughter of Bibi Sonia's daughter. The document establishes beyond doubt that Nawabunnissa is the grand-daughter of Sonia but it does not, in my opinion, establish that she is the daughter of Fazalunnissa. It is argued on behalf of the appellant that as it is not suggested that Ameerunnissa had more than one daughter and as it is admitted that Fazalunnissa had more than one daughter the description of Nawabunnissa as Bibi Sonia's daughter's eldest daughter is consistent only with the case that Bibi Nawabunnissa was a daughter of Fazalunnissa and not the daughter of Ameerunnissa. The argument, in my opinion, is a fallacious one. If we accept the evidence adduced on behalf of the defendants, Nawabunnissa was the only daughter

of Ameerunnissa. But if we reject that evidence, then we have no evidence at all to establish that Ameerunnissa had no daughter at all. I am, therefore, unable to find on this document that Nawabunnissa was a daughter of Fazalunnissa, but the document, taken with the evidence adduced on behalf of the plaintiff and the admission made by D. W. No. 9, establishes, in my opinion, that Nawabunnissa was the daughter of Fazalunnissa and, therefore, a sister of Asmatunnissa. The next document is Exhibit 3, a *kabala*, dated the 22nd November 1851 executed by Asrat Ali in favour of Nawabunnissa and others. The only importance of this document is that it shows that Bibi Aman was dead at the date when this document was executed. The learned Subordinate Judge says that the assertion that Bibi Aman was dead at the date of the execution of this document "makes it a physical impossibility of the plaintiff having been born of her, aged now, as she is, about 64 years." The document, therefore, is valuable as discrediting the evidence adduced on behalf of the defendants that the plaintiff is the daughter of Bibi Aman and not the daughter of Nawabunnissa. I will presently consider the case whether the document is a genuine one and whether it has been properly admitted in evidence. The next document is Exhibit 2, a deed of gift executed by Nawabunnissa in favour of the plaintiff and her brother Saukhat Hussain. It will be remembered that by Exhibit 1 Bibi Sonia made a gift of $4\frac{1}{2}$ annas share out of 16 annas of *Mouza* Rampore to Nawabunnissa and that by Exhibit 3 Asrat Ali made a gift of certain properties to Nawabunnissa. By the deed of gift which Nawabunnissa is alleged to have executed on the 12th July 1855 she purported to convey to her daughter, the plaintiff, and to her son Saukhat Hussain all the properties which she received by Exhibit 1 and Exhibit 3. The document, if genuine, establishes beyond doubt that the plaintiff is the daughter of Nawabunnissa. The first question that arises for our consideration is, whether these documents were properly admitted in evidence by the learned Subordinate Judge. They are undoubtedly ancient documents and were admitted as such by the Court below. The plaintiff produced these documents in the course of her evidence on commission. Her

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evidence is that she got these documents from Mantaz Hussain, her step-brother, and that they were in her custody until she made them over to her husband for being filed in Court. We have to consider whether the plaintiff has proved proper custody of these documents. Now, Exhibit 3 was a document executed by Asrat Ali in favour of his wife Nawabunnissa and certain other persons and Exhibit 2 was a document executed by Nawabunnissa in favour of the plaintiff. It is not unreasonable to suppose that these documents would remain with Asrat Ali and that on his death they would pass to Mantaz, his son. The plaintiff swears that Mantaz Hussain made over these documents to her and that they were all along in her custody until she made them over to her husband, Enayet Ali, who in his turn made them over to the plaintiffs Nos. 2 and 3 for being filed in Court. This was her evidence on commission, and on the documents being tendered, they were objected to on the grounds, first, that the witness being illiterate could not possibly identify the documents, and, secondly, that continuous custody of the documents to the time of their being filed in Court, was not proved. Now, the Commissioner for taking evidence had, of course, no power to decide on the admissibility of the documents and it was necessary, therefore, for the defendants to object to the admissibility of the documents in Court if they had any objection to their being taken in evidence. The record, however, shows that these documents were marked by the learned Subordinate Judge without any objection. It is now urged before us that Enayet Ali should have been called to prove that he received these identical documents from the plaintiff and that he made them over to plaintiffs Nos. 2 and 3. The argument is not without force; but it is to be remembered that the defendants did not object to the documents being marked as Exhibits in Court. Had they put forward their objection in Court it would have been open to the plaintiff to call Enayet Ali as a witness. We are informed that Enayet Ali is now dead and it is impossible for the plaintiff to call him now. In my opinion, the objection being to the mode of proof and not to the relevancy of the documents, it is impossible for us to reject the documents at this stage

on the ground that the plaintiff did not examine Enayet Ali as a witness on her behalf. The question of the mode of proof is a question of procedure and is capable of being waived by a party. Since the question of the admissibility of these documents was not raised before the learned Subordinate Judge by the defendants, we must assume that they waived their objection to the mode of proof adopted by the plaintiff. I hold that it is not open to the defendants now to raise the question of the proper proof of these documents.

The next question is, whether these documents are genuine. The learned Subordinate Judge has come to the conclusion that they are suspicious and that they ought not to be relied upon. I will deal with all the grounds urged by the learned Subordinate Judge for holding that they are suspicious documents. I will first deal with Exhibit 3 which is the earlier document. The learned Subordinate Judge says that the document is not a registered one, but it must be remembered that it was executed on the 22nd November 1851 when it was not obligatory on the parties to register their documents. The document bears a stamp of 1851 and the endorsement of the stamp-vendor is as follows:—"Sold this stamp to Saiyid Asrat Ali, Pleader of the Court, for writing a deed of sale at Rs. 4." It would be difficult for the plaintiff to procure a stamp of 1851, and the document as a whole has the appearance of being a very old document. It would be plainly impossible for us to hold that a document must necessarily be a suspicious document because it does not happen to be a registered document. To take such a view would be to hold that a document of 1851 should have been registered although the law did not require those documents to be registered. The argument is a speculative one and I cannot attach any value to it. The next ground urged by the learned Subordinate Judge is that it is not shown why Asrat Ali should have sold this property to Nawabunnissa and others. It is somewhat unreasonable to call upon the plaintiff in 1916 for proof as to the necessity of a transaction which took place in 1851. It is then urged by the learned Subordinate Judge that the signature of Asrat Ali in Exhibit 3 does not tally with his signature in Exhibit 4, which

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is accepted by him as a genuine document. I have myself examined the two signatures and I am not prepared to base my conclusion as to the genuineness of the document on my personal observation of the signatures. It is always unsafe to hold that a document is a forgery on the personal inspection of the document by the Court. No expert witnesses were examined on the point and no witnesses were called by the defendants to prove that the signature purporting to be the signature of Asrat Ali in Exhibit 3 was not in fact the signature of Asrat Ali.

The last ground urged by the learned Subordinate Judge is that Exhibit 3 bears the seal of Asrat Ali showing "with what care, solicitude and precaution this document has been got about." The procedure adopted by the learned Subordinate Judge was as follows: he looked at Exhibit 1, which, according to him, is genuine and he found that it did not bear the seal of the executant. He then looked at Exhibit 3 and found that it did bear the seal of the executant; and the conclusion at which he arrived is that if a genuine document does not bear the seal of the executant, a document which does bear the seal of the executant must be a suspicious document. I am not prepared to subscribe to the mode of reasoning adopted by the learned Subordinate Judge. In regard to Exhibit 2 the first point which the Subordinate Judge makes is that it is not a registered document. I have already dealt with that argument and it is only necessary to add that to take the view which the learned Subordinate Judge has taken is to say that a document is compulsorily registrable although the law did not require that it should be registered. The learned Subordinate Judge then examined the stamp-paper and he thought that there was something suspicious and that the endorsement of the stamp-vendor showed that it was sold by him to one Raghu Jha for the purpose of a *tamassock*. I may say that the stamp on Exhibit 2 is of the year 1856 and it is difficult to imagine how the plaintiff could procure a stamp of 1856. As to the argument of the learned Subordinate Judge, it is enough to say that Bibi Nawabunnissa, the executant of Exhibit 2, was a *purda-nashin* lady and it was plainly impossible for her to walk up to the stamp-vendor and to

procure the stamp. She had to employ somebody to purchase the stamp for her and that person might as likely have been Raghu Jha as some body else. The learned Subordinate Judge, upon the evidence of D. W. No. 12, has come to the conclusion that Raghu Jha was a client of Imam Ali, the father of Enayet Ali, plaintiff's husband, and upon this he has built the theory that "it is nothing unusual that an old unused stamp-paper in the name of the aforesaid Raghu Jha remained in the Sherista of Enayet Ali and his father and has been utilised by the former for the present purpose." The argument is a speculative one and I am not prepared to assent to it. It is impossible at this date to have the evidence as to who Raghu Jha was and what connection there was between Raghu Jha and Nawabunnissa, the executant of Exhibit 2. As I have said before, Nawabunnissa was a *purda-nashin* lady of rank and position and it was necessary for her to employ an agent to procure the stamp. It is suggested that she might have bought the stamp through her husband Asrat Ali. Asrat Ali himself was a *Vakil* of standing and position and if one could indulge in speculation, one might say that probably Asrat Ali employed Raghu Jha to procure the stamp for his wife. I do not, however, rest my decision on any conjectures. The document appears to be a genuine document and it is difficult to imagine how the plaintiff could possibly have procured the stamp which was undoubtedly sold to Raghu Jha on the 5th July 1856. The last argument of the learned Subordinate Judge is as follows:— "Nawabunnissa got the major portion of the properties only in 1851 and it has not been explained why with such precipitancy she executed this deed in favour of her minor daughter." I quite agree that there is no explanation why Nawabunnissa executed this document in favour of her children but, in my opinion, the argument is a speculative one. It is quite unreasonable to expect the plaintiff to give any evidence on this point.

The learned Subordinate Judge then considered the surrounding circumstances and he came to the conclusion that these documents could not be considered to be genuine documents. The first point con-

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sidered by the learned Subordinate Judge in this connection is that the plaintiff never tried to have possession of the properties which Nawabunnissa is alleged to have given to her by Exhibit 2. The plaintiff has undoubtedly admitted in her evidence that she never had possession of the properties covered by Exhibit 2 and that they were all along in the possession of Fazalunnissa and after her death in the possession of Azizunnissa and Asmatunnissa. It is established beyond doubt that Azizunnissa and Asmatunnissa were recorded in the Land Registration Department as the owners of the properties dealt with by Exhibit 3.

The argument is a weighty one; and if there was nothing also in the case it would be impossible to give effect to a document which, admittedly, has not been acted upon. But there is this to be said against the view of the learned Subordinate Judge, namely, that Nawabunnissa herself was not in possession of these properties. Exhibit 1 is accepted by the learned Subordinate Judge to be a genuine document and under Exhibit 1, 4½ annas share out of 16 annas of Mouza Rampore (the property dealt with by Exhibit 2) passed from Bibi Sonia to Bibi Nawabunnissa. But it is admitted that Bibi Nawabunnissa herself was never in possession of the properties. Therefore, it is impossible to hold that a document must be a forgery because it is not corroborated by evidence of ancient or modern enjoyment or by other equivalent or explanatory proof.

Something admittedly happened which gave the possession of these properties to Fazalunnissa. What actually happened we do not know, nor is it possible to expect the plaintiff to give any satisfactory explanation of the fact that, notwithstanding the deed of gift executed by Bibi Sonia in favour of Nawabunnissa, Fazalunnissa remained in possession of the properties. All that I need say is this that, although Nawabunnissa was not in possession of the properties, it is admitted by the learned Subordinate Judge that Exhibit 1 is a genuine document. That being so, there is no reason to hold that Exhibit 2 is not a genuine document, because the document has not received corroboration from acts naturally referable to the document.

The learned Subordinate Judge, in the next place, attaches some importance to the fact that the memorial stone tablet was removed from the tomb of Nawabunnissa and that the year of her death was erased from it. There is no question that this stone tablet was in fact removed during the pendency of this suit in the Court below and that the tablet was ultimately discovered in a house in which the plaintiff and her husband Enayet Ali used to live. Enayet Ali was prosecuted at the instance of the defendants but he was acquitted by the Criminal Court and the Magistrate dealing with the case has given good reasons for disbelieving the case that Enayet Ali could ever have been a party to the removal of the stone tablet. The surrounding circumstances establish beyond doubt that Enayet Ali could not have been a party to the removal of the memorial stone tablet. That tablet shows that Nawabunnissa died in 1859. This supports the case of the plaintiff, and it was to the interest of the plaintiff to preserve this important evidence and not to destroy it. It appears that in a *kobala* which the plaintiff executed in favour of Tilakdhari Lal she stated that her mother Bibi Nawabunnissa died on the 5th July 1852. That assertion was wholly destructive of the plaintiff's case for it would follow that Exhibit 2 could not have been executed by Nawabunnissa, for it must be remembered that Exhibit 2 was executed on the 12th July 1856. The admission made by the plaintiff in the *kobala* executed by her in favour of Tilakdhari was, therefore, injurious to her case. It was necessary for her to preserve such evidence as she might procure which would show that her admission made in her *kobala* in favour of Tilakdhari was clearly wrong. Now, the tablet shows that Nawabunnissa died in 1859. It was, therefore, important for the plaintiff not to destroy that evidence which was most helpful to her in her case. In my opinion, it is quite impossible to hold that the plaintiff or her husband Enayet Ali had any hand in the removal of the memorial stone tablet from the tomb of Nawabunnissa. Although it is not necessary to go any further than this, it is probable that it was removed at the instance of the defendant who made an attempt to erase the year of the death

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of Nawabunnissa which was on the memorial tomb. Having done that they threw the tablet in a portion of the house of Enayet Ali which was not used by him and at a time when he was actually away from his house.

In my opinion, Exhibits 2 and 3 are genuine documents and, together with Exhibit 1 and the admission by D. W. No. 9, they establish that Nawabunnissa was the daughter of Fazalunnissa and that the plaintiff was the daughter of Nawabunnissa. The only document upon which the defendants rely is Exhibit 1. This is a *wakalat-nama* dated the 23rd June 1840, executed by Fazalunnissa in favour of her Vakil Altaf Hussain for herself and as guardian of her minor children Azizunnissa and Asmatunnissa empowering her Vakil to withdraw a sum of Rs. 556 from Court. It appears that this sum of money was lying in Court to credit of Fazalunnissa's husband and it was necessary for Fazalunnissa's heirs to withdraw that sum from Court. It appears that the document was never filed in Court and was not acted upon; but, in my opinion, there is no reason to doubt the genuineness of this document. But I am unable to draw the conclusion that because the name of Nawabunnissa does not appear in the document, therefore, Nawabunnissa could not have been a daughter of Fazalunnissa. All that one can say from this document is, that Azimunnissa and Asmatunnissa are the daughters of Fazalunnissa. It is quite impossible to go any further than that and to say that because the name of Nawabunnissa is not mentioned in this document, therefore, she could not have been the daughter of Fazalunnissa. It may be that Nawabunnissa had attained her majority and as she had already married Asrat Ali, Fazalunnissa could not represent her in the matter of the withdrawal of the sum of money from Court. It is contended on behalf of the defendants that if a separate petition was put in on behalf of Nawabunnissa Fazalunnissa could not have authorised her Pleader to withdraw the sum of Rs. 556 which was lying in Court. The matter rests on speculation and I am unable to come to a conclusion one way or the other why the name of Nawabunnissa does not appear in this document. Taking the evidence, oral and documentary, as a whole, I am of opinion that the plaintiff

has established her case that she is the daughter of Nawabunnissa, and that Nawabunnissa was the daughter of Fazalunnissa. The defendant's denial of the pedigree set up by the plaintiff in her plaint, is, as I have already said, an evasive one and one would be inclined to hold upon the pleadings that there was no denial of the allegation that the plaintiff is the daughter of Nawabunnissa. On the question whether Nawabunnissa is the daughter of Fazalunnissa, there cannot be, in my opinion, the slightest doubt that she was the daughter of Fazalunnissa. The plaintiff is, as I have already said, supported by one of the defendant's witnesses who is a competent witness, on the point. As to the other point, namely, whether the plaintiff is the daughter of Nawabunnissa, the evidence, taken as a whole, is in her favour. In my opinion the plaintiff has established that she is entitled to the properties left by Bibi Asmatunnissa if she can establish her case as to the *wakfnamas* executed by Bibi Asmatunnissa.

I now come to the question whether the *wakfnamas* executed by Musammât Asmatunnissa are valid and operative documents. The first *wakfnama* was executed on the 15th February 1882. It appears that there was a mosque and an *Imambara* already in existence which had been constructed by her father-in-law. By the *wakfnama* of the 15th February 1882, she dedicated the properties specified in the *wakfnama* for maintaining the mosque and *Imambara* which were already in existence, for the support of *fakirs* and travellers and for "the annual *Fatuha* and *Urs*" of herself and her husband. She declared that she was making "*wakf* absolutely of the properties mentioned below in the name of God without any condition valid or invalid" and that from that day neither she nor her heirs and representatives would have "any personal connection with or any rights in future to the endowed property." She appointed herself the *mutwalli* of the endowed properties for life and fixed her salary at Rs. 125 per month. She provided that the income of the *wakf* property, after the payment of Government revenue, other Government demands and collection expenses, should be "applied to the expenses of the mosque and *Imambaras*" and directed that the ac-

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count of the income and the expenses should be kept in the *Khankah* and should be signed and sealed daily by the *mutwalli* for the mosque for the time being. She appointed the two surviving brothers of her husband to succeed her as the *mutwalli* of the endowment, one as the *mutwalli* of the mosque and the other as the *mutwalli* of the *Imambara*, and gave them power to appoint their successors from amongst their male issue and provided that, in default of such appointment, their male issue should have the power to choose the *mutwallis* from amongst themselves. Lastly, she directed that, out of the income of the *wakf* property, Shaikh Imam Ali, senior, and Shaikh Imam Ali, junior, should each receive Rs. 10 per month generation after generation without any condition of service.

By the second *wakfnama*, which she executed on the 7th December 1897 and which she described as the supplementary deed of *wakf*, she dedicated all her remaining properties to the purposes mentioned in the first *wakfnama* and gave up her salary of Rs. 125 per month, but stipulated that all her expenses should be sent to her wherever she might direct her manager to send the same. By this document, she appointed Shaikh Imam Ali, senior, as the manager of the endowment on a salary of Rs. 5 per month and gave him extensive powers of management, as she contemplated visiting Mecca and other sacred places. She provided that Imam Ali should continue to be the manager of the endowment after her death and modified the terms of the earlier *wakfnama*, the effect of which was to place the *mutwallis*, after her death, more or less, under the control of the manager.

The last deed executed by *Musammât Asmatunnissa* on the 17th July 1907, is hardly a deed of *wakf*; it is in reality a deed laying down the scheme of management of *wakf* properties after her death. It appears that the *mutwallis* nominated by her to succeed her on her death were both dead, and by this document, she nominated Mobarak Hussain, defendant No. 1, to succeed her as the *mutwalli* of the mosque, and Bibi Sagheri Begum, defendant No. 2, to succeed her as the *mutwalli* of the *Imambara*. Mobarak Hussain is the son of Latiff Hussain whom she had nominated to succeed her as the *mutwalli* of the mosque. Bibi Sagheri

Begum is the daughter's daughter of Walayat Hussain whom she had nominated to succeed her as the *mutwalli* of the *Imambara*. As Imam Ali, on account of his old age, had become incapable of looking after the *wakf* properties, she removed him from his office as manager, and appointed Karamat Hussain, defendant No. 4, as the manager of the *wakf* on salary of Rs. 10 per month. She also appointed defendant No. 3 Syed Nawab, the husband of Sagheri Begum, and Rajab Ali, defendant No. 6, as sub-managers, Syed Nawab on a salary of Rs. 10 per month and Rajab Ali on a salary of Rs. 4 per month. She specified the salaries payable to the servants of the *wakf* estate and directed that the salaries specified by her should be paid to them and to their heirs generation after generation provided they performed their duties. There is a schedule at the foot of the deed which gives "the details of salary payable to the servants attached to the *wakf* estate." The "servants" mentioned are Mobarak Hussain (son of her husband's brother Lutf Hussain), Sagheri Begum, (grand-daughter of her husband's brother Walayat Hussain), Bibi Azizunnissa (her sister), Karamat Hussain, (son of her husband's brother Walayat Hussain), Syed Nawab (husband of Sagheri Begum), Rajab Ali (her servant), Manuk (son of her husband's brother Walayat Hussain) and Munshi Imam Ali (her Muktear and confidential adviser).

Mr. Susil Madhab Mullick, on behalf of the appellants, has argued before us, first, that the *wakfs* are invalid and inoperative inasmuch as they were never acted upon and Bibi Asmatunnissa never parted with her possession as full proprietress; secondly, that the *wakfs* are illusory and were not intended to be acted upon and that the whole object was to divert the source of succession under the Muhammadan Law and to keep the properties in her husband's family, and thirdly, that the documents were not read and explained to Bibi Asmatunnissa and that she did not have any independent advice in connection with the execution of these documents. The first point urged before us by Mr. Mullick raises the question whether the *wakf* is a valid *wakf*, the second point, whether the *wakf* is a real *wakf*,

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and the third point, whether the Court would enforce it having regard to the fact that Bibi Asmatunnissa was an illiterate *purda-nashin* lady wholly incapable of understanding the nature of the instruments which she executed.

I will first consider the question whether the *wakf* is a valid and an operative *wakf*. The parties are Shias, and, according to Mr. Ameer Ali, there are four essential requisites on which depends the validity of the *wakf*: (1) that it must be perpetual, (2) it must not be contingent, (3) that possession must be given of the thing dedicated, or, more properly, the properties should cease to be the properties of the donor, and (4) that the right of the donor should be entirely divested therefrom. It is, however, recognized in Shia Law that it is lawful for the *wakif* to constitute himself or herself the *mutwalli*, and that, in such a case a formal change of possession is out of the question, and that all that is required is, not actual delivery of possession, but change in the character of possession. "It is in this sense," says Mr. Ameer Ali, "that the Mafatih declares that, if the *wakif* continue to exercise his right over the *wakf* property and make no change in the character of his possession, the *wakf* will not take effect" (Ameer Ali's Mummandan Law, 4th Edition, Vol. I, 499).

It is contended on behalf of the appellants that, in order to defeat their legal title, the defendants must establish the validity of the *wakf* and that, as a necessary consequence, they must establish that there was a change in the character of possession of Bibi Asmatunnissa, who constituted herself the first *mutwalli* under the *wakf*. It is argued that, not only is there no evidence that Bibi Asmatunnissa changed the character of her possession, but that the evidence is conclusive that she continued to hold possession as full proprietress and not as a *mutwalli*. Mr. Sultan Ahmad on behalf of the respondents, agrees that, in order to complete the *wakf*, there must be change in the character of possession; but he maintains that the *wakfnama* must itself decide whether there is a change in the character of possession. According to him, the issue must be decided on a construction of the *wakfnama*, and not by reference to extrinsic evidence; and he

argues further that, if we are at liberty to go into evidence, that evidence would support his case that, subsequent to the *wakfnama*, Bibi Asmatunnissa held possession, not as proprietress, but as a *mutwalli*.

As reference has been made to the English cases, it is necessary to consider how far the English cases are likely to help us in the solution of the problem. Now, in England, transmutation of possession is not an essential pre-requisite to the constitution of a trust. Provided that the trust was, in the first instance, perfectly created, the trust will be supported, whether there was transmutation of possession or not. But, in order to determine whether the trust was, in the first instance, perfectly created, the Court has to consider whether the settlor contemplated some further act for the purpose of giving it completion. If, for instance, the settlor contemplated making over possession of the trust property to a trustee for the purpose of completing the transaction, the trust will not be regarded as having been perfectly created until possession is actually made over to the proposed trustee. But, if the settlor proposed to convert himself into a trustee, then the trust is perfectly created and will be enforced as soon as the settlor has executed an express declaration of trust, intended to be final and binding on him.

It will be noticed that the Shia Law differs from the English Law on the question of the completion of the trust, though they agree in this that where the trust was in the first instance perfectly created, the Court will enforce it and will not enter into the question whether the trust was acted upon. In England, transmutation of possession is not, whereas in Shia Law it is, an essential pre-requisite to the creation of a trust. In England, if the settlor proposes to convert himself into a trustee, then the trust is perfectly created as soon as the settlor has executed an express declaration of trust, intended to be final and binding on him. In Shia Law, the *wakif* must still show that he has changed the character of his possession. I am of opinion, therefore, that the English cases cannot help us in the solution of the problem whether the *wakf* was, in the present case, perfectly created.

Nor do I agree with the argument that the document must itself decide whether

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there was a change in the character of possession. In my opinion, transmutation of possession, or, (which is the same thing) change in the character of possession is essentially a matter of evidence, and can only be decided on the evidence in the case. The argument assumed that whenever a *wakif* constitutes himself a *mutwalli* of the endowment, there is, by virtue of such constitution, a transmutation of possession for there is, or can be, no other indication in the *wakfnama* that there is a change in the character of possession. To take such a view is to ignore the distinction between change of ownership and change of possession, both of which must have taken place before a *wakf* can be said to be perfectly created. All that the *wakfnama* in the present case does show is that the *wakif* has divested herself of all proprietary interest in the property endowed and constituted herself a *mutwalli* of the endowment. Such a declaration satisfies requisite No. 4 given in Mr. Ameer Ali's book. There is still requisite No. 3 to be satisfied before the *wakf* is complete; and there is no indication in the *wakfnama* that it has been satisfied, unless we regard her appointment as a *mutwalli* as leading to the inference that there was a transmutation of possession. Even assuming that Mr. Sultan Ahmad is right in his contention that the document itself must decide the question whether there has been a transmutation of possession, I do not think that the document throws any clear light on the point; and we must, therefore, go into the evidence to see whether, after the execution of the *wakfnama*, Bibi Asmatunnissa held possession as the *mutwalli* of the endowment.

Mr. Susil Madhab Mullick strongly relies upon the fact that Bibi Asmatunnissa did not, at any time, after the execution of the *wakfnama*, apply for mutation of her name in the Land Registration Department as the *mutwalli* of the endowment. In support of his contention, Mr. Mullick refers us to Exhibit 15 series which establish that in respect of the properties which are now in dispute, she stood recorded in the Land Registration Department as the proprietress up to the time of her death. In order to set the argument advanced before us, it is necessary for us to consider some of the provisions of the Land Registration

Act (Bengal Act VII of 1876). It will be useful to remember, first, that the Act makes a distinction between a proprietor and a manager. "Proprietor" means a person in possession "of an estate as owner thereof." The term "manager" includes every person in charge of an estate on behalf of a religious or charitable foundation. See section 3 (8) and section 3 (6). It follows, therefore, that after the execution of the *wakfnama*, if the transaction was at all perfected, Bibi Asmatunnissa ceased to be a "proprietor" and became vested with the character of "manager" within the meaning of the terms as used in the Land Registration Act. Section 42 provides that "every person assuming charge after such commencement," that is to say, after the commencement of the Land Registration Act, "of any estate or revenue-free property, or of any interest therein . . . as manager, shall within six months from the date of such . . . assumption of charge, make application in the manner hereinafter provided to the Collector of the District on the general register of which such estate or property is borne, . . . for registration of his name and of the character and extent of his interest as such . . . manager." The provision is mandatory, and it was, in my opinion, the duty of Bibi Asmatunnissa to apply for registration of her name as *mutwalli* of the endowment, if, indeed, she had changed the character of her possession. Section 65 provides the penalty for omitting to comply with the Act and declares that a person omitting to make such application within the prescribed time, shall be liable to such fine as the Collector may think fit to impose, not exceeding one hundred Rupees for such omission. Section 78 provides that no person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by the Act to cause his name to be registered, unless the name of such claimant shall have been registered under the Act.

The learned Counsel for the respondents does not contest the proposition that it was the duty of the *mutwalli*; to have her name registered in the Land Registration Department as such *mutwalli*; but he contends that the endowment cannot lose its title to the properties in question, because

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the *mutwalli* failed to have her name registered as such *mutwalli*, and that where the Act provides a penalty for such omission on the part of the *mutwalli*, it would be a strong thing to say that there is no title in the endowment, because there was such an omission on the part of the *mutwalli*. The argument, in my opinion, begs the whole question which is in debate before us. If it be assumed, for the purpose of the decision, that there was transmutation of possession, and that the *wakf* was perfected, then the issue is decided, and the case is at an end. But, in order to determine the issue, it is relevant to enquire into the transaction whether there were acts and transactions consistent with the case of the defendants that there was a change in the character of possession of Bibi Asmatunnissa.

I ought to mention that, with reference to one property, Bibi Asmatunnissa was registered as *mutwalli* of the endowment. On the 17th March 1888, Walayat Hussain sold 1-anna 5½-pies out of the entire 16-annas *Mouza* Murtuzza Chak to Bibi Asmatunnissa; and on such purchase being made Bibi Asmatunnissa was registered in the Land Registration Department as *mutwalli* of the endowment not only in respect of the purchased share of the *Mouza*, but also in respect of the other shares which she had in the *Mouza*. But with reference to this transaction, there is this to be said, that we have not the application before us, and we do not know who actually made the application to the Collector. On the other hand, Walayat Hussain, the vendor of the property, was the husband's brother of *Musammal* Asmatunnissa and was nominated by her to succeed her as the *mutwalli* of the *imambara* and was, therefore, deeply interested in the question of the *wakfnama*. I am unable to look upon the single instance of transmutation of name as establishing that there was transmutation of possession.

The appellants next rely upon the finally published Records of Right showing that Bibi Asmatunnissa was recorded, in respect of the disputed properties, as a proprietress and not as a *mutwalli*.

The Cadastral Survey under Chapter X of the Bengal Tenancy Act was concluded in 1907, and the Records of Right were finally

published on the 17th September 1907. Exhibit 16 series are the finally published Records of Right, and they completely support the argument of Mr. Mullick, Mr. Sultan Ahmad, on behalf of the respondents, accepts the facts upon which the argument is founded, but disputes the validity of the argument. He refers us to the definition of 'proprietor' in section 3 (2) of the Bengal Tenancy Act as meaning "a person owning, whether in trust or for his own benefit, an estate or part of an estate" and he contends that, though a *mutwalli*, Bibi Asmatunnissa was a proprietress within the meaning of the term as used in the Bengal Tenancy Act, and that she could not be recorded as anything but a proprietress in the finally published Record of Rights. The argument, as founded upon the Bengal Tenancy Act, is entitled to weight but we have to read Chapter X of the Bengal Tenancy Act together with the rules made by the Local Government under section 189 of the Bengal Tenancy Act, for the purpose of regulating the procedure to be followed by Revenue Officers in the discharge of any duty imposed upon them by or under the Act and prescribing the forms to be used by them. Rule 48 in Part II, of the Survey and Settlement Manual, 1900, provides, that "the proprietary *khewat* shall show the character and extent of proprietary interests." In my opinion, there is no doubt whatever that she would have been recorded as a *mutwalli* of the endowment if it were known to the Survey Authorities that she was in possession of the properties as a trustee; and not for her own benefit. The proceedings in connection with the preparation of the Record of Rights are conducted with great publicity and with notice to the persons whose interests are intended to be affected by the entry in the Record of Rights. If, indeed, the trust had been perfected at any time during the Cadastral Survey operations, it was the duty of Bibi Asmatunnissa to acquaint the Survey Authorities with the fact that she was in possession of this estate, not for her own benefit, but as a trustee, so that the character of her proprietary interest could be shown in the proprietary *khewat*.

The next series of documents upon which the appellants rely are the rent-receipts (Exhibit 6 series) and the *pottah* (Exhibit 10 series) granted by Bibi Asmatunnissa

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In her capacity as proprietress and *Zemindar*. Mr. Sultan Ahmad's argument in reply is again founded upon the definition of the term "proprietor" in the Bengal Tenancy Act, and he contends that her description of herself as proprietress does not decide the question whether or not she was holding possession as a *mutwakli*. The argument is not without force; but it is a significant fact that not one document has been produced executed by Bibi Asmatunnissa and bearing her seal in which she describes herself as a *mutwali* although many documents have been produced by the defendants executed by third parties in favour of Bibi Asmatunnissa in which she is described as a *mutwalli*. I refer to this for the purpose of showing that, though under the Bengal Tenancy Act, and for the purpose of the Bengal Tenancy Act a proprietor includes a trustee, there is a distinction in fact between the two, a distinction which is observed in actual practice and in acts and transactions affecting property. The definition in the Bengal Tenancy Act establishes no more than this that, wherever the term "proprietor" is used in the Bengal Tenancy Act, it may mean, according to the context, either a person owning an estate for his own benefit, or a person owning an estate as a trustee. But it was not the object of the Bengal Tenancy Act to sweep away the distinction between a proprietor and a trustee and the documents executed by Bibi Asmatunnissa bearing her seal in which she describes herself as proprietress have a special significance when we are considering the question whether there was transfer of possession from herself as owner to herself as *mutwalli*.

In this connection, it will be useful to consider one of the *pattas* executed by Bibi Asmatunnissa. This *patta* is Exhibit A, dated the 27th November 1898, in favour of Shaikh Mahbub. This document was produced by the defendants and was intended to show that the *patta* was granted by Bibi Asmatunnissa in her capacity as a *mutwalli*. When the document was actually tendered in evidence, it was discovered that the word '*mutwalli*' had been struck out in the original, and in its place the word '*malika*' had been substituted. It was suggested by the defendants that the document had been tampered with while

in the custody of the Court. The plaintiffs thereupon called for a certified copy of the document and the certified copy showed that Bibi Asmatunnissa described herself as a proprietress and not as a *mutwalli*. I think that the original document is of great value in determining the question whether the *wakf* was perfected. What obviously happened was, that the document describing her as a *mutwalli* was placed before her for execution and she objected to being described as a *mutwalli*. Thereupon, the word '*mutwalli*' was struck out and the word 'proprietress' was substituted in its place. On no other hypothesis is it possible to explain the fact that in the original the word '*mutwalli*' is struck out and the word 'proprietress' substituted.

Finally, Mr. Susil Madhab Mullick draws our attention to the fact that the account-books of the estate have been deliberately suppressed by the defendants. They produced the account-books of 1882 1885, 1899, 1907 and 1908 and suggested to the learned Subordinate Judge that the account-books other than those produced by them were either lost or destroyed. The learned Subordinate Judge very properly declined to accept the explanation which was offered by the defendants and in regard to the account-books which were actually filed by the defendants, the learned Subordinate Judge says as follows:—"The appearance of these books, the freshness of the ink and papers convince one of their unreliable nature." The finding of the learned Subordinate Judge on this point is not challenged before us by the respondents; and we must accordingly assume that the account-books have been deliberately suppressed by the respondents. Now, the proper presumption arising from the suppression of these account-books is that, if produced, they would be unfavourable to the defendants who withheld them, Mr. Sultan Ahmad contends before us that all that we can presume from the suppression of the account-books is that the accounts have not been properly kept and that there have been breaches of trust on the part of the *mutwalli*. I am unable to accept this contention as well-founded. The question whether there were breaches of trust on the part of the *mutwalli* was not in issue in the case, and we cannot assume that the books of account

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were suppressed in order to conceal the breaches of the trust of the *mutwalli*. What was in issue was whether there was transmutation of possession in fact, and whether the *wakfnamas* were acted upon. The account-books would show whether there was a transmutation of possession in fact, that is to say, whether the accounts stood in the name of the *mutwalli* or of the proprietress. They would show whether the income of the estate was credited to the *wakf* or to the proprietress and they would also show whether a salary of Rs. 125 a month was being paid to the *mutwalli* or whether the whole income was being credited to Bibi Asmatunnissa as proprietress of the estate. In my opinion, the suppression of the account-books is almost decisive of the question. The plaintiffs gave notice to the defendants in their plaint that they would contend that "the possession of *Musammil* Asmatunnissa as proprietress continued over the moveable and immoveable properties till her death." The defendants had complete notice of the case of the plaintiffs, and it was their clear duty to produce those account-books which undoubtedly would have been important bearing on the question at issue.

It was contended by Mr. Sultan Ahmad that the suppression of the account-books is after all not of much importance since there is clear admission made by the witness examined on behalf of the plaintiffs that the *wakfnama* was acted upon. There is no doubt, as the plaintiff's witnesses have admitted, that "*majlis* has all along been held in the *Imambara* from the first to the 12th day of *Muharram* every year," that "*Mehdi* procession is taken out after *majlis* from the courtyard of the *Imambara* on the 7th day of the *Muharram*" that the procession goes round the town in pomp and thereafter returns to the Murtaza Masjid" that "the gentries of the town all along took part and still take part in the said *majlis* and procession "that the ladies of the gentries of the town also come to Asmatunnissa's house to pay respect to the *Mehdi* when it is taken inside the house" that "on the 7th day *malida* is distributed to the persons who attend there either outside or inside the house," that "*sarbat* and *jelapee* were and still are distributed during the ten days" that "on the 12th day *Phul-*

pan is observed" that "*Urs* ceremony of Kazi Muhammad Hussain is observed in the said *Imambara*," that "on such occasion *Koran* Sheriff is recited and *Fateha* ceremony is gone through," that "bread and meat are cooked and distributed to the poor on the *Urs* ceremony day," that "those who attend the ceremony are also offered bread and meat." But the question is not whether there were acts which any pious Muhammadan lady would perform, but whether the *wakf* was at all constituted. If, on a consideration of the evidence, the conclusion is reached that the *wakf* was perfected, it would be wholly irrelevant to consider whether the *wakf* was acted upon, for the evidence tending to show that the *wakf* was not acted upon would only be evidence of breach of trust on the part of the *mutwalli*. The evidence upon which the respondents rely does not in any way establish that the *wakf* was completed. The acts to which the plaintiff's witnesses speak and upon which Mr. Sultan Ahmad relies as establishing that the *wakf* was not only perfected, but was actually acted upon are such as any pious Muhammadan lady of the Shia sect in good circumstances would do of her own accord; and the evidence is conclusive that all these different ceremonies used to take place regularly before the first *wakfnama* was executed. The account-books would be valuable evidence on the point, and I cannot pass by the suppression of these account-books as lightly as the learned Subordinate Judge has done.

Mr. Sultan Ahmad relies upon certain transactions as showing that Asmatunnissa in certain transactions acted as the *mutwalli* of the endowment. Of the numerous transactions upon which Mr. Sultan Ahmad relies, the only series that press me are the suits which Asmatunnissa brought as *mutwalli* of the endowment as against a tenant. The certified copies of the decrees which have been produced are Exhibit V series and they show that *Musammil* Asmatunnissa as *mutwalli* of the endowment recovered certain rent-decrees against certain tenants. These are the only documents which support the case of the defendants. The other documents upon which Mr. Sultan Ahmad relies do not really touch the question at issue. They undoubtedly show that various persons treated her as a *mut-*

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wall of the endowment, but Asmatunnissa was not a party to these documents and it is impossible to regard them as assertions made by her as to her title as *mutwalli* of the endowment. These documents are Exhibit Q, a *kobala* in her favour dated the 20th December 1883; Exhibit K, a *kobala* in her favour dated the 17th March 1888; Exhibit H, a *kobala* in her favour in 1891 and Exhibit J series, certain *kabuliyats* executed by tenants in her favour as *mutwalli* of the endowment. They are no doubt evidence in the case, but they are not sufficient, in my opinion, to turn the scale in favour of the defendants.

In coming to the conclusion that the *wakf* was not perfected, I have been impressed by the facts, first, that Asmatunnissa did not apply for registration of her name in the Land Registration Department as *mutwalli* of the endowment; secondly, that she did invite the Survey Authorities to record her as the *mutwalli* of the endowment; thirdly, that she did not collect the rent due to her as the *mutwalli* of the endowment; and fourthly, that the defendants have suppressed the account-books which would be the most valuable evidence to show in what capacity she held possession of the properties in dispute. In *Hamid Ali v. Mujawar Husain Khan* (1) one of the questions which the Allahabad High Court had to consider was whether, notwithstanding his paper declaration to that effect, the settlor did really obtain that seisin as *mutwalli* which the Shia Law requires, Burkitt, J., in answering the question in the negative, made the following pregnant observations:—"It may also be strongly doubted whether there was in this case that strict seisin by the *mutwalli* which the Shia Law requires. The settlor did, no doubt, draw up the paper *wakfnamah* in which he says that thenceforth he holds the property as *mutwalli*. But he did nothing more except to register the paper. He in no way changed the outward appearance of the title by which he remained in possession. If he had been sincere in his desire to divest himself of his proprietary title, he would have at once applied to the Revenue Authorities to have his name no

longer recorded in the public registers as owner of the dedicated property, and instead to have a new entry made recording him as *mutwalli*. This he did not do" and the learned Judge concluded as follows:—"On the above facts I am unable to say that the settlor, notwithstanding his paper declaration to that effect, did really obtain that seisin as *mutwalli* which the Shia Law requires." In my opinion, the plaintiffs have established that Asmatunnissa did not change the character of her possession and that, accordingly, the *wakfnama* was not perfected. That being so, the subject-matter of the *wakf* was her inheritance to which plaintiff No. 1 is entitled to succeed under the Muhammadan Law.

My finding on this point is sufficient for the disposal of the appeal; but as the case is likely to be carried to the Judicial Committee, it is just as well that I should express my opinion on the two other points which have been argued before us by Mr. Susil Madhab Mullick. Mr. Mullick contends before us that the *wakfs* are illusory and were not intended to be acted upon and that the whole object was to divert the course of succession under the Muhammadan Law and to keep the properties in Bibi Asmatunnissa's husband's family. In my opinion, the question has not been raised in the form in which it has been put by Mr. Mullick before us. It has, indeed, been suggested in the plaint that possession all along remained with Asmatunnissa and that the *wakfs* were never acted upon; but when we are dealing with the question whether the *wakfs* were illusory, the question is not whether the *wakfs* were or were not acted upon, but whether it was intended that they should or should not be acted upon. It is not suggested anywhere in the plaint that it was not intended by Asmatunnissa that the *wakfs* should be acted upon. We are then left to decide the question on the *wakfnamas* as they stand. Now, it cannot be contended for a single moment that the *wakfnamas* as they stand do not constitute a dedication of the properties to charitable or religious uses. That being so, it is impossible to hold, on a construction of the *wakfnamas*, that the *wakfs* are illusory and that they were not intended to be acted upon.

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The last point urged is that the documents were not read and explained to Bibi Asmatunnissa and that she did not have any independent advice in connection with the execution of these documents. The learned Subordinate Judge has given good reasons for deciding this issue in favour of the defendants and I am not prepared to hold that his conclusion is erroneous. I do not propose to discuss all the evidence bearing on this point, it is sufficient for me to refer to a document of great value bearing on this point. It appears that Asmatunnissa was examined on her behalf in a suit which was instituted by Shaikh Kudrat Ali against her. Her deposition in that case is Exhibit S and it establishes, in my opinion, beyond doubt or controversy, that Asmatunnissa was aware of the fact that she had executed three *wakfnamas* one after another. It was contended by Mr. Mullick that Exhibit S was not properly admitted in evidence. In my opinion, it was properly admitted under section 32 (3) of the Evidence Act. In the course of her evidence she said as follows:—"I have executed three *wakfnamas*. In the first *wakfnama* the sum of Rs. 10 was fixed as the pay of Imam Ali and after his death to his sons if they be competent to do the work." There is no doubt, in my opinion, that she was well aware of the fact that she had executed these *wakfnamas*. She even remembered that by the first *wakfnama* the sum of Rs. 10 was fixed as the pay of Imam Ali which is undoubtedly correct. Her evidence read as a whole shows that she is a shrewd and clever woman and it is improbable that she should have signed these documents without understanding what they were.

Although my finding on the second and third points urged by Mr. Mullick are against him, still as, in my view, the *wakf* was not perfected, the plaintiffs are entitled to a decree for possession of the properties in dispute. I would allow the appeal, set aside the judgment and the decree passed by the Court below and give the plaintiffs a decree for possession of the properties set out in Schedule I of the plaint. The plaintiffs are also entitled to a decree for mesne profits and for costs both in this Court and in the Court below.

In conclusion, I should like to draw the

attention of the Trial Court to a matter which, in my opinion, constitutes a reproach on the administration of justice in this country. The plaintiff, an aged lady of 62, was examined on commission, and her cross-examination lasted for 31 days, and covers 63 printed pages in the paper-book. The cross-examination of the other witnesses examined on commission is correspondingly long. There is an idea that Pleaders cross-examining witnesses on commission may take a liberty which would not for a moment be permitted in Court. But, in my opinion, the Courts can and ought to exercise some sort of control in these matters. The Commissioner appointed by the Court has complete power to stop proceedings and to take the direction of the Court whenever it appears to him that the Pleader cross-examining a witness is abusing his position and exceeding the limits of propriety; and, in my opinion, the Court, in appointing a Commissioner, should in each case give him instructions so as to make it clear to him that he is not so powerless as it is imagined, and that he should exercise his power and stop the proceedings for the purpose of taking the direction of the Court whenever he should think that it is necessary to do so.

Adami, J.—I agree.

Z. K.

Appeal allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 128 OF 1918.

June 29, 1922.

Present:—Mr. Justice Martineau and
Mr. Justice Campbell.

KHOTA RAM—PLAINTIFF—APPELLANT
versus

NAWAZ AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II,

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r. 2.—Mortgage—Suit for possession on default in payment of interest—Subsequent suit for recovery of interest, whether barred—Interest, high rate of—Court, duty of.

In a suit by a mortgagee for possession of the mortgaged property on default in payment of interest, the plaintiff is entitled to a decree for possession *simpliciter* and the matter of the amount of the lien should be left to be decided on redemption. [p. 768, col. 1.]

Kimani v. Sultani Mal, 13 Ind. Cas. 559; 66 P. R. 1912; 82 P. W. R. 1912; 148 P. L. R. 1912, relied upon.

Kundan Mal v. Sardar Allah Dad Khan, 5 Ind. Cas. 821; 19 P. R. 1910; 36 P. W. R. 1910; 167 P. L. R. 1910 and *Aulia Khan v. Kanshi Ram*, 17 Ind. Cas. 677; 45 P. R. 1913; 25 P. W. R. 1913; 145 P. L. R. 1913, distinguished.

On a mortgagor making default in payment of interest the mortgagee sued for and obtained possession of the mortgaged property in accordance with the terms of the mortgage-deed. The mortgagor subsequently applied for redemption of the mortgage under the provisions of the Punjab Redemption of Mortgages Act. The Collector directed redemption on payment of the principal amount alone. The mortgagee thereupon brought a suit for a declaration of the mortgage amount, including interest:

Held, that the portion of the claim relating to the amount of interest which had fallen due at the date when the mortgagee sued for possession was not barred by the provisions contained in O. II, r. 2 of the Civil Procedure Code. [p. 768, col. 1.]

Chhabil Das v. Massu, 19 Ind. Cas. 981; 4 P. R. 1914; 243 P. L. R. 1913; 145 & 207 P. W. R. 1913, distinguished.

Courts, as a general rule, are bound to award the interest agreed to be paid on a loan even if lapse of time and accumulation of interest may have swelled the principal sum enormously beyond its original figure. [p. 768, col. 2.]

Aziz Khan v. Duni Chand, 48 Ind. Cas. 933; 101 P. R. 1918; 23 C. W. N. 130; 165 P. W. R. 1918 (P. C.) and *Balla Mal v. Ahad Shah*, 48 Ind. Cas. 1; 124 P. R. 1918; 35 M. L. J. 614; 16 A. L. J. 905; 23 C. W. N. 233; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.), followed.

First appeal from a decree of the Senior Subordinate Judge, Mianwali, dated the 8th October 1917.

Baktshi *Tek Chand*, for the Appellant.
Lala *Jagan Nath*, for the Respondents.

ORDER.—This first appeal is the result of a suit under section 12, Punjab Act II of 1913. The mortgagors, in a certain transaction to be described presently, applied for redemption to the Collector and obtained a decision that the mortgage could be

redeemed on payment to the mortgagee, Khota Ram, of Rs. 570. Khota Ram has sued for a declaration that there is a further charge on the land mortgaged of Rs. 5,015 and that there can be no redemption without payment of this amount. There was a prayer in the alternative for possession, if it be found that he (the mortgagee) is not in possession, but the fact of the mortgagee's possession is now conceded.

The mortgage was entered into on the 26th July 1895 by registered-deed for an area of 214 *kanals* 7 *marlas*. The mortgage price was Rs. 560 and the conditions were that the mortgagors should remain in possession and should pay interest yearly in the form of a certain quantity of grain, on default of any year's interest the mortgagee was to be empowered to take possession and thenceforth payment of interest should cease. The term of mortgage was four years, after which the mortgagors were to redeem on payment of the mortgage-money in the month of *Har*. Then follow in the deed two sentences which are important. The first is this: "Compound interest shall be charged on the unpaid amount of interest at 25 per cent. per annum, and the same shall be paid by the mortgagors to the mortgagee along with the aforesaid mortgage money." The other is the following which comes a little lower down:—"The aforesaid mortgaged lands and the persons of the mortgagors shall both be liable for payment of this debt."

On the 27th June 1898 a further advance of Rs. 10 was made to Charagh, one of the mortgagors, by Khota Ram and a document was drawn up reciting that interest was payable on this amount at Rs. 1-9 per cent. per mensem, that principal and interest were payable on demand, that the debt should be considered as an additional charge on the lands mortgaged, that if those lands were redeemed, payment of the said principal and interest would be made along with the mortgage-money due under the previous deed and that other lands and the persons of the debtors would be liable for the debt.

In 1902 the mortgagee, Khota Ram, sued for possession on the ground that the interest for that year had not been paid but he further stated that previous instalments had not been paid in full. He was given a decree

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for possession and the Court expressly refused to go into the question of what was due for arrears of interest, remarking that the plaintiff could seek his proper remedy in respect of anything outstanding. A concession was given to the mortgagors that should they pay the 1902 and 1903 instalments in *Jeth Sambat* 1960 (May 1903) possession should not be delivered to the plaintiff. No payments, however, were made and Khota Ram obtained possession on the 3rd April 1904. He now asks for a declaration that the value of unpaid grain instalments with compound interest at 25 per cent. up to the date of suit should be declared to be included in the mortgage charge. The calculation is set forth in the plaint and shows that the balance of grain due for each year from *Sambats* 1953 to 1961 has been taken in local weight measures of *paths choths*, *choths* and *topas*. Compound interest at 25 per cent. up to the date of suit has been calculated on each balance in terms of weight of grain. The total weight of grain due has thus been ascertained and a fixed rate of Rs. 3-8-8 per maund has been applied with the result of a sum of Rs. 4,981-4. The mortgagors have been credited with small payments in each of the five years, 1953 to 1957, but with nothing thereafter. Rs. 33-12 interest on the second advance of Rs. 10, brings the total up to Rs. 5,015.

Of the seven issues framed by the lower Court the first three relating to limitation, valuation of the suit and the possession of the plaintiff need not be considered, since these are not questions now in dispute. The remaining four were as follows:—

1. Is the suit barred under O. II, r. 2, Civil Procedure Code?

2. Is the rate of interest penal or excessive and not enforceable?

3. Have the defendants paid interest?

4. To what relief is the plaintiff entitled?

The lower Court held on No. 1 that when the plaintiff sued for possession as mortgagee in 1902 he could have recovered the interest then due at the same time and should have done so. Quoting *Kundan Mal v. Sardar Allah Dad Khan* (1), *Chhabil Das v.*

Massu (2) and *Aulia Khan v. Kanshi Ram* (3), the learned Subordinate Judge found that the plaintiff was barred from bringing a second suit for recovery of interest under O. II, r. 2. On issue No. 2 the lower Court recorded a brief decision that the rate of interest was unconscionable and that no debtor with his eyes open could agree to it. There was no specific finding on the other issues, and the suit was dismissed. The plaintiff has appealed.

In our opinion both the above findings by the learned Subordinate Judge are wrong. An obvious commentary on the first is, that the plaintiff is not bringing a suit for the recovery of interest. He is, to all intents and purposes, a defendant resisting the claim of the mortgagors to turn him out of possession on payment of a comparatively small sum. He has been forced to become a plaintiff in a declaratory suit by the action of the Revenue Officer under Punjab Act II of 1913, but what he says is, that he wants to remain in possession of the land, and that if he is evicted he must be paid a certain sum.

We have heard a lengthy argument from Mr. Jagan Nath for the respondents in support of the lower Court's finding on this issue. He has contended that all the annual defaults from the date of the mortgage up to the date of the suit in 1902 constituted one cause of action and that the plaintiff, having an inherent right to sue for interest not paid at that time, omitted, when he sued merely for possession, to sue for all the reliefs to which he was entitled. In support of the argument as to the inherent right to sue for interest Counsel has quoted *Chhabil Das v. Massu* (2). In that case, as in the present, the mortgage-bond provided that interest was to be paid to the mortgagee every year and that in default the mortgagee should have the right to take possession of the land. In 1897 the mortgagee sued the mortgagors and obtained a decree for the value of produce then due, but did not claim possession. In his subsequent suit for possession the Chief Court held that the fact that the mortgage-deed did not specifically give the

(2) 19 Ind. Cas. 981; 4 P. R. 1914; 243 P. L. R. 1913; 145 & 207 P. W. R. 1913.

(3) 17 Ind. Cas. 677; 45 P. R. 1913; 25 P. W. R. 1913; 145 P. L. R. 1913.

(1) 5 Ind. Cas. 821; 19 P. R. 1910; 36 P. W. R. 1910; 167 P. L. R. 1910.

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mortgagee the right to sue for produce on default did not take away his inherent right to do so; that he should have sued for possession at the same time, and that an admission by the mortgagors of payment of produce between the dates of the decree and that of the second suit did not create a new cause of action. In the first place, it will be seen that this ruling was delivered on different facts and, in the second, it appears to be contrary to what was laid down in a Full Bench ruling reported as *Parmeshri Das v. Fakeria* (4), although it was not expressly mentioned as overruled. The Full Bench decision was that a mortgagee is not debarred under O. II, r. 2, from suing for possession of the mortgaged property on the strength of a stipulation conferring upon him the option to sue for interest or for possession in the event of a mortgagor's failure to pay interest at the stipulated time, by the fact that on the occurrence of a previous default he sued only for interest and not for possession. This was the ruling in a case where there was a distinct provision in the mortgage-deed enabling the mortgagee to sue for interest on default as well as for possession. Here and in the case decided by *Chhabil Das v. Massu* (2) there was no such express condition, but the learned Judges who delivered *Chhabil Das v. Massu* (2) read such a condition into the deed in the guise of an inherent right. In any event, the fact that the first suit was for interest and not for possession clearly distinguishes the present case from *Chhabil Das v. Massu* (2). The cause of action for the 1902 case was the default of payment of interest for that year. The present suit is not one for payment of interest. It is a declaratory suit and the cause of action lies in the steps taken by the mortgagors to put an end to the mortgagee's possession. A direct authority for the view that the previous suit has no effect upon the present is *Kimani v. Sultani Mal* (5), where it was held, when a mortgagee sued for possession on default on payment of interest, that he was entitled to a decree for possession *simpliciter* and that the matter of the amount

of the lien should be left to be decided on redemption. In this connection the other two rulings quoted by the lower Court *Kundan Mal v. Sardar Allah Dad Khan* (1) and *Aulia Khan v. Kanshi Ram* (3) are not in point.

Coming to the second of the four issues detailed above, the effect of the Privy Council rulings, *Aziz Khan v. Duni Chand* (6) and *Balla Mal v. Ahad Shah* (7) is, that Courts, as a general rule are bound to give effect to what the parties are proved to have agreed to, even if lapse of time and accumulation of interest may have swelled the principal sum enormously beyond its original figure. The lower Court has not considered those rulings, and in the present case no specific undue influence on the part of the mortgagee was pleaded by the defendants. There was a general plea of undue influence only and no evidence of any sort of undue influence was produced. It has been argued further before us that the interest is not a charge on the mortgaged land, but it is expressly made so by the sentences in the deed quoted above, and *Aulia Khan v. Kanshi Ram* (3), which is cited, is distinguishable since the terms of the deed in that case were quite different. High as the rate of 25 per cent. compound interest may be, we can find no reason for holding that the mortgagee is not entitled to it.

Counsel for the respondent-mortgagors admits that the onus was on the defendants to prove that any more had been paid to the mortgagee in respect of interest than what has been allowed for in the plaint and that no evidence has been produced on the question by his clients. He has suggested that it was difficult for them to prove anything after 20 years and that the mortgagee had special knowledge but we do not see why the knowledge of the creditor should be presumed to be more special than that of the debtor.

In regard to the last issue, another lengthy argument has been addressed to us to the effect that the plaintiff-mortgagee is not

(6) 48 Ind. Cas. 933; 101 P. R. 1918; 23 C. W. N. 130; 165 P. W. R. 1918 (P. C.).

(4) 59 Ind. Cas. 71; 1 L. 457; 56 P. W. R. 1920 2 L. J. 466 (F. B.).

(5) 13 Ind. Cas. 559; 66 P. R. 1912; 82 P. W. R. 1912; 148 P. L. R. 1912.

(7) 48 Ind. Cas. 1; 124 P. R. 1918; 35 M. L. J. 614; 16 A. L. J. 905; 23 C. W. N. 233; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

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entitled to any arrears of interest on account of his acquiescence in non-payment which should be presumed from the fact that he did not sue to take possession earlier. This is a point which was never raised in the pleadings in the lower Court at all and, in any case, there is no force in it. The law of limitation allowed the mortgagee to sue for interest within 12 years of the first default and 12 years had not elapsed when he took possession. There can be no presumption that he gave up his claim to receive arrears of interest at redemption. The rulings quoted to support this proposition of the appellants need not be discussed since they are not applicable. They are *Mahadaji v. Joti* (8), *Balwantrao Dowlatrao v. Narhar Gangaram Agnihotri* (9), *Jhunku Singh v. Chatkan Singh* (10), *Partab Bahadur Singh v. Gajadhar Bakhsh Singh* (11) and *Badan v. Murari Lal* (12). The three latter are cases of the mortgagees accepting a diminished security and remaining apparently satisfied with it for some years, and all the cases deal with mortgages which were *usufructuary* from their commencement.

The second point raised in connection with this issue is, that the amount of the second bond with the interest due on it cannot be a charge on the land. Again, this was not pleaded in the lower Court and the principal sum Rs. 10 has been paid by the mortgagors as part of the redemption money fixed by the Revenue Officer. In our opinion, according to the terms of the bond, the parties intended it to be a charge on the land and the case is similar to that reported as *Parabh Dial v. Kharku* (13) where the money due on a similar bond was made so chargeable.

Finally remains to be decided what amount of interest the mortgagee should receive. His claim to Rs. 33-12 simple interest on Rs. 10 up to the date of application for redemption is, in our opinion, correct. For the rest he has refrained from

claiming interest after the date on which he took possession but has claimed compound interest on what was in arrear on the date of his taking possession up to the date of the application for redemption. It seems to us, however, after a careful consideration of the terms of the mortgage-deed, that it was not the intention of the parties that compound interest should be charged after possession had been taken. Interest and compound interest both were to be paid in kind and could only be paid so long as the mortgagors had the land which yielded the kind. When the land was taken from them they ceased to have the means of paying either interest or compound interest. Therefore, in our opinion, calculation of compound interest must cease on the 3rd April 1904 when the mortgagee got possession.

In any case, we should not think it right to allow the plaintiff to value his interest in kind at the market rate of 1916 when he brought his suit. We proceed to indicate the lines on which the redemption money due to the mortgagee should be calculated, and it is necessary to remand the case to the lower Court for further evidence to be taken in order to enable us to pronounce a final order.

The quantity of grain outstanding for each year from 1953 to 1961 *Sambat* is accepted as stated in paragraph 3 of the plaint. The market rate for each year is to be ascertained and the balance of grain for each year reduced to money according to that market rate. On each of the sums so ascertained compound interest at 25 per cent. will be calculated from the date of default to the 3rd April 1904. To the resultant figures are to be added (1) Rs. 33, price of chaff, on which no compound interest is claimed, and (2) Rs. 33-12, the interest on the additional charge of Rs. 10. The total will be declared to be the sum on payment of which together with the principal of Rs. 570, the land can be redeemed by the mortgagor-defendants and the plaintiff will receive his proportionate costs in both Courts.

We refer the appeal to the lower Court under O. XLI, r. 25 for trial of the following issues and return of evidence and findings thereon within three months:—

(8) 17 B. 425; 9 Ind. Dec. (N. S.) 277.

(9) 54 Ind. Cas. 814.

(10) 2 Ind. Cas. 221; 31 A. 325; 6 A. L. J. 247.

(11) 24 A. 521; 29 I. A. 148; 7 C. W. N. 97; 4 Bom. L. R. 845; 8 Sar. P. C. J. 310 (P. C.).

(12) 28 Ind. Cas. 973; 37 A. 309 at 313; 13 A. L. J. 397.

(13) 2 P. R. 1890.

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1. What was the market rate for white wheat first quality on the date of each default from Sambat 1953 to Sambat 1961?

2. What is the total value at those rates of the wheat due to the plaintiff on 3rd April 1904 calculated as directed by us above?

Z. K.

Issue remitted.

Mr. C. A. Sashagiri Sastri, for the Petitioner.

Mr. V. Ramasami Iyer, for the Respondents.

JUDGMENT.—The plaintiffs, here respondents, obtained a decree against the two defendants, 2nd defendant being the petitioner in this Court, for Rs 400 in the following circumstances:—Plaintiffs, it is not disputed, owed 1st defendant Rs. 400 and, it is proved, paid it to 2nd defendant, 1st defendant's agent, as such. Second defendant, however, did not account to the 1st defendant for the money, misappropriating it. First defendant then obtained a decree for it against the plaintiffs who did not appear or plead discharge. On these facts the lower Court dismissed the plaintiff's suit against the 1st defendant; but gave a decree against the 2nd defendant; and the question in this revision petition is, whether it was right in law in doing so.

It is clear, that if it was not, plaintiffs will have paid what they owed twice. But that result cannot affect the decision because it is entailed, not by anything in the legal relation between the parties before me, plaintiffs and 2nd defendant, but by the failure of the former to take advantage in the previous suit against them of the plea of discharge, which was open to them. It was no doubt suggested on their behalf during the hearing of this petition that they should now be allowed to make 1st defendant a party to it and claim a reversal of the lower Court's decree in his favour. But it would have been useless to allow this in the absence of any possibility that their contention would succeed. The case must be dealt with as between them and 2nd defendant alone on the issue whether, in the circumstances, they are entitled to recover from him in consequence of his failure to account to his principal.

Under section 233, Indian Contract Act, in cases where an agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable. But it is not shown how, under any provision of law or in virtue of any principle, 2nd defendant was under any liability to plaintiffs in respect of the money received by him from them. This was the basis of the

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 624 OF 1921.

January 23, 1923.

Present:—Mr. Justice O. D. Field.

KULANDAIVELU PILLAI

—DEFENDANT NO. 2—PETITIONER

versus

RAMASAMI NAICKER AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 233—Payment by debtor to agent of creditor—Misappropriation by agent—Debtor, whether entitled to recover amount from agent.

Where a debtor pays the amount of his debt to the agent of his creditor, and the latter misappropriates it, the debtor is not entitled to recover the same from the agent because of the absence of privity between him and the agent. [p. 771, cols. 1 & 2.]

Ellis v. Gossion, (1893) 1 Q. B. 350; 62 L. J. Q. B. 232; 4 R. 267; 66 L. T. 144; 41 W. R. 411, followed.

Lollard v. Bank of England, (1871) 6 Q. B. 623; 40 L. J. Q. B. 233; 25 L. T. 415; 19 W. R. 1108 and *Taylor v. Metropolitan Railway Co.*, (1906) 2 K. L. 55; 75 L. J. K. B. 735; 95 L. T. 143; 22 T. L. R. 479, distinguished.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge, Madura, in Small Cause Suit No. 1898 of 1920.

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decision in *Ellis v. Goulton* (1). Lord Esher and Smith, L. J., dealing with and rejecting *seriatim* the various heads of liability which could conceivably be relied on; and so also, although the reasons are given more shortly, in *Bamford v. Shuttlesworth* (2) and *Stephens v. Budcock* (3). Against these authorities, plaintiffs have relied first, on the *dictum* of Blackburn, J., in *Pollard v. Bank of England* (4) and *Taylor v. Metropolitan Railway Co.* (5) in which that *dictum* is quoted with approval: "Where money has been paid under a mistake of fact to an agent, it may be recovered back from him unless he has in the meantime paid it to his principal or done something equivalent to payment to him, in which case the recourse... is against the principal only." But in the present case, as in *Ellis v. Goulton* (1) and the cases cited with it, there was no question of mistake, the absence of any being referred to explicitly in *Stephens v. Budcock* (3) and the two cases last referred to must be distinguished on that ground.

Plaintiffs, however, rely on the fact that these are not cases in which fraud or dishonesty on the part of the agent was relied on and have referred to two of the headings under which the liability of the agent to refund money paid to him is classified in Bowstead on Agency, Art. 125 (b) and (c), p. 421. But of these the first "when the money is obtained by duress or by means of any fraud or wrongful act to which the agent is party or privy" is not relevant. For it is not alleged that plaintiffs made their payment to 1st defendant otherwise than in the ordinary course, in discharge of what they owed his principal; and the lower Court was in fact inclined to find that he originally received the money honestly, failing to credit it correctly only through inadvertence. As regards the other head of liability referred to "When the money is

paid under a mistake of fact or under duress or in consequence of some fraud or wrongful act and re-payment is demanded of the agent before he has in good faith paid the money over to or otherwise dealt to his detriment with the principal in the belief that the payment was a good and valid payment," it is sufficient that, as already observed, there is here no question of mistake of fact and there is none of duress or other misconduct on the part of the principal to which alone the learned author can be supposed to be referring, since he has already dealt with the cases of misconduct on the part of the agent. It is then immaterial that a demand may be taken to have been made in the present case on the former before he paid to the latter since the other conditions postulated are not fulfilled.

The plaintiff's reference to this authority in fact calls for notice mainly because the second citation from it purports to be founded on the old case of *Cary v. Webster* (6). That case actually decided only that a clerk receiving money for his principal and paying it over to him although without making any entry in his account is not liable to the person who made the payment and the portion now relevant is only an accompanying *obiter dictum* that if the clerk had not made the payment over, he or his principal would have been liable at the plaintiff's option. No reason for this opinion is given and nothing later in the same sense has been shown and it is, therefore, unnecessary to regard the decision, in spite of the high authority of Lord Camden who gave it, as extending in any degree the two headings of liability based on the misconduct of either agent or principal above referred to. That failing, I follow the decision in *Ellis v. Goulton* (1) and the two cases mentioned in it. In the absence of such misconduct in connection with the receipt of the money, of which refund is claimed, the basis of those decisions, the absence of privity between the agent and the person who paid him, would have been available equally, whatever the circumstances in which the former retained it. Shortly, 2nd defendant received it as his principal's money and

(1) (1893) 1 Q. B. 350; 62 L. J. Q. B. 232; 4 R. 267; 68 L. T. 144; 41 W. R. 411.

(2) (1840) 11 A. & E. 926; 52 R. R. 542; 113 E. R. 666.

(3) (1832) 3 B. & Ad. 354; 1 L. J. (N. S.) K. B. 75; 37 R. R. 448; 110 E. R. 133.

(4) (1871) 6 Q. B. 623; 40 L. J. Q. B. 233; 25 L. T. 415; 19 W. R. 1168.

(5) (1906) 2 K. B. 55; 75 L. J. K. B. 735; 95 L. T. 149; 22 T. L. R. 479.

(6) 1 Str. 480; 93 E. R. 647.

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plaintiff's who could have pleaded against 1st defendant that he did so, cannot by their failure so to plead enable themselves to recover from him.

The petition must be allowed, the lower Court's decree being modified as regards 2nd defendant by the dismissal of the suit against him with costs throughout.

V. N. V.

Petition allowed.

N. H.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 903 OF 1914.

March 13, 1923.

Present.—Mr. Justice Abdul Raoof.

THE FIRM ABDUL HAKIM-MUHAMMAD

SADIK—DEFENDANT—APPELLANT

versus

JOHO JAUTZEN, THROUGH KISHAN

NARAIN, AGENT—PLAINTIFF—

RESPONDENT.

Vendor and purchaser—Re-sale, when can be effected—Reasonable time.

Where a right of re-sale is given by the contract between the parties it is not necessary that the property in the goods should pass to the purchaser to enable the seller to re-sell the goods and claim the difference between the price of the goods as originally contracted for and the price fetched at the re-sale. [p. 773, col. 1.]

Moll Schutte & Co. v. Luchmi Chand, 25 C. 505; 2 C. W. N. 283; 13 Ind. Dec. (N. S.) 335 (P. C.), relied upon.

Yule & Co. v. Mahomed Hossain, 24 C. 124; 1 C. W. N. 71; 12 Ind. Dec. (N. S.) 748, dissented from.

Angulia & Co. v. Sassoon & Co., 13 Ind. Cas. 705; 39 C. 568; 16 C. W. N. 593, distinguished.

A seller electing to exercise the right of re-sale is not only bound to wait a reasonable time after giving notice of his intention before actually re-selling, but he is bound to exercise the right within a reasonable time after the date of the breach, otherwise the price obtained on such re-sale, if it has been unreasonably delayed till the market has fallen, will not be a true criterion of the damage. [p. 774, col. 1.]

Prag Narain v. Mul Chand, 19 A. 535; A. W. N. (1897) 150; 9 Ind. Dec. (N. S.) 346, relied upon.

Second appeal from a decree of the Additional Divisional Judge, Delhi, dated the 19th January 1914, varying that of the District Judge, Delhi, dated the 19th May 1913.

Lala Balwant Rai, for the Appellant.

Mr. Manohar Lal, for the Respondent.

JUDGMENT.—This second appeal has arisen out of a suit for recovery of damages on account of a breach of contract on the part of the defendants. The defendants indented for 20 cases of oriental beads and 8 cases of needles. Out of the former, they took delivery of 10 cases only and out of the latter only of 6 cases. Thereupon, the plaintiffs re-sold the goods which resulted in a loss. Therefore, they sued the defendants for damages incurred by them. The two Courts below have dealt with the two cases separately because the facts relating to the contract for the purchase of beads are slightly different from those relating to the contract for the needles. The main defence in the suit relating to the beads was that the goods were not in accordance with the order as the packing and the number of beads in each string were not according to order. It has been found by both the Courts that the goods were not packed according to the order. In the indent it was clearly noted that the beads were to be packed in long bundles, but when they arrived they were found to be in round bundles. There were other defences put forward also, such as the cancelment of the indent by mutual agreement between the plaintiff's agent and the defendant's and that the agent had promised to make an allowance on account of the less number of beads in each string. As regards the authority of the agent of the plaintiff the Trial Court was inclined to favour the view that he had no power to make any allowance and that the plaintiff was not bound by any promises but the Court having found that the packing was not done according to the order it materially affected the goods and the plaintiff was not entitled to sue for short proceeds on the re-sale. As regards the needles the Court found that the defendant was liable and granted a decree in favour of the plaintiff for the sum of Rs. 552-10-8.

Both parties appealed. The lower Appellate Court has taken a different view and has granted a decree for Rs. 164-5 in favour of the plaintiff in respect of the re-sale of the beads also and has upheld the decree for Rs. 552-10-5 in respect of the needles.

ABDUL HAKIM-MUHAMMAD SADIK v. JOHO JOUTZEN.

The defendants have, therefore, presented two second appeals to this Court. The first contention put forward by Mr. Balwant Rai is that as the property in the goods had not passed to the purchasers the case did not come within the provisions of section 107 of the Indian Contract Act and the plaintiffs had no right of re-sale. In support of his contention the learned Vakil has relied upon the case of *Yule & Co. v. Mahomed Hossain* (1). The decision in this case was dissented from by the same Court in the case of *Moll Schutte & Co. v. Luchmi Chand* (2). It was held in the latter case that where a right of re-sale is given by the contract between the parties it is not necessary that the property in the goods should pass to the purchaser to enable the seller to re-sell the goods and claim the difference between the price of the goods as originally contracted for and the price fetched at the re-sale. In the present case the right of re-sale is given by the contract itself. Therefore, the plaintiffs were entitled to re-sell the goods and claim the difference. The suit, therefore, was maintainable. The learned Vakil has also relied upon the decision in the case of *Angulia & Co. v. Sassoon & Co.* (3) the facts of that case were entirely different. The sugar contracted to be sold was in bulk and the learned Judges held that there might be a case where neither the provisions of section 107 of the Indian Contract Act applied, nor the provisions in the indent. Here, the provision as to the re-sale clearly applies and the rule laid down in *Moll Schutte & Co. v. Luchmi Chand* (2) clearly governs the case.

The next contention put forward by Mr. Balwant Rai is that as the packing was not according to the order his clients were entitled to reject the goods. The question to be decided is whether the packing was so defective as to affect the goods, see *Remfry on Sale of Goods in British India*, p. 492. Reference is made there to a case where

in a contract of sale of rice it was agreed that the rice would be packed in double bags. Having regard to the facts of that case it was held that the want of packing in double bags necessarily affected the quality and description of the goods. In the present case it has been clearly found by the Courts below that the beads were not of different quality from that ordered in the indent. The mere fact that they were packed in round cases instead of long cases would not justify a finding that the quality and description of the goods had in any way suffered. It has been clearly found by the Courts below that there is no difference between the beads received from those ordered by the defendants. Moreover, having regard to the fourth clause in the indent, it is hardly open to the defendants to raise this contention. That clause runs as follows:—

"I shall not be entitled to refuse to pay for goods or to refuse to accept any draft in respect of them for which the representing samples have not been submitted to me. *Partial damage* or short quantity or measure or inferiority or difference in quality or design or colour shall not be a ground of objection to pay for the goods or to accept the drafts or to take delivery of the goods."

In this provision the difference in packing is not excepted. If any of the contingencies mentioned in clause (4) had arisen it was open to the defendants to take the advantage of the clause in the indent providing for a reference to arbitration. The defendants ought to have taken delivery and then ought to have referred the matter to arbitrators and ought to have claimed compensation. The lower Appellate Court, in my opinion, was right in holding that the defendants were not entitled to resist the suit upon this ground.

The third point argued by Mr. Balwant Rai is that, upon the facts admitted, the goods had arrived in July 1908 and that, therefore, the plaintiffs had not exercised their right of re-sale within a reasonable time and are not entitled to maintain the suit. In support of his contention he has relied upon the following passage to be found at page 402 of *Remfry on Sale of Goods in British India*:—

(1) 24 C. 124; 1 C. W. N. 71; 12 Ind. Dec. (N. S.) 748.

(2) 25 C. 505; 2 C. W. N. 283; 13 Ind. Dec. (N. S.) 335 (F. B.).

(3) 13 Ind. Cas. 705; 39 C. 568; 16 C. W. N. 593.

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"Section 446. The seller electing to exercise this right is not only bound to wait a reasonable time after giving notice of his intention before actually re-selling, but he is bound to exercise the right within a reasonable time after the date of the breach, otherwise the price obtained on such re-sale if it has been unreasonably delayed until the market has fallen, will not be a true criterion of the damage."

This rule is based upon the decision of a Division Bench of the Allahabad High Court in the case of *Prag Narain v. Mul Chand* (4). At page 540 of the report the learned Judges made the following observation :—

"In Addison's Law of Contract, 9th Edition, p. 526, the rule on the subject is thus stated :—'If the goods have been re-sold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of the damages will be the difference between the price agreed to be given and the price realized on the re-sale, with the costs and expenses of the re-sale, but if there-sale has been unreasonably delayed until the market has fallen, the price realized on such re-sale will not afford a true criterion of the damage.' These are authorities for holding that if the seller elects to re-sell, he must do so within a reasonable time from the date on which the contract was finally repudiated by the buyer. Any other conclusion might cause undue hardship to the buyer. A seller may, with the deliberate intention of causing loss to the buyer, delay the re-sale until the market has fallen and then re-sell the property, and thereby cause to the buyer a loss which he might not have sustained had the re-sale taken place within a reasonable time from the date of the breach of contract."

Having regard to the rule laid down in this case, it is necessary to ascertain certain facts before deciding the appeal finally.

I accordingly refer to the lower Appellate Court the following issues under O. XXI, r. 25, Civil Procedure Code :—

(1) On what date was the contract finally repudiated by the defendants?

(4) 19 A. 535; A. W. N. (1897) 150; 9 Ind. Dec. (N. S.) 346.

(2) What was the price of the beads and needles prevailing in the market on that date, and what would be the amount due to the plaintiffs calculated at the rate prevailing on that date?

(3) Was the delay in selling the goods in the present case reasonable?

The Court below will allow the parties to produce such further evidence as they may like to tender in support of their cases. On receipt of findings ten days will be allowed to the parties to take objections to the findings.

Z. K.

Issues remitted

MADRAS HIGH COURT.

CIVIL REVISION PETITION NOS. 663 TO 667 OF 1921.

November 24, 1922.

Present:— Mr. Justice Wallace.

KOSALAI RAMA PILLAI AND OTHERS
—PETITIONERS

versus

PULOSTHIAM PILLAI—RESPONDENT.

Contract Act (IX of 1872), s. 25 (2)—Subsequent promise to subscribe for expenses of festival already incurred, whether enforceable—Civil Procedure Code (Act V of 1908), s. 115—Decree contrary to law—Revision.

A subsequent promise by the defendant to subscribe for expenses already incurred by the plaintiff in conducting a festival is purely voluntary and for no consideration. Section 25 (2) of the Contract Act does not apply to such a case. Payment under such a promise is not enforceable as payment of money due under a contract, and a Village Munsif under section 13 of the Madras Village Courts Act has no jurisdiction to entertain a suit upon it. [p. 775, col. 1.]

Kedarnath Bhattacharji v. Gorie Mahomed, 14 C. 64; 7 Ind. Dec. (N. S.) 43, distinguished.

Where the decree of a Subordinate Court is obviously contrary to law, the High Court will interfere in revision. [p. 775, col. 1.]

Petitions, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order, dated the 9th March 1921, of the Court of the District Munsif, Tenkasi, in Original Petition Nos. 3, 4, 5, 6 and 7 of 1921, respectively, presented against the decrees, dated the 27th December 1921, in Civil Suits Nos. 18 to 22 of 1920 on the

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file of the Court of the Village Munsif, Sivagiri.

Mr. S. Ramasami Iyer, for the Petitioner.

Messrs. P. N. Appusami Iyer and P. V. Krishnaswami Iyer, for the Respondent.

JUDGMENT.—I am quite clear that in these cases before the Village Munsif there was no contract on which a suit could lie. The plaintiffs only allege that according to a village custom subscriptions are raised from persons of the caste of plaintiff and defendants for conducting a festival. It is not alleged that it was in consequence of any prior agreement by the defendants, plaintiff incurred the obligations, nor, so far as appears from the records, is there any proof thereof. The principle quoted by respondents in *Kedarnath Bhattacharji v. Gorie Mahomed* (1) has, therefore, no application. All that is relied upon is a subsequent promise by petitioners to subscribe for the expenses already incurred by plaintiff and it is also neither alleged nor proved that there was any promise by petitioners to compensate plaintiff for something which plaintiff had already voluntarily done for the petitioners, hence section 25 (2) of the Indian Contract Act will not avail.

(2) So far as appears on these plaintiffs and the judgment of the Village Munsif, the promise by petitioners to pay was purely voluntary for no legal consideration and payment is not, therefore, enforceable in law as payment of money due under a contract. Hence the Village Munsif, under section 23 of the Village Courts Act, has no jurisdiction to entertain the plaintiffs and his decrees are contrary to law.

(3) Obviously, when decrees of Subordinate Courts are contrary to law, this Court should interfere. I, therefore, reverse and set aside the order of the District Munsif dismissing the petitioner's petitions before him and set aside the decrees of the Village Munsif in these suits. Each petitioner will get his costs here and in the lower Court and share the Vakils' fee fixed at Rs. 50 (equal to Rs. 10 for each case).

(4) This order will not bar plaintiff from framing proper plaintiffs on his alleged cause of action and presenting them in the proper Court.

V. N. V.

Petition allowed.

(1) 14 C. 64; 7 Ind. Dec. (N. S.) 43.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2144 OF 1918
February 13, 1923.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

PREM SINGH AND OTHERS—

PLAINTIFFS—APPELLANTS

VERSUS

DARBARA SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Custom v. personal law—Test—Kalals of Kot Kalalan, Sialkot District.

One of the most important tests to be applied in determining whether a particular caste is or is not governed by agricultural custom, is to ascertain whether or not they form a compact village community, or, at least, a compact section of the village community. If they do so, the presumption is strongly in favour of the applicability of custom. [p. 776, col. 1.]

This presumption in favour of custom has been applied even in cases of Brahmins and must be still stronger when applied to a tribe whose social and religious status is much inferior, for instance, the *Kalals*. [p. 776, col. 1.]

Once this presumption has been established the onus is shifted on to the party who relies upon personal law. [p. 777, col. 1.]

The *Kalals* of Kot Kalalan in the Sialkot District are governed by the Customary Law in matters of succession.

(Case-law discussed.)

Second appeal from a decree of the District Judge, Sialkot, dated the 21st July 1919, reversing that of the Subordinate Judge, Second Class, Sialkot, dated the 13th July 1918.

Dr. G. C. Narang, for the Appellants.

Mr. Aziz Ahmad and Lala Nihal Chand, for the Respondents.

JUDGMENT.—The facts of this case have been fully set out in the judgment of the Court of first instance and have been succinctly summarised by the learned District Judge. The only question for our decision is whether upon these facts the proper inference to draw is that, in matters of succession, the parties are governed by Hindu Law or by the law of custom.

The First Court has held in favour of custom and the learned District Judge, on appeal, has decided in favour of the personal law.

A number of cases have been cited to us by Counsel on both sides but as each of these cases was decided upon its own particular facts the resulting decisions cannot be of much

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assistance to us except in so far as they can be shown to have laid down any general principle for our guidance. One clear principle to be extracted from the authorities is that one of the most important tests to be applied in determining whether a particular caste is or is not governed by agricultural custom is to ascertain whether or not they form a compact village community, or, at least, a compact section of the village community. If they do so, the presumption is strongly in favour of the applicability of custom. This presumption in favour of custom has been applied even in cases of Brahmins and must be still stronger when applied to a tribe whose religious and social status is much inferior, as in the present case.

The evidence before us shows that though these Kalals may not form a compact village community, they do at least form a very compact section of the village community. They migrated to this village from another village in the Sialkot District, called Ramdhewa, 40 years before the 1865 Settlement and obtained 2-3rds of the village lands from the Jat proprietors and the village was thereafter named Kot Kalalan after them. At the present time they own more than 2-3rds of the cultivated area, cultivating some of it themselves and the rest through tenants or servants.

In addition to this presumptive evidence a good deal of direct evidence of custom has been produced on behalf of the appellants which cannot be ignored. An instance has been cited of the adoption of a sister's son being cancelled because of objections by collaterals. Ultimately, the matter was compromised by the adopter giving an undertaking that only his self-acquired property should go to the adopted child.

A number of instances have also been cited of collaterals inheriting as against daughters in the absence of sons.

On the other hand, the respondents have not been able to produce a single instance of a daughter succeeding to property from which it may, necessarily be assumed that no such case has occurred. Such evidence, standing by itself, might not be of very much importance, but taken with the whole family history of the parties it is entitled to some weight.

The learned District Judge appears to have based his decision principally on

the authority of *Diwan Singh v. Paro* (1). The facts of which he considers bear a close resemblance to the present case. Both the Courts below there held that the parties were not governed by custom and this finding was upheld on appeal. In that case, however, it was definitely found that the members of the family not only depended for their livelihood on non-agricultural pursuits, but only two or three Kalal families owned any agricultural land, and the Kalals constituted a very small portion of the population of the village, whereas in the present case it has been shown that three out of four *pattis* of the village are owned solely by the Kalals who have, moreover, two *Lambardars* of their own.

It is quite obvious that the Court in *Diwan Singh's case* (1) could not possibly have come to the conclusion upon the facts of that case that the Kalals there formed a compact section of the village community.

We find ourselves unable to agree with the learned District Judge that the facts in the case under consideration are more closely akin to those in *Diwan Singh's case* (1) than to the facts in the case reported in *Kirpi v. Solekh Singh* (2). There the parties were Kalals of Ambala, residing in Ambala City, the land in question being situated in a village called Patti Kalalan. Three-fourths of the village was owned by Kalals who had their own *Lambardars*. The testator was a peon in one of the Courts and it appeared that many of the Kalals who lived in Ambala were employed in service or "literary pursuits." Kalals, however, owned or cultivated land in this and other villages in Ambala District, and the Kalals in question came from an agricultural village of Fatehpur in the Karnal District.

Upon these facts mainly the Court held that, *qua* agricultural lands at any rate, the parties must be held to be bound by the agricultural custom of the district.

So far as the facts of these two cases are concerned, the latter certainly bears a closer resemblance to the one before us than does the former. However, as we have already

(1) 33 Ind. Cas. 529; 89 P. R. 1916; 70 P. W. R. 1916.

(2) 67 P. R. 1904.

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said, cases which are decided merely upon their own particular facts and which do not lay down general principles, are of very little value as authorities. In two cases relied upon by Counsel for the appellants, namely, *Bishen Das v. Ram Dhan* (3) and *Jai Ram v. Sardar Singh* (4) the Court applied the test already referred to, that is, that where the caste concerned forms a compact section of the village community there is a strong presumption in favour of custom. Once that presumption has been established, the onus is shifted on to the party who relies upon personal law. Such onus has not been discharged by the respondents.

A number of cases have been cited by Counsel for the respondents, viz., *Sardul Singh v. Karam Singh* (5), *Mangtu v. Chuni Lal* (6), *Umar-ud-din v. Janto* (7), *Maya v. Gurdit Singh* (8), *Tulsi Ram v. Nathu* (9), *Labh Singh v. Gurcharan Singh* (10) and *Harnam Singh v. Devi Chand* (11). Some of these referred to Brahmins, some to Muhammadans, and some to Khatri, but none of them have any bearing upon the facts of the present case. Most of them deal with the principles governing the onus of proof, about which, however, there is very little controversy.

After carefully considering all the facts of the present case we are satisfied that the parties are governed by custom and not by Hindu Law.

We must, accordingly, accept this appeal, and reversing the decree of the lower Appellate Court we restore that of the Subordinate Judge. The respondents must pay the costs throughout.

Z. K.

Appeal accepted.

(3) 7 Ind. Cas. 483; 63 P. R. 1910; 100 P. W. R. 1910; 112 P. L. R. 1910.

(4) 26 Ind. Cas. 512; 23 P. R. 1914; 195 P. L. R. 1914; 242 P. W. R. 1913.

(5) 5 Ind. Cas. 990; 30 P. R. 1910; 27 P. W. R. 1910; 58 P. L. R. 1910.

(6) 51 P. R. 1903; 174 P. L. R. 1903.

(7) 101 P. R. 1906; 156 P. L. R. 1906; 93 P. W. R. 1906.

(8) 4 Ind. Cas. 947; 1 P. R. 1910; 145 P. L. R. 1909; 128 P. W. R. 1909.

(9) 39 Ind. Cas. 93; 5 P. R. 1917.

(10) 19 Ind. Cas. 730; 54 P. R. 1913; 62 P. W. R. 1913; 131 P. L. R. 1913.

(11) 107 P. R. 1901; 117 P. L. R. 1901.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2681 OF 1921.

June 20, 1922.

Present:—Mr. Justice Scott-Smith.THE FIRM UDHO RAM-CHANDI RAM,
THROUGH CHANDI RAM—PLAINTIFFS—
APPELLANTS

versus

FIRM HEM RAJ-TEJ BHAN, THROUGH
TEJ BHAN, AND OTHERS—DEFENDANTS—
RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), ss. 45-A, 64, 76 (a)—Hundi, loss of—Non-presentment, effect of—Duplicate, when can be demanded.

The loss of a bill or note does not dispense with presentment under section 64 of the Negotiable Instruments Act.

Where a *hundi* payable at sight is lost, it cannot be said that it is lost before it is overdue within the meaning of section 45-A of the Negotiable Instruments Act. The holder of such a *hundi* is not, therefore, as of right entitled to demand a duplicate from the drawer under that section. [p. 778, col. 1.]

The right to obtain a duplicate in case of loss is, however, a part of the mercantile laws of countries and a duplicate may be demanded on equitable principles where a bill is lost whether before or after maturity. [p. 778, col. 1.]

Where owing to the refusal of the drawer of a *hundi* to supply a duplicate none is presented to the drawee, no presentment for payment is necessary as against the drawee under section 76 (a) of the Negotiable Instruments Act. [p. 778, col. 2.]

Second appeal from a decree of the District Judge, Mianwali, dated the 29th August 1921, affirming that of the Munsif First Class, Mianwali, dated the 23rd May 1921.

Mr. M. S. Bhagat, for the Appellants.

Mr. M. L. Puri, for Defendant No. 1,

Mr. Nanak Chand, for Defendant No. 2.

JUDGMENT.—This is a second appeal from the order of the District Judge, Mianwali, dismissing the plaintiff's suit for Rs. 994-80 based upon a *hundi*. The *hundi* was payable at sight and was drawn by the firm, defendant No. 3, upon a Bombay firm not a party to the suit. It was drawn in favour of defendant No. 2, who endorsed it in favour of defendant No. 1. Defendant No. 1 firm in its turn sold it to the plaintiff, plaintiff stated that the *hundi* had been lost. According to the plaintiff's allegation the *hundi* was sent to their Commission Agents in Amritsar in January 1919 and in May 1920 when the latter came to settle up accounts, it was

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ascertained that the *hundi* was never received by them. As against defendants Nos. 1 and 2 the learned District Judge dismissed the suit on the ground that as the *hundi* had been lost there had been no presentment thereof for payment in accordance with the provisions of section 64 of the Negotiable Instruments Act. As regards defendant No. 3 he dismissed the suit as it had not been shown that the drawer, *i.e.* defendant No. 3 could not suffer damage from the want of such presentment. Plaintiffs stated that when it was discovered that the *hundi* had been lost he asked defendant No. 3 to supply a duplicate, which, however, defendant No. 3 refused. In the Negotiable Instruments Act by Bhashyam and Adgia, 2nd Edition, at page 284 it is stated that "neither bankruptcy nor death of the party dispenses with presentment under section 64 and that even the loss of the bill or the note does not excuse non-presentment." I am, therefore, clearly of opinion that the learned District Judge has rightly held that defendants Nos. 1 and 2 are not liable. Mr. M. S. Bhagat on behalf of the appellant says that no plea was raised in the Trial Court about non-presentment and that, therefore, such a plea should not be allowed at the present stage. It appears, however, from the pleas of defendant No. 1 that he urged that the drawee should have been asked by the plaintiff for the payment of the amount due, in other words, he meant that there should have been presentment to the drawee. Moreover, from the judgment of the learned District Judge it appears that the point which is a legal one, was fully argued before him.

As regards defendants No. 3, the drawer of the *hundi*, it appears to me that as the *hundi* was payable at sight the holder was not as of right entitled to demand a duplicate under section 45 (A) of the Negotiable Instruments Act. Moreover, as it was payable at sight it cannot be said that it was lost before it was overdue. Messrs. Bhashyam and Adgia in the Work referred to above at page 214 state the following rule,

Power to obtain duplicate in case of loss is a part of the mercantile laws of countries and ample scope is given to it by Court of Equity in England both on bills lost before and after maturity and on

notes as well." The learned authors go on to say that "the section is not so wide as the proposition of law laid down in the above passage; for it is confined in its operation to bills only, and that, too, before they arrive at maturity; moreover, the remedy given by the section to the loser is against the drawer alone. But the Indian Courts administering rules of equity, justice, and good conscience will adopt the above rule as being not only in consonance with the spirit of the section but also as being the rule applied to similar cases in England." Defendant No. 3 never appeared in the Trial Court. There was, therefore, no plea by him that the plaintiff was not entitled according to mercantile usage to demand a duplicate of the lost *hundi*. I have no doubt that he was so entitled and as defendant No. 3 refused to supply him with one it was impossible for the plaintiff to make any presentment to the drawee. Therefore, I am of opinion that, under section 76 (a) of the Negotiable Instruments Act, no presentment for payment was necessary as against defendant No. 3 because, owing to his own refusal to supply a duplicate, none was presented to the drawee.

I, therefore, accept the appeal on equitable grounds so far as defendant No. 3 is concerned and give the plaintiff a decree for the sum claimed with costs against him in all the Courts. As against defendants Nos. 1 and 2 the appeal is dismissed with costs.

Z. K.

Appeal accepted in part.

GREAT INDIAN PENINSULAR RY., CO. v. PANNA LAL GOPALJI.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2681 OF 1922.

March 20, 1923.

Present :—Mr. Justice Moti Sagar.

THE GREAT INDIAN PENINSULAR

RAILWAY CO., LTD.—DEFENDANT—

APPELLANT

versus

THE FIRM MESSRS. PANNA LAL

GOPALJI—PLAINTIFFS—

RESPONDENTS.

Railways—Carriage of goods—Risk-note exempting Railway from liability except in certain cases—Burden of proof.

Where goods are consigned to a Railway Company for carriage under a Risk-note under which the Company is not to be held liable for the loss of any article consigned to it unless the loss is due to the Company's wilful neglect or theft by or the wilful neglect of its servants, and the goods are not delivered and the consignor sues the Company for damages, the Railway Company cannot escape liability by merely admitting the loss; they must lead evidence to show that the goods were lost. After the loss is proved it is for the claimant to prove the exceptional circumstances mentioned in the Risk-note making the Railway Company liable for damages, such as wilful neglect on the part of the Railway servants or theft by them. (p. 780, col. 1.)

Ghelabhai Pansi v. East Indian Railway Company, 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525. *Agent, G. I. P. Railway v. Karaylal*, 48 Ind. Cas. 294; 14 N. L. R. 122; B. B. & C. I. Railway Co. v. *Ranchhodlal Chhotalal & Co.*, 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779. *Jamnadhur Baldevdass Firm v. Burma Railways Company*, 64 Ind. Cas. 395; 10 L. B. R. 354; 13 Bur. L. T. 190. *Daudbhai v. G. I. P. Railway Co.* 69 Ind. Cas. 750. *Mohansingh Chawan v. Henry Condors, General Traffic Manager, G. I. P. Railway Co.*, 7 B. 478; 8 Ind. Jur. 98; 4 Ind. Dec. (N. S.) 322, relied upon.

Hill, Sawyers & Co. v. Secretary of State, 61 Ind. Cas. 926; 2 L. 133; 3 L.L.J. 297, distinguished.

Second appeal from a decree of the District Judge, Delhi, dated the 25th July 1922, affirming that of the Additional Munsif, Second Class, Delhi, dated the 16th July 1921.

Lala Sardha Ram Kapur, for the Appellants.

Mr. Shamair Chand, for the Respondents.

JUDGMENT.—This is a second appeal against a decision of the District Judge, Delhi, dated the 25th July 1922 upholding a decision of the Munsif granting plaintiffs a decree for Rs. 600 damages for the non-delivery of a certain

consignment against the defendant, Great Indian Peninsular Railway Co. Certain goods were consigned to the Madras Railway Station of the Madras and Southern Marhatta Railway Co., for delivery to the plaintiff's firm at Delhi on the line of the appellant Company. The goods had to be carried over two railway lines, namely, the Madras and Southern Marhatta Railway line and the Great Indian Peninsular Railway line. The goods not having been delivered the plaintiffs filed the suit giving rise to this appeal for their value. Both the Railway Companies were impleaded as defendants to this suit. They admitted receipt of the consignment but pleaded that they were exempt from liability by reason of a Risk-note executed by the consignors under which they could not be held liable for any loss of articles consigned to the plaintiffs from any cause unless the loss was due to the Company's wilful neglect or theft by or the wilful neglect of its servants. They denied that there had been any such wilful neglect or theft. It was further contended on behalf of the Madras and Southern Marhatta Railway Co. that the suit was not maintainable, inasmuch as they had received no notice under section 77 of Indian Railways Act.

The Trial Court held that the onus of proving that the goods had been lost was upon the defendant Companies which they had failed to discharge, and that they were consequently not entitled to claim exemption of the provision contained in the Risk-note under which the goods had been entrusted to them. As to notice also, the finding was in favour of the plaintiffs and the suit was accordingly decreed. On appeal the learned District Judge dismissed the suit against the Madras and Southern Marhatta Railway Co. on the ground that no notice under section 77 of the Indian Railways Act had been given to that Company. As against the Great Indian Peninsular Railway Co. the learned District Judge was of opinion that the evidence as to the loss of the consignment was unsatisfactory, and he accordingly remanded the case under O. XLI, r. 25, of the Civil Procedure Code for further enquiry upon this point. It appears that the plea put forward by the defendant Company was that the wagon containing the goods in question had caught fire and that

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the consignment had been burnt at the Sanchi Railway Station on the Great Indian Peninsular Railway on the 13th May 1919. Certain witnesses were produced by the Railway Company before the Munsif to prove the loss alleged, but their evidence was found most unreliable and the learned Munsif held that loss of the goods in dispute had not been established. The learned District Judge concurred with this finding and, holding that loss of the goods had not been proved, confirmed the decree of the Court of first instance.

The Great Indian Peninsular Railway Co., has now come up in second appeal to this Court, and two contentions have been raised on its behalf by Mr. Sardha Ram. Firstly, it is contended that the suit was bad for want of a notice under section 77 of the Indian Railways Act. A reference to the written statement of the Company makes it clear that no such plea was ever put forward and that want of notice was never pleaded by them. On the contrary, paragraph 4 of the plaint in which the plaintiffs had asserted that a notice had been given was never denied and the only issue upon which the parties went to trial was whether exemption under the Risk-note could or could not be claimed by this Company. In these circumstances, I am unable to allow the defendant Company to raise a ground of defence in this appeal.

Next, it is contended that in the case of non-delivery loss ought to have been presumed and the plaintiff's suit dismissed on the ground that he failed to prove that the same was due to the wilful neglect of the Company or of its servants. With this contention I am unable to agree. There is ample authority for holding that in such cases the Railway Company must give proof of the actual loss of the goods and that it is not sufficient that they have not been delivered. After the loss is proved it is for the claimant to prove the exceptional circumstances mentioned in the Risk-note making the Railway Company liable for damages such as wilful neglect on the part of the Railway servants or theft by them: *Ghelabhai Punsu v. East Indian Railway Company* (1) cited for the respondents, it has been laid down that in such cases the Railway

Company cannot escape liability by merely admitting the loss but that they must lead evidence to show that the goods were lost. The same principle has been enunciated in the cases reported as *Agent, G. I. P. Railway v. Karaylal* (2) *B. B. & C. I. Railway v. Ranchhodlal Chhotlal & Co.* (3), *Jamnadar Baldevdass Firm v. Burma Railways Company* (4), *Daudbhai v. G. I. P. Railway Company* (5), and *Mohansingh Chawan v. Henry Conder, General Traffic Manager, G. I. P. Railway Company* (6). The Irish case of *Curran v. Midland Great Western Company of Ireland* (7) is also in point. In that case two pigs consigned by the plaintiff were short delivered and the Railway Company sought to escape liability under the Risk-note drawn up in terms similar to the present Risk-note H. The suit was decreed on the ground that although the Company admitted the loss, they did not lead any evidence as to how the pigs came to be lost. Mr. Sardha Ram, however, relies upon the Full Bench ruling of this Court reported as *Hill, Sawyers and Company v. Secretary of State* (8) in which it has been held that the word "loss" in Chapter VII of the Indian Railways Act includes loss to the owner of goods made over to a Railway Administration which have been mis-delivered and so have been lost to the person entitled thereto, and contends, on the analogy of this ruling, that as the goods consigned were not delivered to the plaintiffs, they were lost and that the *onus* of proving the exceptional circumstances mentioned in the Risk-note was, therefore, shifted on to the claimant. In my opinion the authority relied upon is clearly distinguishable and does not materially assist the appellant. In the first place, that was a case of mis-delivery, and I do not think that non-delivery or conversion stands on the same footing as mis-delivery. In the second place, as pointed out by the learned District Judge, that was not a case in which protection was claimed

(2) 48 Ind. Cas. 294; 14 N. L. R. 122.

(3) 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 779.

(4) 64 Ind. Cas. 395; 10 L. B. R. 354; 13 Bur. L. T. 190.

(5) 69 Ind. Cas. 750.

(6) 7 B. 478; 8 Ind. Jur. 98; 4 Ind. Dec. (N. S.) 522.

(7) (1896) 2 Ir. R. 183; 2 Ir. L. R. 739.

(8) 61 Ind. Cas. 926; 2 L. 133; 3 L. L. J. 29.

(1) 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525.

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under a Risk-note but under certain sections of the Act itself. No authority has been cited before me in which the word "loss," in a Risk-note has been held to include a loss by non-delivery or conversion, and I cannot, therefore, presume by the mere fact of non-delivery that the goods have been lost.

Finally, Mr. Sardha Ram argues that the finding of the learned District Judge that the goods have not been lost is not justified by the evidence on the record. This he is certainly not entitled to do. The learned District Judge has fully considered the evidence and has come to the conclusion that the loss has not been established. This is clearly a finding of fact and not liable to attack in second appeal. I must, consequently, hold that loss of the goods not having been proved, the defendant Company is not entitled to the exemption claimed and that the suit has been rightly decreed. I dismiss the appeal with costs.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO.
823 OF 1921.

February 28, 1923.

Present:—Justice Sir John Bucknill, Kt.
SHEOPRATAP DUBEY AND OTHERS
—APPELLANTS

versus

Lala SHEOGULAM LAL—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 30(a), 105, 113—Limitation Act (IX of 1908), Sch. I, Art. 131—Occupancy tenants entered as fixed rate tenants in Record of Rights—Enhancement of rent, suit for—Limitation—Settlement of rent under s. 105, whether bar to suit for enhancement.

It is not necessary to sue for a declaration that an entry in the Record of Rights that defendants are *raiya*ts at fixed rates is wrong before instituting a proceeding for enhancement of rent under the Bengal Tenancy Act. [p. 783, col. 2.]

Amiruddin v. Saidur Rahman, 35 Ind. Cas. 433; 1 P. L. J. 73 and *Ram Gulam v. Bishnu Pargash Narain Singh*, 11 C. W. N. 48, distinguished. *Brij Behari Singh v. Sheo Sankar Jha*, 39 Ind. Cas. 85; 2 P. L. J. 124; 1 P. L. W. 434; (1917) Pat. 108, followed.

Malharjun v. Narhari, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J.

368; 7 Sar. P. C. J. 739 (P. C.) and *Jagadamba Chaothani v. Dakhina Mohun Roy Chaothri*, 13 I. A. 84; 13 C. 308; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715; 6 Ind. Dec. (N. S.) 705, referred to.

Therefore, a suit for enhancement brought more than six years after the date of the final publication of the Record of Rights in which the defendants are entered as *raiya*ts at fixed rates is not barred by limitation. [p. 783, col. 2.]

A claim to enhance rent is a recurring cause of action and is governed by Art. 131 of Sch. I to the Limitation Act, limitation running from the date of refusal. [p. 784, col. 1.]

Where a fair and equitable rent has once been settled in a proceeding under section 105 of the Bengal Tenancy Act, it is a bar to any subsequent proceeding for the enhancement of rent before the expiry of the period mentioned in section 113 of the Act, except on the grounds mentioned in that section. [p. 786, col. 2; p. 787, cols. 1 & 2.]

Nawab Bahadur of Murshidabad v. Ahmad Hussain, 35 Ind. Cas. 695; 44 C. 783; 21 C. W. N. 1004; 25 C. L. J. 556 and *Prasanna Kumar v. Rachimuddin Howladar*, 15 Ind. Cas. 327; 17 C. W. N. 153, referred to.

Appeal from a decision of the Subordinate Judge, Second Court of Arrah, dated the 20th September 1920, modifying a decision of the Additional Munsif, Second Court, Buxar, dated the 18th September 1919.

Mr. Lachmi Narayan Sinha, for the Appellants.

Mr. Parmeswar Dayal, for the Respondent.

JUDGMENT.—This is a second appeal. The appeal is from a judgment of the Subordinate Judge of the Second Court of Arrah, dated the 20th September 1920, modifying a decision of the Additional Munsif of the Second Court of Buxar given on the 18th of September in the previous year.

The circumstances which gave rise to the litigation are simple enough but they raise some points of law which are not altogether free from difficulty. The plaintiff and certain other persons were *mokararidars* of a *mouza* called Khariacha in Parganna Bhojpur, Touzi No. 1307, in the proprietary interest of the Maharaja of Dumraon. The defendants, according to the Record of Rights are entered as *sarahmoyian* tenants, that is to say, tenants at a fixed rental. If this entry is correct it would not be possible for the plaintiffs to obtain an enhancement of rent. The plaintiffs in this suit, however, claimed that the defendants were not in fact *sarahmoyian* tenants, but were merely *kaimi kaskars*, that is to say, ordinary occupancy tenants. In the suit the

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plaintiffs claimed, firstly, that it might be determined that the defendants are *kasht-kars* of the property and that they are not permanent tenure-holders of *istamarri mukararidars* and that the entries in the *khewais* and *khatians* were wrong. The plaintiffs, secondly, claimed that on the declaration of the facts as mentioned in the preceding paragraph they should be granted an enhancement of rent at the rate of 0-5-0 per rupee under the provisions of section 30 (b) of the Bengal Tenancy Act or in the alternative that if the defendants were by the Court held to be tenure-holders then the plaintiffs ask for a similar decree for enhancement under the provisions of section 7 of the Bengal Tenancy Act. Lastly, they asked for recovery of arrears of rent. With this last claim this appeal has no concern.

Now, upon this matter coming before the Munsif that officer settled certain issues for determination. They are as follows:—

1. Do the lands in suit form the *kaemi jote* of the defendants or are they held at fixed rents?
2. Are the plaintiffs entitled to enhancement of rent under section 30 (b) of the Bengal Tenancy Act?
3. Is the plea of payment true?
4. What is the rental of the land in suit?
5. To what relief, if any, is the plaintiff entitled?

With issue No. 3 this appeal is not concerned. As to issue No. 1 the Munsif found that the lands in suit did form the *kaemi jote* of the defendants and that in fact the entries in the Record of Rights were wrong. I may say at once that the Subordinate Judge came to the same finding in this respect as did the Munsif and it is not now contended before me that those findings are wrong. With regard to the second issue, various considerations arose. In the first place, there had been the question as to whether it was possible for the plaintiffs to succeed in their claim for the declaration which they sought. The Munsif says that it is clear that the period of limitation for a declaratory decree in respect of entries in a Record of Rights is six years from the date of the final publication; that the final publication in respect of the lands in suit was made on the 18th of October

1911 and the suit only filed on the 22nd October 1918 and that, therefore, the plaintiff's claim for a declaration as to the status of the defendants must fail as being barred by time. The Subordinate Judge is of the same opinion and it is not now contended before me by the learned Vakil who appeared for the respondents that these decisions were not correct. The first point, however, which gives rise to difficulty is as to whether it was possible for the plaintiff, although he was unable to obtain a declaration that the entry in the Record of Rights was erroneous, still to bring a suit for enhancement of rent. The Munsif seems to consider that the plaintiff's claim for enhancement of rent is, like the declaration as to the status of the defendants, also barred by time. The Subordinate Judge deals with the matter somewhat differently. He says "I don't think that the fact that he cannot get those declarations" (that is, the declarations relating to the incorrect character of the entries in the Record of Rights) "precludes him from getting the other reliefs, even if he is successful in proving that the Survey Record of Rights is not correct. If it had been necessary for the plaintiff, as a condition precedent to have enhancement, to obtain a declaration that the Survey entry was erroneous, then of course he would have been bound to have that declaration at the outset. It has been held over and over again that an entry in a Record of Rights neither creates nor extinguishes rights, but that it is merely a rebuttable piece of evidence and, that being so, I do not see why the plaintiff should in the present case be required to have at first the entry declared wrong before he can succeed in his claim to enforce his right to enhancement. I am accordingly not prepared to hold that, because the plaintiff cannot have the declaration asked for, he is precluded from having enhancement of rent if he is otherwise found entitled to have that relief." Now the learned Vakil who appeared for the appellants here drew my attention to the case of *Amiruddin v. Saidur Rahman* (1) which he regards as being a decision in support of his proposition that, where it is impossible for a plaintiff to obtain a declaration as to the status of himself or of any other person as entered in a Record

(1) 35 Ind. Cas. 433; 1 P. L. J. 73.

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of Rights owing to a bar created by the Limitation Act he is unable to bring a suit for a relief which is based upon the erroneous character of such entry. In the case quoted the plaintiff, in the Record of Rights published on the 14th November 1905, was shown as a tenant liable to pay rent to the defendant. On the 7th October 1912 the plaintiff instituted a suit against the defendant for a declaration that he was a *lakheraj* tenant and that he was not liable to pay any rent to the defendant. The period of limitation for a declaratory decree in respect of entries in a Record of Rights was held to be six years from the date of the final publication. It was decided in that case that the suit was substantially, one under the Bengal Tenancy Act of 1885, section IIIA, because the declaration which the plaintiff prayed for would have the effect, if granted, of correcting the Record of Rights; and it was decided that the suit was barred by limitation and that the plaintiff could not succeed in his desire to obtain any order from the Court that he would not be liable to pay rent to the defendant. Mr. Justice Mullick in the course of his decision says:—"The only point urged before me is whether the suit is barred by limitation or not. The learned Vakil for the appellant relies upon *Ram Gulam v. Bishnu Pargash Narain Singh* (2) and says that the Record of Rights is at best only evidence creating a presumption of title and that it was not necessary for the plaintiff to sue to set aside that presumption; that the suit is not one that has any reference to the Record of Rights but that it is a suit which he is entitled to bring under the general law and that his cause of action properly dates from the last rent decree (which I may add was on the 1st August, 1912). It is obvious that the suit is a declaratory suit. The learned Vakil for the appellant does not admit, but it is quite clear, that the suit is one substantially under section IIIA of the Bengal Tenancy Act. The plaintiff carefully refrains from making any reference to the Record of Rights because he knows that the period of limitation for getting declaratory relief in respect of entries in a Record of Rights is six years from the date of the publication." The suit was, therefore, held

to be barred. But the learned Vakil, who appears for the respondent here, has drawn my attention to the case of *Brij Behari Singh v. Sheo Sankar Jha* (3). This decision, which is also a decision of Mr. Justice Mullick sitting with Mr. Justice Atkinson, appears to be an authority which is directly in point in the case now before me. In that case it was held that it was not necessary to sue for a declaration that an entry in the Record of Rights that the defendants were *raiya*ts at fixed rates is wrong before instituting a proceeding for enhancement of rent under the Bengal Tenancy Act, 1885. Mr. Justice Mullick in the course of his decision remarks:—"With regard to the first holding, the plaintiffs, (who were the landlords), allege that the entry in the Record of Rights showing the defendants as *raiya*ts at fixed rates is wrong, and that the rent is liable to enhancement in order to accord with the prevailing rates of surrounding lands with similar advantages and on account of the rise in the price of food grains within ten years preceding the institution of the suit in 1911. The Subordinate Judge found that the entry was wrong, but that the plaintiffs having failed to sue for a declaration of its erroneous character within six years after the date of the publication, the present suit for enhancement was barred by limitation under Article 120 of the Limitation Act." The learned Subordinate Judge is, in my opinion, wrong in holding that the suit is barred by six years' limitation. It is true that in the plaint the first prayer that the plaintiffs make is that it may be declared that the defendants have only an occupancy right in the lands and that they are not *jotedars* at fixed rates of rent and they date the cause of action in this respect from the 5th December 1899, i.e., the date of the final publication of the Record of Rights. Now, if the suit had been one for a mere declaration, it would have been, in my opinion, one contemplated by the latter part of section IIIA of the Bengal Tenancy Act, which is the Act applicable to the case. This was the view which was taken in *Amiruddin v. Saidur Rahman* (1) where it was held that if a suit is substantially such a declaratory suit as is con-

(2) 11 C. W. N. 48.

(3) 39 Ind. Cas. 85; 2 P. L. J. 124; 1 P. L. W. 341 (1917) Pat. 168.

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templated in the proviso to section IIIA of the Bengal Tenancy Act, then the plaintiff cannot, by adding a prayer for confirmation of possession, escape the six years' rule. The point from which limitation is to run is the date of the publication of the adverse entry in the Record of Rights... unless there has been any subsequent invasion of the plaintiff's right, in which case it starts from the later date. If it had been necessary for the plaintiff, as a condition precedent to enhancement, to declare the entry to the erroneous, then I think he would have been bound by the *ratio decidendi* in *Malkarjun v. Narhari* (4) and *Jagadamba Chaudhrani v. Dakhina Mohun Roy Chaudhri* (5). In the former case the plaintiff's claim involved the setting aside of an execution sale and in the latter of an adoption. In both title had passed to the defendants; but an entry in a Record of Rights neither creates nor extinguishes rights, it is merely a rebuttable piece of evidence. I see no reason why the plaintiff should in the present case have the entry declared wrong before they can succeed in their suit to enforce their right to enhancement. Whatever presumptive value attaches to the entry has been sufficiently rebutted by the entry itself, which shows that it was based on an admittedly erroneous construction of the *kabuliat* of 1881.

The next question is whether the suit for enhancement is in time. The answer must be in the affirmative, for Art. 131 of the Limitation Act governs the case. A claim to enhance is a recurring cause of action and limitation runs from the date of refusal. Here the plaintiff's right to enhance the rent is based not on contract but on Statute.

I do not think that it would be possible to find a decision in which the circumstances could be more closely parallel to those in this case. Here the plaintiff's claim for enhancement was based upon the increase in the selling prices of staple food crops. Here, too, the defendants were entered in the Record of Rights as tenants at a fixed rate

of rent; here, too, the plaintiffs were desirous of showing that that entry was wrong and that as a matter of fact the defendants were ordinary *kaemi* tenants; here, too, the Munsif and the Subordinate Judge have found that the plaintiffs' contention that the defendants really were *kaemi* tenants and not tenants at fixed rent was correct. Under these circumstances, it seems to me that I am bound to follow the decision in the case of *Brij Behari Singh v. Sheo Sankar Jha* (3) and come to the conclusion that the opinion expressed by the Subordinate Judge in regard to this point is correct.

The second point which has been urged before me by the learned Vakil who appears for the appellants presents considerably more difficulty. It is common ground that in the year 1913 there were certain proceedings taken under the provisions of section 105 of the Bengal Tenancy Act with regard to the property in connection with which this suit is brought. Settlement was then taking place. The point which is now said to be a bar in respect of the present claim made by the plaintiff for enhancement of rent is the operation of section 113 of the Bengal Tenancy Act. Section 105, sub-section (1) reads as follows:—

"When, in any case in which a Settlement of land revenue is not being made or is not about to be made either the landlord or the tenant applies, within two months from the date of the certificate of the final publication of the Record of Rights under section 103 A, sub-section (2), for a settlement of rent, the Revenue Officer shall settle a fair and equitable rent in respect of the land held by the tenant."

Whilst section 113, sub-section (1) reads:

"When the rent of a tenure or holding is settled under this Chapter, it shall not, except on the ground of a landlord's improvement or of a subsequent alteration in the area of the tenure or holding, be enhanced, in the case of a tenure or an occupancy holding or the holding of an under-*raiyat* having occupancy rights, for fifteen years, and, in the case of a non-occupancy holding or the holding of an under-*raiyat* not having occupancy rights for five years; and no such rent shall be reduced within the periods aforesaid save on the

(4) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

(5) 13 I. A. 84; 13 C. 308; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715; 6 Ind. Dec. (N. S.) 705 (P. C.).

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ground of alteration in the area of the holding, or on the ground specified in section 38, clause (a)."

Now it is again common ground here that in these proceedings taken in accordance with the provisions of section 105 of the Bengal Tenancy Act, the primary, and indeed at that time the only, ostensible object which the plaintiffs had, was to obtain additional rent in respect of a certain area of land which they alleged existed in excess of the area which was recorded in the Survey proceedings. I think it is of great importance to look at the decision of the Assistant Settlement Officer in this matter in order to ascertain exactly what there took place. The Assistant Settlement Officer in his decision says: "In this case the plaintiff wants fair rent to be settled for the excess land in the possession of the defendants, under section 52 (a), Bengal Tenancy Act. The defendants contest the claim of the plaintiff. The following issues are framed for decision:—

"(1) Do the defendants really hold any land in excess of that for which they pay rent?

"(2) Whether the holdings of the defendants were previously determined by measurement, if so, by what standard?

"(3) Has the plaintiff been able to raise the presumption in his favour under section 52 (b) of the Bengal Tenancy Act?

"(4) What allowance should be given to meet the difference resulting from the system of measurement?"

I may point out that we are not really concerned here greatly with these four issues, for it is admitted that there was no excess area and there is no suggestion now that there was not. The 5th and 6th issues are, however, of great importance.

The 5th reads: "What should be the fair and equitable rate of rent for the assessment on the excess area?" and the 6th reads: "What should be the fair and equitable rent for the defendants' holdings?"

With regard, however, to issue No. 1 it is perhaps desirable to point out what the Assistant Settlement Officer says in connection therewith. He writes:—"There is no evidence to find that any particular plot is held in excess. I have found that the *jamabandi* area is based upon measurement. Hence the excess of Survey area after

deduction of 10 per cent. over the *jamabandi* area is the excess area in the possession of the defendant." With regard to issue No. 5, he writes: "There is no evidence to indicate the particular plot held in excess, hence the fair rate of rent for assessment of excess area is the average rate of rent under section 52 (5), Bengal Tenancy Act." As to issue No. 6 he writes:—"The present rent of the defendant, after being added with the rent on excess land as found in issues Nos. 1 and 5, is fair and equitable. The rent settled will be noted in the annexed schedule and will take effect from the beginning of the next agricultural year 1321 Fashl."

Now it may be at once observed that in addition to the finding that there was an excess area and in addition to the finding that that area was not capable of being defined as a separate piece of land but merely as an area in respect of which there had been a mistake in the original measurement, the Assistant Settlement Officer fixes the rent on the excess at the same rate as that at which the other land had been originally fixed many years before and, further than that, declares that the *new total rental* now payable in respect of the whole *re-measured area* is a fair and equitable one.

It is urged before me by the learned Counsel, who appears for the respondent, that it would not seem that the mind of the Assistant Settlement Officer had really been directed to the question as to whether the rate of rent which was at that date, namely, 1913, being paid was a fair and equitable one within the meaning of the provisions of section 105 of the Bengal Tenancy Act. But I must confess that, in view of the explicit language which is used by the Assistant Settlement Officer, it would be very difficult to say that that was the case. In addition to this, I think it necessary to point out that had the plaintiffs at that time thought that the original rental which had been arranged many years before was not a fair and equitable one, they could, and, no doubt, would, under the provisions of section 105, have endeavoured to place before the Assistant Settlement Officer their views as to what they considered at the date of the Settlement the fair and equitable rent for the holding. Now the Munsif in dealing with this question comes to the conclusion that the provisions of sec

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tion 113, Bengal Tenancy Act, bar the plaintiff's claim in this suit for enhancement of rent. He says: "The claim for enhancement of rent, it is urged, is evidently barred under section 113 of the Bengal Tenancy Act. I think the contention is quite sound. It appears there was a case under section 105 of the Bengal Tenancy Act regarding the rents of the lands in suit, and although the application under that section was filed on the ground of an increase in area under section 52 (a) of the Bengal Tenancy Act, it cannot be again said that fair rents were settled by the Survey Officer according to section 105 under the provisions of Chapter X of the Bengal Tenancy Act. Now under section 113, as it now stands, when the rent of a tenure of an occupancy holding has been settled under this Chapter (X) it cannot be either enhanced or reduced for a period of fifteen years except on the grounds specified in the section. The learned Pleader for the plaintiff points out that, as a matter of fact, there was no question of enhancement under section 30B in the 105 proceedings and there could not possibly be, for this could not be the subject of a 105 proceeding before the question of status was determined under section 106 as the defendants had been recorded in Survey as *istamrari moharridars*, i. e., tenants at fixed rents. He, therefore, urges that as the question of enhancement under section 30 (b) was neither the subject-matter of the 105-proceedings nor could be, section 113 does not operate as a bar to the consideration of the relief that he claims now. I cannot, however, agree with these views, for section 113 does not impose any limitation to the section except those mentioned therein. It does not contemplate the increase of rents under section 52 (a) or of enhancement under section 30 (b). It simply says, 'when the rent of a tenure or holding is settled under this Chapter it shall not be altered for 15 years.' Now the rent was certainly settled by the Survey Officer in the proceedings under section 105. I fail to see, therefore, how the plaintiff can now pray for enhancement of rents before the 15 years have elapsed. I am of opinion, therefore, that the plaintiff's prayer for enhancement must fail".

Now the Subordinate Judge has taken

an entirely opposite view. He writes, "Nor am I prepared to hold that the plaintiff's claim for enhancement is barred under section 113 of the Bengal Tenancy Act. This objection in bar of the plaintiff's claim for enhancement is based on the fact that, at his instance, there were proceedings taken under section 105 of the Bengal Tenancy Act and that in the course of the same proceedings the rent payable by the defendants was settled and the plaintiff was declared entitled to have additional rent of Rs. 4-7-0. It is argued, therefore, that there was a settlement of rent of the holding under Chapter X of the Bengal Tenancy Act and that, accordingly, under the provisions of section 113 of the said Act the rent thus settled shall not except on the ground specifically mentioned in the section, which admittedly does not arise in the present case, be enhanced for 15 years. The copy, Exhibit 7, of the Assistant Settlement Officer's order in the aforesaid case goes to show that the plaintiff's prayer therein was for additional rent in respect of excess lands held by the defendants and no other grounds for enhancement were either advanced or considered by the aforesaid Officer. That being so, I do not think that the provisions of section 113 came into play as the claim for enhancement on the ground now put forward was not considered in the aforesaid case." He then cites the case which has been mentioned to me by the learned Vakil for the appellants *Nawab Bahadur of Murshidabad v. Ahmad Hussain* (6). In that case it was held that in order to attract the operation of section 109 of the Bengal Tenancy Act, which contemplates creating a bar to the jurisdiction of the Civil Courts under certain circumstances, it is essential to establish that the civil suit had for its subject a matter which had already formed the subject of an application under section 105 of the Bengal Tenancy Act. In that case it was held that the introduction of section 105 (a) had not altered the scope of the section 109 which had to be construed on the same lines as before the introduction of that subsection. Mr. Justice Mookerjee and Mr. Justice Cuming who heard this case remark

(6) 35 Ind. Cas. 695; 44 C. 783; 21 C. W. N. 1004; 23 C. L. J. 556.

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in the course of their judgment:—"Section 109 provides that, subject to the provisions of section 109 A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken, under sections 105 to 108 both inclusive." They then at a later stage in their judgment say:—"If we were to accept the construction put forward by the appellant, we should have to read into section 109 words which are not to be found there, we cannot hold, on the analogy of the doctrine of constructive *res judicata*, that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under section 105 read with section 105 A." They held, therefore, that as the matters which had previously been decided did not form the subject of determination in the civil suit which had been brought in the case which was then before them, the provisions of section 109 could not be brought into aid, I am bound to say that I think there is a substantial distinction between the position of that case and the position which obtains in this case. Here, whatever may have been the actual ground upon which the plaintiffs started their proceedings under section 105 of the Bengal Tenancy Act, there cannot be the least doubt that the Assistant Settlement Officer definitely stated that, in his opinion, a fair and equitable rent for the holding was at such and such a figure. I cannot help feeling very strongly that if the plaintiffs are unable now to bring this suit for enhancement they have only themselves entirely to blame. It was, I should have thought, open to them in 1913 in the proceedings, settlement then going on, which they brought under section 105 to have put forward what they then thought to be a fair and equitable rent for assessment by the Settlement Officer especially if the status of defendants was not then defined. They did nothing of the sort and now, after the lapse of comparatively a few years, they have come forward asking for a new assessment. The Subordinate Judge, however, was of the opinion that the principle in the case which I have just quoted appeared to be applicable to the present one although, as he pointed out, the facts

were different. He also refers to the case of *Prasanno Kumar v. Rachimuddin Howladar* (7). In that case it was held that an entry in the Record of Rights settling the rent in accordance with the provisions of section 104 to 104 F unless altered by means of a suit brought as contemplated by section 104 H is conclusive and that no suit is maintainable for enhancement of rent on the ground of excess area in spite of their having been a stipulation to that effect in the *kabuliat* executed by the tenant prior to the Settlement proceedings; and that section 113 of the Bengal Tenancy Act was not a bar to the maintainability of the suit of such character and had no application in such circumstances. I must confess, after carefully reading this case, I am unable to see how it seriously bears upon the question for disposal before me. The learned Subordinate Judge, however, seems to think that that case bore some analogy to the present one and acting, as he says, upon the two cases which I have quoted above, he came to the conclusion, with some doubt, that the decision under section 105 did not amount to a settlement of rent as contemplated by section 113 of the Bengal Tenancy Act and that, consequently, it was no bar to the plaintiff's suit. I am of the contrary opinion. I think that, taking the circumstances into consideration, the language of the Assistant Settlement Officer and the fact that it seems to have been the fault of the plaintiffs themselves if they find themselves now barred by the express provisions of section 113 from bringing, other than within the period specified, a suit for enhancement, such bar is entirely due to their own laches. Under these circumstances, I must hold that their suit is thus barred.

In my view, therefore, the appeal must be allowed. The judgment of the Munsif will be restored so far as it has been modified by the judgment of the Subordinate Judge in respect of the plaintiff's claim for enhancement of rent. The appellants will be entitled to their costs of this appeal and in both Courts below.

Z. K.

Appeal allowed.

(7) 15 Ind. Cas. 327; 17 C. W. N. 153.

JAGAN NATH v. PIR MOHAMMED:

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

CASE NO. 317 OF 1922.

July 3, 1922.

Present:—Mr. Justice Abdul Raof.

JAGAN NATH SETHI—JUDGMENT—

DEBTOR—APPELLANTS

versus

PIR MOHAMMED AND OTHERS:

—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 (2); O. XXI, rr. 90, 92, O. XLIII, r. 1 (j)—Execution of decree—Sale—Application to set aside sale—Appeal, second, whether lies.

An application to set aside an execution sale on the ground of material irregularity and fraud fails under O. XXI, r. 90 of the Civil Procedure Code and an order made thereon is appealable under O. XLIII, r. 1 (j) of the Code. Under section 104 (2) of the Code no second appeal is competent from an order passed in appeal under r. 1 (j) of O. XLIII.

Sheo Prasad Singh v. Premma Kuar, 43 Ind. Cas. 522; 40 A. 122; 15 A. L. J. 920 and *Bhadreswar Goloi v. Bishnu Charan Sen*, 8 Ind. Cas. 3, relied upon.

Miscellaneous second appeal from the order of the District Judge, Rawalpindi, dated the 18th of October 1921, reversing that of the Junior Subordinate Judge, Second Class, Rawalpindi, dated the 23rd November 1920.

Mr. Nanak Chand and Sayad Mohsin Shah, for Mr. Aziz Ahmad, for the Appellants.

Mr. Ghulam Rasul, for the Respondents.

JUDGMENT.—The People's Bank obtained a money decree against one Jagan Nath on the 30th May 1910. In execution of that decree one shop belonging to the judgment-debtor was attached and sold on the 16th September 1910. The present application was made on the 14th November 1911, seeking to set aside the sale on the ground of material irregularity and fraud. This application was allowed by the first Court on the 23rd November 1920. Thereupon an appeal was preferred against the order setting aside the sale. The lower Appellate Court has set aside the order of the first Court and has dismissed the application of the judgment-debtor. The judgment-debtor has, therefore, come up in second appeal to this Court. A preliminary objection has been taken to the hearing of this appeal on the ground that the order appealed against was passed under clause (j) of O. XLIII, r. 1, and as such is not open

to appeal. In support of this contention reliance is placed on sub-section (2) of section 104 of the Civil Procedure Code. Sub-section (2) of section 104 provides that no appeal shall lie from any order passed in appeal under the section. It cannot be denied that the appeal to the Court below was preferred in accordance with the provisions of O. XLIII, r. 1, clause (j), inasmuch as the order was passed under O. XXI, r. 92. In my opinion there is force in this contention. It is supported by a recent ruling of the Allahabad High Court in *Sheo Prasad Singh v. Premma Kuar* (1). It is also supported by the ruling in the case of *Bhadreswar Goloi v. Bishnu Charan Sen* (2). Mr. Nanak Chand, the Counsel for the opposite side, has contended that the order appealed against comes within the provisions of section 47 of the Code of Civil Procedure and should be treated as a decree. In support of this contention he has cited certain rulings under the old Code of Civil Procedure with reference to section 244 of the Code and has contended that, inasmuch as the sale was impugned on the ground of fraud, the order must be taken to be an order under section 47 and not under O. XXI, r. 92. The learned Counsel's argument entirely ignores the fact that a change has been effected in the present Code of Civil Procedure and liberty has been given for impugning a sale on the ground of fraud also to an aggrieved party. Under the old Code of Civil Procedure a party was not entitled to question a sale on the ground of fraud under the provisions of section 311 of the old Code. The application made in this case was in substance an application under O. XXI, r. 90 of the Code. I have not the slightest hesitation in holding that the order passed was an order and not a decree within the meaning of section (2) of the Code. The present appeal is, therefore, barred by sub-section (2) of section 104 of the Civil Procedure Code.

(1) 43 Ind. Cas. 522; 40 A. 122; 15 A. L. J. 920.

(2) 8 Ind. Cas. 3.

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The preliminary objection prevails and the appeal is dismissed with costs.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 357 OF 1919.

December 19, 1922.

Present:—Mr. Justice Phillips and Mr.

Justice Devadoss.

SRI-RAJA A. V. JAGGA ROW BAHADUR GARU (DEAD) AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

GORI BIBI alias GONHAR BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Finding as to res judicata based on mistake of fact, whether binding—Construction of document—Grant—Wakf—Inam Commissioner, decision of, whether binding on Court.

When a Court decides that a certain matter is *res judicata* between the parties to the suit, that matter cannot be re-opened in a subsequent suit between the same parties, even though the decision was based on a mistake of fact. [p. 794, col. 1.]

Certain properties were held to be *wakf* properties in a suit. In a subsequent suit, the plaintiff in which was not a party to the prior suit, it was held that the question whether the properties were *wakf* was *res judicata* by virtue of the decision in the prior suit, the Court overlooking the fact that the plaintiff was not a party to the prior suit. The question as to the *wakf* nature of the properties again arose in a third suit between persons who were parties to the second suit:

Held, that the decision in the second suit that the question of the *wakf* nature of the properties was *res judicata* by virtue of the decision in the first suit, although based on a mistake of fact, was binding on the parties to the third suit. [p. 794, col. 2.]

Per Devadoss, J.—A grant of a village recited that a certain religious person was engaged in looking after a certain *Durgah* and that “there were not sufficient means for the said person to carry on all the religious objects of the institution and that the village was granted by way of aid to the maintenance of the servants, students and other men deserving of help at the aforesaid religious man’s hands. The grant further stated that the village was to be treated as civil liability so that from year to year the income thereof may be utilised for the maintenance of the servants and the requisites of the *Durgah*. There was an endorsement

on the document to the effect that the village had been fixed as aids for the maintenance of the aforesaid religious man and for the expenses of the *Durgah* and that the same was to be left in the enjoyment of the said person with effect from a certain date:

Held, that the grant was not a personal one burdened with a trust in favour of certain charities but that the properties were “*wakf*” properties inalienable by the grantee. [p. 792, col. 1.]

Ramanadan Chettiar v. Vava Levvai Marakayar, 39 Ind. Cas. 235; 40 M. 116; 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 I. A. 21 (P. C.), relied on.

In construing *firman*s and grants, great weight ought to be attached to the actual words used in the grant and not to an endorsement which is brief and simple and may not fully express the intention of the grantor. [p. 791, col. 2.]

In interpreting deeds and contracts, the intention of the parties to the document should be gathered only from the recitals in the documents to which they are parties and not from what they said or did before the document was executed. [p. 791, col. 2.]

The decision of an Inam Commissioner as regards the nature of a grant is not conclusive. It is for the Court to decide the nature of the grant though the Inam Commissioner’s decision may help the Court in arriving at a finding as to the practice of an institution. [p. 792, col. 2.]

It is not a safe principle to interpret one document by referring to recitals in another. But where a Court has given a definite meaning to certain expressions, that meaning should be applied to those expressions in other cases. [p. 792, col. 2.]

Jewun Doss Sahoo v. Shah Kubeer-ood-din, 2 M. L. A. 390; 6 W. R. 3 (P. C.); 1 Suth. P. C. J. 100; 1 Sar. P. C. J. 206; 18 E. R. 348, *Muzhurool Hug v. Puhraj Ditarey Mohapatrur*, 13 W. R. 235, *Jugatmoni Chowdram v. Romjani Bibee*, 10 C. 533; 5 Ind. Dec. (N. S.) 337 and *Sathianama Bharati v. Saravanabagi Ammal*, 18 M. 266; 4 M. L. J. 223; 6 Ind. Dec. (N. S.) 535, referred to.

Appeal preferred against a decree, dated the 7th July 1919, of the District Court, Vizagapatam, in the Original Suit No. 2 of 1915 (Original Suit No. 2 of 1914 on the file of the Sub-Court, Vizagapatam).

Messrs. C. Madhavan Nair and S. Aravamadu Iyer, for the appellants.

Messrs. C. S. Venkata Chariar and H. Suryanarayana, for the Respondents.

JUDGMENT.

Phillips, J.—I agree, but I prefer not to express any opinion as to the meaning of the deed of grant (Exhibit VI), but would base my decision on the two points (1) *res judicata*, (2) failure to prove necessity. The decision of this Court in Appeal No. 169 of 1911 is undoubtedly based upon a m

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take of fact, but is nonetheless binding upon plaintiff for that reason. He cannot now contend that the properties are not *wakf*; that being so, he must prove necessity for the alienation. Having failed to do this, his appeal fails and must be dismissed with costs of the first respondent.

Plaintiff's right to retain possession of the property, if he is really in possession, does not arise in this suit for money and need not be discussed.

Devadoss, J.—This appeal is against the decree of the District Judge of Vizagapatam dismissing the plaintiff's suit on a mortgage-bond dated 8th December 1900 on the ground that the hypotheca are *wakf* or trust properties and, therefore, could not be alienated, and that there was no necessity to mortgage the *wakf* properties.

It is contended for the plaintiff (appellant) before us, (1) that the properties are not *wakf* properties, but are only burdened with a trust in favour of certain charities; (2) that there was necessity for the mortgage, and (3) that the plaintiff has prescribed for a mortgagee's possession and he could not, therefore, be evicted without the amount due on the mortgage being paid.

The question whether the properties are *wakf* properties or not depends upon the construction of Exhibit VI which is a grant by the Nawab of Chicacole in the *Hijra* year 1121. The material portions of the document, are,—Hajee Mir Mahammad Sadique, servant of the Holy Hairs of the Holy Prophet, engaged himself in praying the Creator of Day and Night and always caused the humble fare reach some of the pious men, devotees, righteous and poor men after performing *Fatiha* (blessings) on the victorious soul of the leader of all Prophets. He decorates, lights and performs the anniversary of the mausoleum every year and low and high people gain prosperity by acquiring a portion of what was left of food and drink, presented and offered to the holy men * * * and as there is no sufficient means for these laudable expenses in this world of causes, accordingly considering all * * * which relates to the person of the King of the world and * * * the entire village of Buradi Kunjram belonging to the said Sircar assessed at even

hundred and twenty rupees with effect from the commencement of the 1125 *Fasil*, as per endorsement, was granted by way of expenses of *farsh* (carpetting, matting, etc.,) and lighting at the anniversary and maintenance of servants, students and other men deserving help at the hands of the Refuge of Nobility. It is necessary that they should leave it in the enjoyment of the aforesaid person and treat it as above mentioned civil liability so that from year to year utilising the income thereof for the expenses of maintenance of servants and requisites of the *Dargah* where angels pray, etc." On this document there is the following endorsement: "The endorsement is to this effect that the entire village of Burdi Kunjram belonging to the Chicacole Sircar assessed at seven hundred and twenty (720) has been fixed by way of aids to maintenance of Haji Mir Mahammad Sadique, servant of the Holy Relics and for the expenses of the *Dargah*; it is necessary that the said village should be left in the enjoyment of the said person with effect from the beginning of 1125 *Fasil*. The signature on the petition is to this effect "Give *sunnad*. One village, assessed at 720", Mr. Ahmed Hassan, the Persian interpreter, has explained to us the object of the endorsement; when a petition for a grant was presented to the Nawab, and endorsement was made as to the order of the Nawab on the petition with a direction that a *sunnad* should issue and on the basis of this the *farmans* or grant was prepared and signed by the Nawab, Exhibit VI is a grant bearing the *baiz* (Royal Mark) of the Nawab.

It is contended by Mr. Madhavan Nair that this document was produced and admitted as evidence after both the plaintiff and the defendants had closed their case and that he was prejudiced thereby. The case was closed and the arguments were heard by the learned District Judge on 4th April 1919. He insisted on the production of the original grant which was done by the first defendant on 16th April 1919.

There is an endorsement on Exhibit VI that both the parties admitted the document. That endorsement is dated 21st April 1918. Judgment was delivered after the midsummer vacation on 7th July 1919,

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Mr. Madhavan Nair strongly urges that he had no opportunity of either explaining the contents of the document or of adducing evidence to counteract the effect of them. Seeing what the endorsement on the document is, it cannot be said that the learned District Judge admitted it in evidence without giving the Vakils on both sides an opportunity of inspecting it and having their say on it. It cannot be said that this document was sprung upon the plaintiff; such a document was referred to in the evidence and, seeing what the contention of the first defendant was in this case, there is no reason to suppose that the plaintiff has been in any way prejudiced by the admission of the document after the arguments were heard. If the plaintiff's Vakil thought that he could meet the document in any way he would certainly have asked the Judge to give him an opportunity to do so. There is no affidavit before us to show that plaintiff's Vakil asked for time to have an opportunity of putting forward any contention in respect of the document and that was refused. Therefore, there is no substance in the objection against the reception of the document in evidence.

It is next urged that Exhibit VI does not create *wakf* but evidences a grant in favour of Mahammad Sadique with a direction to apply a portion of the income to certain charitable purposes, and, therefore, the property granted by the document is only burdened with a trust and is not a trust property inalienable by the grantee. The circumstances under which the grant was made have to be considered. There was a shrine or *Dargah* in which the Holy Relics of the Prophet were deposited and Mahammad Sadique being a religious man was engaged in offering prayers, performing *fatihs*, feeding the poor and probably in maintaining a school. The Nawab of Chicacole was approached to make a grant as Mahammad Sadique had no sufficient fund to meet all the expenses of the mosque. The endorsement shows that the Nawab wanted to grant the village in question by way of aid to the maintenance of Mahammad Sadique and for the expenses of the *Dargah*. Whatever might have been the intention of the Nawab as expressed in the endorsement, when the grant was actually made out, it was so framed as to make the grant a *wakf*.

In construing the *farmans* and grants, great weight ought to be attached to the actual words used in the grant rather than to an endorsement, which is brief and simple, and may not fully express the intention of the grantor. In interpreting deeds and contracts, the intention of parties to the document should be gathered only from the recitals in the document to which they are parties and not from what they said or did before the document was executed. The intention of the grantor is quite clear from the following words in the document:—"The entire village of Burdi Kunjram was granted by way of expenses of *farsh* and lighting at the anniversary and maintenance of servants and students and other men deserving help at the hands of the Refuge of Nobility," the Refuge of Nobility being Mahammad Sadique. What follows puts the intention beyond doubt, "It is necessary that they should leave it in the enjoyment of the aforesaid person and treat it as above mentioned as civil liability so that from year to year utilising the incomes thereof for the expense of the maintenance of servants and requisites of *Dargah*." Mr. Ahmed Hussain (the Persian Interpreter) explained that by civil liability was meant that it was not an ecclesiastical grant but *wakf* which, under certain circumstances, could be revoked. There is nothing in the operative portion of the document to show that it was intended as a grant to Mahammad Sadique with a pious wish that he should devote a portion of the income to the charity. No doubt, in that portion of the document relating to the reasons for making the grant the fact that he was not able to meet all the expenses is mentioned. But the operative portion does not make any mention of the needs of Mahammad Sadique.

It is urged that it could not have been the intention of the grantor to make the whole of the income *wakf*. The word "*wakf*" is not used in the document hence it could not be considered trust property. This argument overlooks the clear recitals in the document and the object of the grantor, which are that his state should endure for all time by the prayers that may be offered at the *Dargah*. Further, the income was to be devoted not only to the maintenance of the servants, but also of students and other men deserving help. It is said that it is usual in mosques

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and *Durgah* to have a school for teaching Arabic, and the expense in connection therewith cannot be estimated at any particular figure. The size of the school and the nature of the education imparted therein would depend upon the amount that could be spared for such purpose. Considering all the circumstances of the case, I think the learned District Judge is right in finding that the property covered by Exhibit VI is a *wakf* property and, therefore, inalienable. In *Ramanadan Chettiar v. Vava-Levvai Marakayar* (1). "the lands in question were comprised in a trust-deed dated the 28th July 1893 whereby they were settled substantially in trust to apply an indeterminate portion of the income for the due performance of customary *fatihs* for ancestors and to alms-giving, and to apply the residue of the income in perpetuity for the benefit of the defendant and their ancestors without power of alienation." Their Lordships observed at page 123. "The paramount purpose of the grantors was evidently to provide for all the needs of these charities up to the limit of the trust funds, the income received from the land. Those needs are the first burden upon that income. It is the residue, which may be a dwindling sum, that is given to the family. The contention that, because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is to give the property in substance to the family, and that, therefore, it is invalid as a deed of *wakf* is, their Lordships think, entirely unsound. And they hold that "having regard to all the circumstances of the case, the dominating purpose and intention of the grantors in executing this deed evidently was to provide adequately for these charities."

Mr. Venkatachari for the first respondent contended that the Inam title-deed, Exhibit I, described the property as trust property. In the first place, the decision of the Inam Commissioner as regards the nature of the grant is not conclusive. Secondly, it is for the Court, when the original grant is before it, to see what that document means. In this

(1) 39 Ind. Cas. 235; 40 M. 116; 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 L. A. 21 (P. C.).

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case the Inam Commissioner recommended that the *inam* may be continued on the present tenure. Exhibit I shows no doubt that in column 2 the *inam* is called *Devadayam inam*, but in column 10 it is said permanent so long as the service is performed. Then in column 21 it is found "to be confirmed and continued so long as the service is performed." It is not clear from this document whether the Commissioner treated it as service *inam* or as grant to the *Dargah*. But as I said above it is for the Court to see what the nature of the grant is, and though the Inam Commissioner's decision may help the Court in arriving at a finding as to the practice of an institution, yet it is not conclusive as to the meaning of the grant, and in this case, I have no hesitation in holding that the grant made by Exhibit VI was a *wakf* grant. He relied upon a number of cases to show how the grant is to be understood. It is not a safe principle to interpret one document by referring to the recitals in another document. But where the Court has given a definite meaning to certain expressions that meaning should be applied to such expressions in other cases. Neither the *firman* in *Jewun Dass Sahoo v. Shah Kubeer-ud-din* (2) nor the one in *Muzhurool Huq v. Puhraj Ditarey Mohapattur* (3) gives us any help as regards the meaning of Exhibit VI. In *Jugatmoni Chowdrani v. Romjani Bibee* (4) the requisites of a valid *wakf* are set out and in *Sathianama Bharati v. Saravanabagi Ammal* (5) the original grant provided that the grantee was "to improve the *mutt*, maintain the charity and be happy." It was found that, according to the usage of the institution, the specific trusts to which the income of the village was applicable consisted (1) in the distribution of *sadavarthi* (rice and condiments were supplied in lieu of cooked food) in the *mutt* to Gosayi and other pilgrims who pass through Montithope; (2) in the maintaining of *pooja* or worship in the temple called Sankara Bharati Swami Kovil; (3) in supporting a watershed or *pandal* at a place near the

(2) 2 M. I. A. 390; 6 W. R. 3 (P. C.); 1 Suth. P. C. J. 100; 1 Sar. P. C. J. 206; 18 E. R. 348.

(3) 13 W. R. 235.

(4) 10 C. 533; 5 Ind. Dec. (N. S.) 357.

(5) 18 M. 266; 4 M. L. J. 223; 6 Ind. Dec. (N. S.) 335.

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village called Ellandope, and (4) in providing maintenance to the descendants of the grantee. The learned Judges held: "The conclusion to which we come is that the village was granted as an endowment to the *mutt* and the charities connected with it, and that what might remain after the due execution of those trusts was intended to be applied to the maintenance of the grantee or his descendants." The next contention on behalf of the appellant is that there was necessity for the alienation and, therefore, the debt is binding on the trust. There is no evidence that there was any necessity for borrowing such a large sum. Exhibit A is a usufructuary mortgage-deed in favour of Sri Ankitam Atchayamma by Jainabibi in which there is a recital to the effect that Rs. 150 per annum was the sum payable for lighting and other expenses of the *Dargah* and Rs. 100 per annum for the festival of *Urs*. If that was all the amount that was needed for the up keep of the *Dargah*, it is not easy to conceive how such a large sum as Rs. 10,000 could have been required for the expenses of *Dargah*. There is no evidence that, owing to famines or other causes beyond the control of the *Muthavalli*, it was necessary to borrow for upkeep of the *Dargah* or for performing the annual festival. Though the District Judge has not discussed the evidence at great length, yet, in the absence of any evidence worth the name, it cannot be said that his finding as to the absence of necessity is wrong. It is for the plaintiff to make out necessity in a case like this, and the mere fact that there has been a debt outstanding for a long time is not a circumstance going to show that, when the debt was first incurred it must have been for a purpose which would bind the trust. From the conduct of the parties, who treated the *wakf* property, as family property it can be safely inferred that they borrowed for their own purposes and it was only in the year 1884 that Jainabibi was willing to acknowledge that the village in question was granted for offering services to the Asar Sheriff at Chicacole and for the expenses as aforesaid and for the festivals in the *Dargah*. In the earlier proceedings affecting the plaint village there is no mention any where that it was granted for the purpose of any service; *vide* Exhibits H. J. and X. I, therefore, hold

that no necessity has been proved in this case.

It is next contended by Mr. Malhayan Nair that he has prescribed for a mortgagee's title, and he relies upon *Sontyana Gopala Dasee v. Inaputalapula Rami* (6). He urged that the predecessors-in-title of the plaintiff were in possession from the year 1884 up to 1903, and though he relinquished possession for a short time, yet possession was given back to him by the mortgagees though he could not collect the rent and that his possession was good in law. Granting that his contention is correct, he could only acquire title by prescription against the trustee or *Mutwalli*, I fail to see how he could prescribe for a title against the trust. If the properties are trust properties, any person claiming from a trustee cannot acquire a prescriptive title against the trust. Exhibit A is a mortgage-deed dated 2nd December 1884 executed by Jainabi who was then the *Mutwalli* of the *Dargah*. Whether the document is valid or invalid, it would not give a right to any body claiming under that document to prescribe for a title against the trust. Granting, for argument's sake, that the plaintiff has been in possession for more than 12 years under an invalid mortgage-deed, and has prescribed for a title against the trustee, such prescriptive title will cease with the lifetime of the trustee. It is admitted that Jainabi died in 1902 and Kurban Ali died in 1908. Jainabi was admittedly the *Mutwalli* during her life time and any title by prescription acquired against her would not avail against her successor as was decided in *Vidya Varuthi Thirtha v. Swamigal Balusami Ayyar* (7). However, the plaintiff who is not in possession seeks to recover the mortgage amount by sale of hypotheca and is not resisting a suit for possession and he cannot, therefore, insist upon being redeemed. Therefore, there is nothing in this contention on behalf of the appellant.

(6) 64 Ind. Cas. 328; 44 M. 946; 13 L. W. 685; (1921) M. W. N. 385; 41 M. L. J. 194.

(7) 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497 (1922) A. L. R. (P. C.) 123; 48 L. A. 302 (P. C.).

LAL, BEHARY BASAK v. AKHIL CHANDRA SANTRA.

There is one fatal objection to the claim of the plaintiff which has evidently been overlooked by the Court below. The plaintiff in Original Suit No. 42 of 1907 on the File of the District Court of Ganjam sued Qurban Ali and others for a share of the properties. The plaintiff herein was made the 10th defendant in that suit. The second defendant was Kulsam Bibi, the mother of the first defendant herein. In that suit Mr. Sadasiva Iyer, who was the then District Judge of Ganjam, found that the properties were *wakf* properties. Though he relied for his finding upon a previous judgment in Original Suit No. 22 of 1905 to which the plaintiff was not a party, yet he allowed him to let in evidence to show that it was the self-acquisition of the first defendant. On the evidence he found that it was *wakf* property. The third defendant appealed against the decree. The appellant Chand Bibi did not make Gori Bi the first defendant herein who was added as the 18th defendant on the death of her mother, Kulsam Bi, party to the appeal. The appeal was heard by Abdur Rahim and Srinivasa Iyengar, JJ., who held that in the previous suit of 1905 the properties in dispute had been found by the then District Judge of Ganjam to be *wakf* properties and that that judgment was binding upon the parties: *Vide* Exhibit IV. They evidently overlooked the fact that the 10th defendant (plaintiff herein) was not a party to the suit of 1905. The learned Vakil who appeared for him did not bring to the notice of the learned Judge the fact that his client was not a party to the suit of 1905. They decided that the question whether the properties in dispute were *wakf* or not was *res judicata* between the parties and, therefore, could not be re-opened. Though there is a mistake of fact as regards the parties to the litigation of 1905 yet the learned Judge decided that the matter was *res judicata* between the parties and, therefore, it is not competent for us to go behind their decision.

It is urged by Mr. Madhavan Nair that the plaintiff was given his costs in the High Court and, therefore, the judgment is not binding on him. The plaintiff was allowed his costs evidently on the ground that he was a Receiver in charge of the plaint properties, and it cannot be said that he was exonerated with costs and that the suit

was dismissed as against him. On the other hand, it is quite clear from the judgment that the learned Judges considered that the parties before them were parties to the previous suit, and, therefore, the question was *res judicata* between them. On this ground alone the plaintiff ought to have been non-suited. The appeal, therefore, fails and is dismissed with costs of first respondent.

V. N. V.

N. H.

*Appeal dismissed.***CALCUTTA HIGH COURT.**

CIVIL RULE NO. 213 OF 1922.

August 2, 1922.

Present:—Justice Sir Thomas Richardson Kt., and Mr. Justice B. B. Ghose.

LAL, BEHARY BASAK—PLAINTIFF—
PETITIONER

versus

**AKHIL CHANDRA SANTRA—DEFEND-
ANT—OPPOSITE PARTY.**

Bengal, Agra and Assam Civil Courts Act (XII of 1887), s. 8 (2)—Bengal Tenancy Act (VIII of 1885), s. 153, proviso, application under—Transfer to Additional Judge, whether competent.

Under section 8 of the Bengal, Agra and Assam Civil Courts Act an Additional Judge has jurisdiction to hear an application made under the proviso to section 153 of the Bengal Tenancy Act transferred to him for disposal by the District Judge.

Gaudna Bibi v. Jabanulla Mandul, 2 C. W. N. 48 notes, distinguished.

Rule against an order of the Additional District Judge, Howrah, dated the 3rd January 1922.

Babus *Hari Charan Ganguly* and *Monmohan Bose*, for the Petitioner.

Babu *Hiralal Chakravarty*, for the Opposite Party.

JUDGMENT.—This Rule relates to an order dated the 3rd January 1922 made by the Additional District Judge of Howrah whereby he dismissed the application of the petitioner presented to the District Judge of Hooghly under the proviso to section 153 of the Bengal Tenancy Act and transferred by the District Judge to him for hearing.

The Rule obtained by the petitioner calls upon the opposite party to show cause why the Additional District Judge's order should not be set aside for the reasons set forth in ground (a) of the petition.

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Ground (a) of the petition is to the effect "that the learned District Judge exercised his jurisdiction illegally and with material irregularity in transferring the case to the Additional District Judge and the latter exercised jurisdiction not vested in him in proceeding with the trial and dismissing the motion."

In support of the Rule reliance was placed on the case of *Gaudna Bibi v. Jabanulla Mandul* (1), (Civil Rule No. 1969 of 1900) reported as 5 C. W. N. Short Notes, 48. We have referred to the record of the case in this Court and we find that there the Additional Judge of Jessore had before him an appeal described in the title as a miscellaneous appeal. The learned Additional Judge dealt with the matter not as an appeal but as an application under section 153 of the Bengal Tenancy Act, and it was held by this Court that he had no jurisdiction in those circumstances to deal with the case as an application under section 153 of the Bengal Tenancy Act. In the present case the application of the opposite party tenant was properly made to the District Judge of Hooghly, who appears to have transferred it for disposal to the Additional District Judge of Howrah.

In so doing the District Judge no doubt acted under the general powers conferred on him by section 8 of the Civil Courts Act, XII of 1887.

Sub-section (2) of that section provides "Additional Judges . . . shall discharge any of the functions of a District Judge which the District Judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the District Judge."

We are of opinion that the case cited is distinguishable from the present case on the facts and that the provision in the Civil Courts Act to which we have referred is wide enough to enable an Additional Judge to hear an application under the proviso to section 153 of the Tenancy Act transferred to him for disposal by the District Judge. No doubt the jurisdiction conferred by the proviso is conferred on the District Judge but in our view the hearing of an application under the proviso is a

function of a District Judge which, under the Civil Courts Act, he may assign to an Additional Judge.

If that be so, the order of the learned Additional Judge to which the Rule relates was not made without jurisdiction and this Rule must be discharged with costs (hearing fee one gold *mohur*).

W. C. A.

Rule discharged.

MADRAS HIGH COURT.

CIVIL REVISION PETITION Nos. 657 TO 673
OF 1920.

December 13, 1922

Present:—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

JAVVADI SOORAYYA AND OTHERS—
DEFENDANTS—PETITIONERS
versus

TAVVALA SURYA RAO NAIDU AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Grant—Grant of village in inam—Grant, whether of both warams—Presumption—Occupancy rights, existence of—"Mauza," implication of—"Kadims," implication of.

The grant of a whole village in *inam* will not be presumed to be the grant only of a *melwaram* interest unless it is shown that the *kudivaram* interest was already in the hands of some one else than the donee. [p. 796, col. 2.]

Suryanarayana v. Patanna, 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 45 I. A. 209; 21 Bom. L. R. 547; (1919) M. W. N. 463 (P. C.), followed.

The word "Mauza" does not necessarily import the existence of occupancy *raiya*s on the land. [p. 797, col. 1.]

Upadrasta Venkata Sastrulu v. Devi Sitaramudu, 24 Ind. Cas. 224; 38 M. 891; 26 M. L. J. 585 on appeal *Upadrasta Venkata Sastrulu v. Divi Seetharamudu*, 51 Ind. Cas. 304; 43 M. 166; 17 A. L. J. 725; 37 M. L. J. 42; 21 Bom. L. R. 925; 26 M. L. T. 175; 30 C. L. J. 441; 10 L. W. 633; 24 C. W. N. 129; 46 I. A. 123 (P. C.), referred to.

Subrahmanya Somayajulu v. Seethayya, 70 Ind. Cas. 729; 16 L. W. 462; (1922) M. W. N. 614; 31 M. L. T. 347; (1923) A. I. R. (M.) 1, followed.

The mention of there being "Kadims" in a village does not convey anything as to the existence of occupancy rights. [p. 797, col. 2.]

JAVVADI SOORAYYA v. TAVVALA SURYA RAO NAIDU.

Petitions, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Subordinate Judge, Kistna, at Ellore, in Miscellaneous Appeals Nos. 46, 47, 50, 51, 52, 54, 55, 58, 59, 60, 62, 63, 64, 65, 66, 68 and 7, of 1918, preferred against the orders of the Court of the Additional District Munsif, Kovvur, in Original Suits Nos. 15, 16, 19, 20, 21, 23, 24, 27, 28, 29, 31, 32 to 35, 37 and 40 of 1915 respectively.

Mr. A. Krishnaswami Aiyar, for the Petitioners.

Messrs. P. Narayanamurthi and N. Rama Rao, for the Respondents.

JUDGMENT.

Spencer, J.—The order sought to be revised is an order of the Subordinate Judge of Ellore remanding certain suits for disposal by the District Munsif. The question whether the Civil Court had jurisdiction to try these suits, which were for rent and ejectment of tenants, depends on the question whether the *Agraharam* of Pentapad in the *Zemindari* of Nuzvid was an "estate" within the meaning of the Madras Estates Land Act. The Subordinate Judge has found that the grant in question was a grant of both *melwaram* and *kudivaram*. In this case the original grant is before us and is marked as Exhibit D. It purports to be a grant by Apparayanin Garu, *Zemindar* of Nuzvid, in the year 1744 of the Mauza village of Patha Pentaped to a Brahmin named Tirumalasingaracharyulu Ayyavarlam Garu.

Reliance is placed for the appellants on the fact that this is a grant to a Brahmin and that it is described as a Mauza village; also on the fact that in Exhibit IX, an abstract of revenue collections in the years 1777 to 1781, the existence of 300 inhabitants is mentioned, also that there was a division of produce between the Brahmin *Agraharamdars*, and the cultivators; also that in Exhibit O, which is a statement made by *Agraharamdars* before the Imam Commissioner, the *Agraharamdars* disclaimed any interest in the communal lands of the village; and lastly on the mention in Exhibit XVI (j) of 23 *kadims* among the population of the village.

As regards the existence of 300 inhabitants 33 years after the grant, the words of the Privy Council in *Suryanarayana v. Patanna* (1) are most apposite. They are these: "It is not proved, nor is there any evidence to suggest, that at the date of the grant there were any tenants in the village holding lands with any rights of occupancy by custom or otherwise." In other words, the grant of a whole village will not be presumed to be the grant only of *melwaram* interest unless it is shown that the *kudivaram* interest was already in the hands of some one else than the donee. The division of produce between the *agraharamdars* and the cultivators throws light on the system then prevalent of paying *kist* to the land owner, but is no indication whether the tenant had or had not occupancy rights. Mr. Wilson's definition in his Glossary of the word "*Mauza*" has been referred to in several decisions. It is "a village, understanding by that term one or more clusters of habitations, and all the lands belonging to their proprietary inhabitants." It is not clear whether the word "proprietary" is intended to refer to the habitations or to the lands.

In *Upadrasta Venkata Sasthrulu v. Devi Sitaramudu* (2), Sadasiva Aiyar, J., interpreted *Mauza* village as meaning a village in which there were proprietors owning cultivable lands. The value to be attached to the learned Judge's definition has been considerably diminished by the remarks of the Judicial Committee in the appeal in *Upadrasta Venkata Sasthrulu v. Divi Seetharamudu* (3) when Sadasiva Aiyar, J.'s decision was reversed. That case was one of a grant of an *inam* called Billapadu *agraharam* in 1748 by the same *Zemindar* of Nuzvid who was the donor in the present case. The latest pronouncement regarding the meaning of

(1) 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 45 I. A. 209; 21 Bom. L. R. 547; (1910) M. W. N. 463 (P. C.).

(2) 24 Ind. Cas. 224; 38 M. 891; 26 M. L. J. 585.

(3) 51 Ind. Cas. 304; 43 M. 166; 17 A. L. J. 725; 37 M. L. J. 42; 21 Bom. L. R. 925; 26 M. L. T. 175; 30 C. L. J. 441; 10 L. W. 633; 24 C. W. N. 129; 46 I. A. 123 (P. C.).

GURDIT SINGH v. CHARAN DAS.

expression "*Mauza*" is that of the learned Chief Justice in *Subrahmanya Somayajulu v. Seethayya* (4). He observed that on the material before him it was not possible to say that this word necessarily imported the meaning that there were occupancy *railyats* on the land. With this observation I respectfully agree, and I apply it to the same expression occurring in the present case.

The word "*kadim*" is defined by Mr. Wilson as "an old inhabitant of a village, one holding by hereditary descent." In the Glossary to the 5th report "*kadim*" is defined as a "headman." The word is uncommon so far as my experience goes. But it does not seem to convey anything as to the existence of occupancy rights. On the other hand, a large number of *muchallikas* (Exhibits A, Q, F, J, S, K, W, series) have been filed in these suits in which the tenants agree to vacate their holdings on the expiry of the term of their tenancy. There is no express admission that the tenants have no *jiroyiti* rights as there was in the *muchallikas* in *Suryanarayana v. Patanna* (1). But their undertakings to quit the lands at the end of their term implies absence of occupancy rights. There is also the further fact referred to by the Subordinate Judge that in some cases where lands have been acquired by the Government, compensation has been paid to the *agrahramdars* as shown in Exhibit O series, without any claim being made by the tenants to share in such compensation. For these reasons, I consider that the lower Court was right in deciding that the jurisdiction of the Civil Courts has not been ousted by section 289 of the Madras Estates Land Act.

The civil revision petitions are, therefore, dismissed with costs.

Venkatasubba Rao, J.—I agree.

V. N. V.

Petition dismissed.

(4) 70 Ind. Cas. 729; 16 L. W. 462; (1922) M. W. N. 614; 31 M. L. T. 347; (1923) A. I. R. (M.) 1.

LAHORE HIGH COURT.

CIVIL APPEAL NO. 1525 OF 1919.

June 14, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

GURDIT SINGH—PLAINTIFF—APPELLANT

versus

CHARAN DAS—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), ss. 5, 12—Limitation for second appeal, computation of—Delay in despatch of copy of lower Appellate Court's judgment or decree—Exclusion of time—Time taken to obtain copy of Trial Court's judgment, exclusion of.

In computing the period of limitation for a second appeal, the time taken in obtaining a copy of the decree as well as a copy of the judgment of the lower Appellate Court can be excluded under section 12 of the Limitation Act. And whether copies are not despatched until several days after they are ready, the appellant is entitled to the exclusion of those days. But the time taken in obtaining a copy of the Trial Court's judgment cannot be excluded under that section. Nor can such time be excluded under section 5 of the Act, where the copy of the Trial Court's judgment was, or could be, obtained before the expiry of the period of limitation.

Appeal from an order of the Additional District Judge, Lyallpur, dated the 27th March 1919.

Lala Niamai Rai, for the Appellant.

Lala Durga Das, for the Respondent.

JUDGMENT.—Mr. Durga Das for the respondent raises a preliminary objection to the effect that the appeal to this Court is barred by time. It appears that the judgment appealed against was passed on the 27th March 1919. The time for appeal, i.e., 90 days, expired on the 25th June 1919. The memorandum of appeal was filed on the 2nd July 1919 with a copy of the judgment appealed against and a copy of the order of the Trial Court but without a copy of the decree. It was thus improperly filed, and was returned by the office, being re-filed with a copy of the decree on the 12th July 1919, i.e., 107 days after the date of the lower Appellate Court's judgment. Mr. Niamat Rai for the appellant contends that under section 12 he is entitled to the time occupied in obtaining copies of these three documents. The time taken up in obtaining a copy of the judgment of the lower Appellate Court was five days. He tells us that his client went to Gujranwala on 21st June 1919 and was told on that date that the records were at Lyallpur.

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Instead of proceeding to Lyallpur his client returned to Lahore and on the 24th June 1919 Mr. Niamat Rai forwarded an application per registered post to the Copying Department at Lyallpur for a copy of the decree. The said copy shows that the application was received at Lyallpur on the 2nd July and that it was ready on the 3rd July. It appears, however, that it was not despatched till the 7th of that month, and we consider, on the authorities, that the appellant is entitled to the time between the 2nd and 7th July, both days inclusive, or a period of six days. Adding these six days to the five days taken in obtaining a copy of the lower Appellate Court's judgment he is entitled to the benefit of 11 days. There still remain six days to be accounted for. The learned Vakil urges that the time taken in obtaining a copy of the Trial Court's judgment, (which in this case was six days,) should be allowed. It certainly cannot be allowed under section 12 of the Limitation Act, but he urges that section 5 can be invoked to his aid. We are, however, unable to see how this can be done. Had the appellant failed to obtain a copy of the Trial Court's judgment at the commencement and been compelled to obtain this copy towards the end of the period of limitation, we think that section 5 could be utilised. He had, however, obtained this copy early in June and we are unable to see any reason for holding that there was any sufficient cause for the delay in this case. We consider that the appellant has been grossly negligent. He could have proceeded to Lyallpur on the 22nd June and had he done so, the appeal could have been filed within the 90 days. Instead of that, he contented himself with instructing Counsel to apply by post, with the result that his application did not reach the Copying Department at Lyallpur till the end of July. We have duly considered *Ashiq Hutsain v. Ali Bakhsh* (1), *Krishna v. Balia* (2), *Nur Muhammad v. Ram Das* (3) and *Iqbal Jehan Begam v. Muthura Prasad* (4) authorities with which we are in accord.

We accordingly dismiss this appeal with costs as barred by time.

N. H.

Appeal dismissed.

(1) 9 Ind. Cas. 381; 61 P. L. R. 1911; 189 P. W. R. 1911.

(2) 14 Ind. Cas. 403; 8 N. L. R. 11.

(3) 50 Ind. Cas. 760; 4 P. L. R. 1919.

(4) 54 Ind. Cas. 831; 6 O. L. J. 660.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 225 OF 1921.

November 14, 1922.

Present:—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

P. SAMI GURUKKAL—PETITIONER—
APPELLANT

versus

THIRUPATHIA PILLAI AND ANOTHER—
RESPONDENTS.

Construction of decree—Mortgage-decree—Subrogation—Priority set up negatived—Language of decree defective—Property, whether liable to be sold in execution.

A mortgage of a village was executed subject to the alienations of the *kudiwaram* interest in certain items of land therein. The mortgage was executed in order to pay off a decree on a prior mortgage. In a suit to enforce the mortgage, the mortgagee claimed priority, on the basis of subrogation, as against the alienees of the *kudiwaram* interest. One of such alienees who had purchased the *kudiwaram* interest in three items set up his prior right as to one of the items only and not as to the other two. The finding was against him, but the decree directed the sale only of the "right, title and interest of the judgment-debtor." On objection being taken in execution proceedings to the items being sold in execution under the decree;

Held, (1) that there having been a final adjudication in regard to the claim as to the item specifically set up by the alienee, and having regard to the form of the rest of the decree, the item was liable to be sold in execution notwithstanding the defective language of the decree;

Sri Gopal v. Pirithi Singh, 24 A. 429; 29 I. A. 118; 4 Bom. L. R. 827; 6 C. W. N. 889; 8 Sar. P. C. J. 293 (P. C.), followed.

Radha Kishun v. Khurshed Hossein, 55 Ind. Cas. 959; 38 M. L. J. 424; 18 A. L. J. 401; (1920) M. W. N. 308; 11 L. W. 518; 22 Bom. L. R. 557; 47 I. A. 11; 47 C. 662; 28 M. L. T. 425; 25 C. W. N. 417 (P. C.), referred to.

(2) that in the absence of any adjudication negating the alienee's admitted right of priority in respect of the other two items, the decree must be construed strictly and the items must be held not to have been included in the decree.

Appeal against an order, dated the 17th January 1921, of the Court of the Subordinate Judge, Tanjore, in Execution Appeal No. 2 of 1921, in Execution Petition No. 149 of 1919, in Original Suit No. 43 of 1911.

Mr. N. Sivarama Krishna Iyer, for the Respondent, took the preliminary objection that no appeal lies against an order directing proclamation of sale of properties not included in the decree, (Order XXI, r. 66).

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An order settling terms of proclamation is merely an administrative order and not a decree that is appealable.

Sivagami Achi v. Subrahmania Ayyar (1); *Deoki Nandan Singh v. Bansi Singh* (2) and *Punch Duar Thakur v. Mani Raut* (3).

There is no ambiguity or difficulty in the decree and no question of interpretation of decree arises.

Mr. G. Krishnaswamy Aiyar, for the Appellant.—Section 96 of the Civil Procedure Code provides an appeal against decrees, i.e., all orders which conclusively determine the rights of parties so far as the Court is concerned. The matter relates to execution, *Gunniah Vencatachalapathy Aiyar v. Perumal Iyer* (4) and *Biru Mahala v. Shyama Churn* (5), and the question in the case directly raises the interpretation of the decree.

[The preliminary objection was overruled as the case raises the question of the effect of the decree.]

ON THE MERITS:—The alienee-defendant was really an unnecessary party. Where the prior mortgagee or transferee is added as a party but the priority of the mortgage or transfer is admitted or not disputed, the prior mortgagee or transferee is not bound to intervene. He can sue upon his mortgage or transfer. *Srinivasa Rao Saheb v. Yamunabhai Ammal* (6); *Sri Gopal v. Pirthi Singh* (7). If validity is admitted priority follows as a matter of course. *Radha Kishun v. Khurshed Hossein* (8) relied on by the lower Court merely decided that it is the duty of the person who pleaded *res judicata* to satisfy the Court that the matter was and could have been in issue.

The mortgage does not include *kudiwaram* rights. The decree in the case is perfectly clear and unambiguous and only "the right and interest of the judgment-debtor"

were directed to be sold. That was clearly subject to the title of the prior alienees. The *kudiwaram* right is not displaced. My paramount title has not been impugned even in the plaint. The properties are free of the subsequent mortgage claim in favour of plaintiff.

Mr. N. Sivarama Krishna Iyer:—It was the duty of the defendant to set up his right. If he fails to do so, he is barred from afterwards setting it up.

Srinivasa Rao Saheb v. Yamunabhai Ammal (6); *Nattu Krishnama Chariar v. Annangara Chariar* (9); *Sethurama Iyer v. Ramachandra Iyer* (10); *Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh* (11) and *Radha Kishun v. Khurshed Hossein* (8) is not in any wise inconsistent with *Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh* (11).

The defendant set up his claim as to one item which was negatived. No paramount title was set up in respect of the other two. This omission operates as a bar. The defendant has, therefore, lost his right as to all the items. It is not open to the defendant to raise these objections in proceedings in execution at this stage.

JUDGMENT.

Venkatasubba Rao, J.—The question argued in this appeal relates to the effect to be given to the decree in Original Suit No. 43 of 1911 on the file of the Court of the Subordinate Judge of Tanjore in so far as the 14th defendant, the appellant before us, is concerned. The plaintiff in the suit claimed under a deed of mortgage dated the 15th November 1907 executed by the first defendant's father, Suryanarayana Pandarathar in his favour in the following circumstances. One Sena Yena Nagappa Chetti obtained a mortgage-decree against the said Suryanarayana in Original Suit No. 54 of 1903 on the file of the Sub-Court, Tanjore. When the decree-holder brought the mort-

(1) 27 M. 259; 14 M. L. J. 57 (F. B.)

(2) 10 Ind. Cas. 371; 16 C. W. N. 124; 14 C. L. J. 35.

(3) 17 Ind. Cas. 88; 16 C. W. N. 970.

(4) 13 Ind. Cas. 133; 10 M. L. J. 527; (1912) M. W. N. 44.

(5) 22 C. 483; 11 Ind. Dec. (N. S.) 323.

(6) 29 M. 84; 16 M. L. J. 50.

(7) 24 A. 429; 29 I. A. 118; 4 Bom. L. R. 827; 6 C. W. N. 889; 8 Sar. P. C. J. 293 (F. C.).

(8) 55 Ind. Cas. 959; 36 M. L. J. 424; 18 A. L. J. 401; (1920) M. W. N. 368; 11 L. W. 518; 22 Bom. L. R. 557; 47 I. A. 11; 47 C. 662; 28 M. L. T. 425; 25 C. W. N. 417 (P. C.).

(9) 30 M. 353; 2 M. L. T. 330; 17 M. L. J. 301.

(10) 38 Ind. Cas. 184; (1917) M. W. N. 336; 5 L. W. 650.

(11) 14 Ind. Cas. 496; 39 C. 527; (1912) M. W. N. 367; 11 M. L. T. 265; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 488; 30 I. A. 68 (P. C.).

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gaged property, the village of Kovilur, to sale, it was arranged that the judgment-debtor should deposit in Court a sum of Rs. 35,000 towards the said decree and he, for the purpose of raising funds, disposed of the *kudiwaram* right in various plots in the village and realised a sum of Rs. 20,000 and deposited the same in Court, and he borrowed the balance of Rs. 15,000 from the plaintiff executing in his favour the mortgage-deed referred to above. The 14th defendant was the alienee of the *kudiwaram* right of Items Nos. 123, 118 and 126 in the village of Kovilur. The right was conveyed by a deed bearing date the 13th November 1907, that is, two days previous to the mortgage in favour of the plaintiff. The deed of mortgage recites the facts relating to the decree of Nagappa Chetty, the realization of Rs. 20,000 by sale to tenants of the *kudiwaram* right belonging to the *Zemindar* in several plots, and the deposit of the said amount in Court. The deed further mentions that the balance of Rs. 15,000 was borrowed from the plaintiff on the security of the village of Kovilur. In regard to the extent of the right conveyed to the mortgagee, the following passage in the document is very material:—"Not only shall the sale of *kudikaniachi* (occupancy rights) and the grant of permanent lease for the fixed assessment for *melvaram* already made by us until now in Kovilur village which is mortgaged under this document in order to discharge the said Nagappa Chettiar's debts be binding on you but any sale of *kudikaniachi* and the right of *melvaram thirwa* not less than those now fixed in the said village and the grant of permanent lease made by us in future for payment of this mortgage amount shall be binding on you." The rights of the mortgagee are, therefore, expressly made subject to the alienations of the *kudiwaram* right effected previous to the date of the mortgage, namely, 15th November 1907. The 14th defendant claims that both under the general law as well as under the special terms of the mortgage-deed, his rights in virtue of the alienations in his favour are paramount to the claim of the mortgagee in the suit. So far, the case presents no difficulty and the rights of the plaintiff would be undoubtedly subject to those of the 14th defendant and the claim of the plaintiff

to priority would be clearly untenable. But some complication is introduced by the manner in which the pleadings were prepared and the trial was allowed to proceed.

Paragraph 4 of the plaint refers to the mortgage in favour of Sena Yena Nagappa Chettiar dated 7th May 1898, the decree obtained by him in Original Suit No. 54 of 1903 and the bringing to sale of the village of Kovilur in execution of the decree.

Paragraph 5 states that the first defendant's father applied to the plaintiff for a loan of Rs. 15,000 for payment to the decree-holder in Original Suit No. 54 of 1903 and that the plaintiff paid the amount into Court on 4th November 1907 on the understanding that a mortgage should be executed in his favour in respect of the village of Kovilur.

Paragraph 6 refers to the execution of the deed of mortgage and paragraph 7 contains the usual statement that, in spite of demands, no amount was re-paid towards the debt and that the amount claimed in the suit was due.

Paragraph 8 is important and may be re-produced:—

"As the whole of the consideration of the mortgage sued on was paid towards the decree in Original Suit No. 54 of 1903, the plaintiff is entitled to step into the shoes of the decree-holders and enforce his mortgage right even as against any encumbrancers that may have acquired any interest on the mortgaged properties subsequently."

Then, the plaintiff proceeds to say that the second defendant holds a prior charge in the suit properties for her maintenance, that the third defendant obtained a hypothecation bond, dated 26th April 1909, from the father of the first defendant agreeing *inter alia* to pay the debt due to the plaintiff, and that he, in spite of demands, failed to make any payment and is consequently personally liable to pay the same to the plaintiff.

The latter portion of paragraph 11 is again very material and it runs as follows: "The other defendants Nos. 4 to 8 are setting up some subsequently acquired rights over the mortgaged property that cannot prevail against the superior rights of this plaintiff and they have, therefore, been made party defendants herein."

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The cause of action is stated to have arisen on 13th October 1908 and 13th October, 1909, the date fixed for payment of principal and interest, respectively.

The reliefs asked for in the suit are of the usual nature and comprise a prayer to direct the first defendant to pay the amount due, in default the property mortgaged to be sold subject to the maintenance charge of the second defendant, and to direct the third defendant to be personally liable for the suit amount.

It is now represented to us that most of the defendants Nos. 4 to 48 are some of the alienees to whom the *kudiwaram* right in various plots had been transferred previous to the date of the mortgage. In this respect the 14th defendant and many of the others included in this group denominated defendants Nos. 4 to 48 are in precisely the same position. Though the plaintiff, on the basis of subrogation, stated in the body of the plaint that the rights of the defendants, Nos. 4 to 48 should be postponed to his mortgage he did not in express terms claim any relief on that basis.

It is important to bear in mind that the plaintiff asked in the suit that the sale should be of the *property mortgaged to him*. The property is described in the schedule to the plaint and while the description does not contain any reference to the fact that under the mortgage-deed the rights alienated previously were expressly excluded from the mortgage security, there is the inconsistent addition at the foot of the description "the right, title and interest of the first defendant in these lands." The plaint is thus indeed very confusing and the matter is made worse by what subsequently followed.

The 14th defendant put in a written statement wherein he alleged that on 13th November 1907 the first defendant's father sold him the occupancy right in respect of two *mahs* of land (now identified with Item No. 123) for Rs. 250 and the said amount was paid for discharging a portion of the liability under Original Suit No. 54 of 1903. He further pleaded that he was an unnecessary party. The issue in regard to this matter is Issue No. II which runs as follows:

"Whether the document dated 13th November 1907 mentioned in paragraph 3 of 14th defendant's written statement is true, valid

and binds the plaintiff." It is difficult to understand how this issue came to be framed. The alienation in favour of the 14th defendant was prior in date to the mortgage in favour of the plaintiff. If the plaintiff challenged the genuineness of the alienation in favour of the 14th defendant and claimed priority on the footing that the document dated 13th November 1907 was either not genuine or antedated, the issue would be perfectly intelligible. But the plaintiff did nothing of the kind. He set up a right of priority only on the footing that he had discharged the previous mortgage dated 7th May 1898 and that he was, therefore, subrogated to the rights of the previous mortgagee and he alleged that, by reason of the right of subrogation which he thus acquired, his claim had precedence over that of the 14th defendant. In that view it would be unnecessary to determine whether the alienation in favour of the 14th defendant was true. If the plaintiff proved that he stepped into the shoes of the previous mortgagee, he would establish his priority independent of the fact whether the document in favour of the 14th defendant was or was not genuine. The right of subrogation set up was patently false because the mortgage-deed itself excludes in express terms the right created in favour of the alienees previous to the date of the mortgage, and having regard to the pleadings, the issue framed did not arise at all. In the judgment, reference to this issue is contained in the following short paragraph: "11th and 12th issues: There is no evidence on these issues. I find them against 14th and 15th defendants." The decree drawn up directed the sale of the hypotheca mentioned in the plaint schedule hereunder described. The schedule to the decree contained the description as given in the plaint with the words "the right, title and interest of the defendant." The decree proceeds to say "subject to the rights of the 9th defendant under Exhibit 12, of the 10th defendant under Exhibits 4 and 5, of the 16th defendant under Exhibit 6, of the 32nd defendant under Exhibit 7, of the 35th defendant under Exhibit 8, of the 43rd and 44th defendants under Exhibits 10 and 11 and of the 49th and 50th defendants under Exhibit 9." It will be seen that the decree did not direct

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the sale of the properties subject to the right of the 14th defendant over the two *mahs* referred to in the written statement (Item No. 123).

The first question to be determined has reference to this Item No. 123. Is it to be supposed that it is included in the property directed to be sold under the decree or that it is not? The 14th defendant as a prior alienee was not a necessary party to the suit. But, nevertheless, he was impleaded as a party. Though the alienation in favour of the 14th defendant was not impeached in the plaint on the ground that it was either not genuine or the document was ante-dated, still there was an assertion in the plaint that by reason of the right to subrogation which he alleged, he was entitled to priority over the 14th defendant, and the issue, strangely enough, raised the question as to the genuineness and the validity of the sale in favour of the 14th defendant. The issue was found against him.

Mr. G. Krishnaswami Aiyar, the learned Vakil for the appellant, strongly relied on *Radha Kishun v. Khurshed Hossein* (8), but this hardly assists him because it proceeded upon the footing that the *sahoos* did not in the former suit seek to displace "Bakhtar Mull's position, therefore, it was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned." *Sri Gopal v. Pirithi Singh* (7) is a more direct authority. In that case as in this, the paramount right based on subrogation was claimed. It was held that "the prior mortgagee who was impleaded and whose mortgage was impeached was under a duty to set up an earlier mortgage." The facts of the present case bear a very strong resemblance to those of *Sri Gopal v. Pirithi Singh* (7) quoted above. If the 14th defendant had failed to set up his right in the suit, he would be barred by *res judicata* from asserting those rights subsequently. He, however, did set up his rights and there was an adjudication against him. The decree that was passed in the suit did not save his rights and it must be taken that there was a final adjudication in regard to the claim set up by him. The difficulty, however, is in reconciling the judgment which contains a finding against the 14th defendant with the decree which directs the sale

merely of the "right title and interest of the first defendant." But having regard to the claim, the defence, the issue framed and the decision embodied in the judgment and having also regard to the further fact that the decree expressly excludes from its operation, the rights claimed by certain other defendants, I am constrained to come to the conclusion that, notwithstanding the words in the decree "the right, title and interest of the first defendant", the interest of the 14th defendant in the two *mahs* referred to in the written statement (Item No. 123) is included in the property directed to be sold by the decree. I am, therefore, of the opinion that the learned Subordinate Judge is right in having decided that the 14th defendant is not entitled to claim that Item No. 123 should be excluded from the proclamation of sale.

With regard, however, to Items Nos. 115 and 126, the case is different. No plea was put forward regarding them by the 14th defendant similar to the plea he raised in respect of Item No. 123. It seems strange that he did not set up his paramount title to these items because his claim to all the three plots arose from a transaction or transactions of the same date and was based on one and the same footing. But, however, the fact remains that he did not claim any right in the written statement to the two plots under consideration. In the circumstances, if, nevertheless, a decree had been passed directing the entire village of Kovilur to be sold, under the ruling quoted above *Sri Gopal v. Pirithi Singh* (7), the 14th defendant's rights would have become subject to the rights of the plaintiff and he could not contend that he was not bound by the decree. But, fortunately for him, the decree directed only the right, title and interest of the mortgagor to be sold, and inasmuch as there is no adjudication negating the 14th defendant's admitted right of priority in respect of these two items we must construe the decree strictly and hold that the interest of the 14th defendant in these two plots is not included in the property directed to be sold under the decree. The respondent's learned Vakil tried to show that the words "right, title and interest of the first defendant" should be read as having reference not to the date of the suit,

AJUDHIA DAS V. LOKU MALIK.

nor to the date of the mortgage in the plaintiff's favour but to the date of the previous mortgage which the plaintiff claimed he had discharged. But he was obliged to admit that the judgment in the case does not support this contention. As a matter of fact, the judgment nowhere recognises the right to priority by reason of subrogation claimed by the plaintiff. There is no discussion regarding it in the judgment. Presumably there was no evidence given or argument directed in order to support the claim alleged in the plaint. No doubt the judgment saves in express words the rights of some of the defendants, alienations in whose favour were prior to the date of the mortgage. But this was not done as a result of any judicial determination of the question. These defendants were excluded from the operation of the decree merely because the plaintiff admitted in each case that the claim of the defendant might be treated as paramount. I find no indication whatever in the judgment that the right of priority claimed by the plaintiff was adjudicated upon, and it, therefore, follows that the words "the right, title and interest of the first defendant" must have reference only to the date of the mortgage—*deed* in favour of the plaintiff.

In the result, I hold that the *kudiwaram* rights acquired by the appellant in virtue of the sale in his favour in plots Nos. 118 and 126 are not covered by the decree and that the Subordinate Judge is wrong in having refused to give effect to these rights. The appeal in so far as it relates to Item No. 123 is dismissed, and in so far as it relates to Items Nos. 118 and 126 is allowed.

Spencer, J.—I agree. The parties will pay and receive proportionate costs to the extent to which they have succeeded in appeal.

V. N. V.

Z. K.

*Appeal dismissed.***LAHORE HIGH COURT.**

FIRST CIVIL APPEAL NO. 771 OF 1917.

August 1, 1922.

Present.—Mr. Justice Broadway and Mr. Justice Brasher.

**Bawa AJUDHIA DAS—DEFENDANT—
APPELLANT**

*versus***LOKU MALIK AND OTHERS—****PLAINTIFFS—RESPONDENTS.**

Mahant.—Denial of *wakf* nature of property, effect of.—Removal of Mahant.

The denial by a Mahant of the *wakf* nature of the property attached to the temple and the setting up of an adverse claim to it is sufficient to render him an unfit person to continue in the office of Mahant and liable to removal in a properly constituted proceeding. [p. 804, col. 2.]

Miyaji v. Sheikh Ahmed Sahib, 31 M. 212; 18 M. L. J. 205 and *Chintaman Bajaji Dev v. Dhondo Ganesh Dev*, 15 B. 612; 8 Ind. Dec. (N. S.) 413, relied upon.

First appeal from a decree of the Subordinate Judge, First Class, Multan, dated the 12th December 1916.

Mr. Nanak Chand, for Pandit Sheo Narain, R. B., for the Appellant.

Bakhshi Tek Chand and Lala Hargopal, for the Respondents.

JUDGMENT.—This judgment will dispose of two connected appeals. Ajudhia Das, who was formerly Mahant of two temples at Multan named Prehlad and Narsinghpuri, was removed from his office on January 23rd, 1913, by a *panchayat* appointed at a mass meeting of Hindus which was commenced on that date. Ajudhia Das instituted a suit on June 21st, 1913, against various Hindu gentlemen. In his plaint, as amended, he asked for a declaration to the effect that he is Mahant of both temples, for restoration to the office of Mahant, and for Rs. 1,000 as damages on account of offerings collected by the defendants.

A counter suit under section 92, Civil Procedure Code, was instituted on April 17th, 1914, by six Hindus, who had obtained the sanction of the Collector, in which they prayed for the removal of Ajudhia Das and asked that an account should be taken from him, that the management of the temples should be made over to the Narsingh *panchayat* and that a scheme for their future management should be settled by the Court.

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Numerous pleas were raised in both suits, which it is not necessary to detail here. The main questions were whether the *panchayat* had power to remove Ajudhia Das from the office of *Mahant* in the event of his misconduct, and whether he had been guilty of such misconduct as would justify his removal either by the *panchayat*, or by the plaintiffs in the suit under section 92, Civil Procedure Code.

The lower Court has held that there is no rule of succession by inheritance as was alleged by Ajudhia Das, that the *Mahants* were appointed by the Hindu public, and that the office was controlled by a *Panchayat* known as the Narsingh Sabha elected by this public. It has further held that though this Narsingh Sabha was not competent to remove Ajudhia Das except by a suit under section 92, Civil Procedure Code, Ajudhia Das can have no claim to re-instatement if the suit under section 92, Civil Procedure Code is successful. Ajudhia Das has been found to have been guilty of misconduct. The suit brought by himself, has therefore, been dismissed, and in the other suit it has been ordered that he be removed from the office of *Mahant*, and a scheme for the management of the temples has been prepared.

Ajudhia Das has appealed in each case, and the only points which have been argued before us are those which have been indicated above. The misconduct attributed to the *Mahant* is of various kinds. It is alleged that he is a habitual *charas* smoker, that he has been on unduly intimate terms with various women, that he had been irregular and unpunctual in worship at the temples, that he has refused to allow pilgrims to be put up there, and that he has failed to keep any accounts. We have considered the evidence on these points, and we have come to the conclusion that Ajudhia Das's character is not as black as it has been depicted. There is certainly ample evidence to show that he is addicted to *charas* smoking, and we can see no reason to doubt the statement of Lala Mohan Lal, who is a member of the Municipal Committee of Multan, that Ajudhia Das has refused to allow *fakirs* to live in the temples. The evidence relating to the *Mahant's* relations with women, how-

ever, is of a very flimsy type, and is mainly based on hearsay. It appears that a woman was delivered of a child in the temple of Prehladpuri, and Ajudhia Das was suspected of being the father of the child; but since the woman is said to have come to the temple accompanied by a man, who was either her husband or her paramour, the suspicion entertained against Ajudhia Das may well have been without foundation. The *Mahant* has admittedly not kept any accounts, but since he is illiterate it would hardly be reasonable to expect him to do so.

We think that the acts of misconduct proved would not, in themselves, be sufficient to justify the removal of Ajudhia Das; but it has been pointed out on behalf of the respondents that Ajudhia Das, when examined in connection with the suit brought by him, denied the *wakf* nature of the property attached to the temples and set up an adverse claim to it. This alone, it is said, would suffice to render him an unfit person to continue in the office of *Mahant*, and *Miyaji v. Sheikh Ahmed Sahib* (1) and *Chintaman Bajaji Dev v. Dhondo Ganesh Dev* (2), are authorities which support this contention. We consider, therefore, that the circumstances are such as to justify the removal of Ajudhia Das in the suit instituted under section 92, Civil Procedure Code.

For the purpose of this appeal it is not really necessary to determine whether the *panchayat* lawfully deposed Ajudhia Das at the meeting held on January 23rd, 1913. If the suit under section 92, Civil Procedure Code, is successful Ajudhia Das cannot, in any case, be re-instated, and he is not entitled to any damages. We may, however, note that in our opinion the action of the *panchayat* was not justified. The documentary evidence certainly shows that for some time the management of the temples had been controlled by the Narsingh Sabha, with the concurrence of the *Bairagis*, and Ajudhia Das, in a statement made before the Naib Tehsildar (page 128 of the paper-book) admitted that he had been appointed in this manner. The Narsingh

(1) 31 M. 212; 18 M. L. J. 205.

(2) 15 B. 612; 8 Ind. Dec. (N. S.) 413.

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Sabha would, therefore, have had the power to remove Ajudhia Das for serious misconduct, but as we have already held there is not sufficient proof that Ajudhia Das had rendered himself liable to removal on this account.

Both these appeals must fail, but it is agreed, on behalf of the respondents that Ajudhia Das who is old and debilitated should be allowed a sufficient sum for his maintenance out of the income derived from the temples, and we consider that Rs. 20 per mensem would be a suitable allowance. We think also that the third clause of the decree drawn up in the suit brought against Ajudhia Das should be omitted, since it would be futile to require accounts from him; and clause (5) contains some extraneous matter which should be expunged. In Appeal No. 771 of 1917, therefore, we modify the decree of the lower Court to the following extent:—

The third clause will be cancelled. In the fifth clause the words "I have. . . Mahant" will be expunged, and the decree will provide for the payment of a monthly allowance of Rs. 20 to Ajudhia Das out of the income derived from the temples from the date of the decree until his death. In other respects the appeal is dismissed and the respondents will be given their costs. Appeal No. 1955 of 1917 is dismissed with costs.

Z. K.

Order accordingly.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 697 OF 1921.

February 21, 1923.

Present:—Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

DOONADULA SRIRAMULU

—PETITIONER

versus

PONAKAVIRA REDDI—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 24, 26, 27—Adjudication on validity of secured debts—Insolvency Court, power of.

Under section 24 of the Provincial Insolvency Act of 1907, an Insolvency Court has a general power to inquire into the validity of a secured debt, independently of the provisions of sections 36 and 37 of the Act, those sections being merely rules of evidence or special rules of substantive law applicable to particular kinds of transfer by the insolvent.

Official Receiver, Tinnevely v. Sankaralinga Mudaliar, 62 Ind. Cas. 495; 44 M. 524; 40 M. L. J. 219; (1921) M. W. N. 236; 14 L. W. 505; *In re Sparke, Ex parte, Cohen*, (1872) 7 Ch. 20; 41 L. J. Bk. 17; 25 L. T. 473; 20 W. R. 69 and *Ellis v. Silber*, (1873) 8 Ch. 83; 42 L. J. Ch. 666; 28 L. T. 156; 21 W. R. 346, followed.

Per Venkatasubba Rao, J.—Under the Provincial Insolvency Act of 1907, the Court in the exercise of its insolvency jurisdiction has no power to decide questions relating to adverse claims by or against third parties. [p. 809, col. i.]

Petition under section 46, clause (1) of Act III of 1907 and section 75 of Act V of 1920, praying the High Court to revise, the order of the District Court, Nellore dated the 14th January 1921 in Civil Miscellaneous Appeal Suit No. 20 of 1919, preferred against the order of the Court of the District Munsif, Kavali, dated 15th September 1919 in Insolvency Petition No. 5 of 1917.

Mr. M. Patanjali Sastri, for the Petitioner.

Mr. K. Rajah Aiyar, for the Respondent.

JUDGMENT.

Oldfield, J.—In concurring in the order which my learned brother proposes, I do not desire to follow him further than is necessary to support his conclusion.

The decision under appeal is in terms that the District Munsif erred in removing the name of 5th creditor, here respondent, from the list of creditors; and we have to consider whether he had power to do this, and, if so, whether we can accept the order made in the exercise of that power. By an irregular and confused course of procedure and pleading, to which my learned brother has referred, that order involved the conclusion, not only that 5th creditor's debt was not proveable in the insolvency, but also that the mortgage securing it was invalid. The objection thus allowed was taken as follows in a counter-petition of 1st creditor:—"The mortgage for Rs. 500 said to have been executed by petitioner (the insolvent) and his father in

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favour of 5th creditor was created for the benefit of the insolvent and with the intention of evading payments of the debts due to 1st creditor and others and nominally, but is not a true debt. Nothing is payable to the 5th creditor."

This, it is contended, means only that Exhibit A, the mortgage, offends against section 53, Transfer of Property Act, and that as it does not come within section 35 or 36 of Act III of 1907, which is applicable to this insolvency, there could be no adjudication on its validity by the District Munsif in Insolvency or otherwise than in a separate suit, because, shortly, the Insolvency Court cannot adjudicate on claims by or against third parties. The question thus raised is of some difficulty in connection with Act III of 1907 owing to the absence therefrom of any thing corresponding with section 4 of the present Act V of 1920. or section 105 of the English Act or the corresponding provisions of previous Statutes.

This contention, it is urged, can be met by reading the objection to Exhibit A as being that there was no debt and no transfer at all, but only a pretence, which could be disregarded and not that there was a transfer which offended against section 53, Transfer of Property Act, and had to be set aside; and, if the question were of property to be reduced to the possession of the Receiver on behalf of the creditors I should be prepared to adhere to my opinion expressed in *Official Receiver, Tinnevely v. Sankaralinga Mudaliar* (1) and hold that, so far as the objection to Exhibit A was of the former description and the question was of discovery within the purview of section 18 (1) and (3), the Insolvency Court was competent to decide it. But in fact the Exhibit A being a simple mortgage, there is no question of possession; and there is the further difficulty that the language already quoted from the first creditor's counter-petition is elastic enough to express objections of both the descriptions above referred to.

It is a better argument and one which, I agree, must prevail, that the question is of a claim, not by or against a third party

or stranger to the proceedings, but by a creditor, a necessary party to them, which can be made and which the respondent in the present case has chosen to make in the insolvency and with which the Court under section 24 must deal after hearing other creditors' objections; and, as there is no restriction there or elsewhere on the ground on which objections may be made, the Court must adjudicate on them, whether they are that the transactions relied on resulted in no debt or that resulting in a debt, it should be annulled. This, of course, involves that a secured creditor is before the Court primarily to obtain inclusion of his debt in the schedule and only secondarily because the Receiver on behalf of the creditors is concerned to claim the interest in the insolvent's property, constituting the security, for their benefit. But the reply attempted is that, if the objection to the decision of the Insolvency Court binding a secured creditor can be met in this manner, it has still to be shown how that Court is empowered to reach a decision at all as to the validity of a transfer like Exhibit A in the present case, to which, owing to its date, sections 36 and 37 cannot be applied.

It can serve no useful purpose to repeat my learned brother's treatment of the English and Indian authorities on this question. For the English Courts were interpreting provisions in successive Acts with which nothing in the Indian Law applicable to the present case corresponds; and it is, therefore, inconclusive that in *In re Sparke, Ex parte Cohen* (2) the power of the Insolvency Court to adjudicate on a secured creditor's transfer was sustained, that decision having (as I understand it) been in no degree discredited by the subsequent very generally expressed statement in *Ellis v. Silber* (3) which my learned brother has referred to, of the principle to be followed. The Indian authorities also are indecisive because it does not appear that any is based on comprehensive arguments and some at least are consistent with the view that the Insolvency Court has power to enquire into the validity of all transfers, the

(2) (1872) 7 Ch. 20; 41 L. J. Bk. 17; 25 L. T. 473; 30 W. R. 69.

(1) 62 Ind. Cas. 495; 44 M. 524; 40 M. L. J. 219; (1921) M. W. N. 236; 14 L. W. 505.

(3) (1873) 8 Ch. 83; 42 L. J. Ch. 666; 28 L. T. 156; 21 W. R. 346.

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question having been only whether it had in the particular case exercised a proper discretion in doing so or refusing to do so. In these circumstances, I can add nothing to my conclusion in the *Official Receiver, Tinnevely v. Sankaralinga Mudaliar* (1), already referred to, except that there the general power of the Court was exercisable under section 18 whilst here it is under section 24 and that, accordingly, the Court's power to enquire into the validity of a secured debt exists independently of sections 36 and 37 those sections being, as they were there referred to, only rules of evidence, or, as my learned brother puts it, special rules of substantive law applicable to particular kinds of transfer by the insolvent.

Taking this view, I concur in setting aside the lower Appellate Court's order and, as I agree with my learned brother's criticisms on the District Munsif's disposal, also in the remand he proposes. But I cannot part with the case without observing that much of the time taken over its disposal might have been saved, if the latter Court had made an attempt to appreciate and adhere to the proper course of insolvency procedure. It is unnecessary to refer again to the points noticed in my learned brother's judgment; but I add that, although the present appellant, the 19th creditor, was, as we have ascertained, appointed Receiver on 23rd July 1918, he has never been impleaded in these proceedings in that capacity and was allowed to take the very questionable course of selling the property, the subject of Exhibit A, whilst the validity of that document was still in dispute. It is unfortunate that, although according to the record what is described as a final dividend has been distributed, the proceeds of the sale have been retained in Court and are, we are told, sufficient to satisfy any claim which can be made under Exhibit A.

Venkatasubba Rao, J.—The District Munsif of Kavali in the exercise of his Insolvency Jurisdiction expunged the debt alleged to be due to Veera Reddi, the respondent before us, from the schedule of the insolvent's creditors.

About 4 years previous to the date of the adjudication, the insolvent had executed a deed of mortgage in favour of the respondent, and the order of the District Munsif was made on an objection raised

by several of the other creditors to the validity of the transaction evidenced by the said instrument. On appeal, the District Judge held that the Insolvency Court had no jurisdiction to set aside the deed of mortgage on the ground that section 36 of the Provincial Insolvency Act, III of 1907, has no application in the case of transfers beyond two years of the adjudication. One of the creditors has filed this Civil Revision Petition questioning the correctness of the order of the District Judge.

The arguments covered a wide ground, and the question that was raised was whether the Insolvency Court has jurisdiction under the Provincial Insolvency Act, III of 1907, to adjudicate upon claims of third parties as against the insolvent or his estate represented by the Receiver. I must state at once that, in my opinion, this question does not arise at all in the present case, and that the matter before us can be decided on a ground very different from the one stated.

On the general question argued, there has been a great divergence of judicial opinion. In *Guntapalli Narasimhaya v. Malapatti Veeraraghavulu* (4) a purchaser from Receiver who had been obstructed by a third party applied to the Insolvency Court, and it was held that the Court had no jurisdiction to decide questions of title. *Abdur Rahim, J.*, makes the following observations: " * * * it would be going much too far to say that a Judge in insolvency in the *mofussal* has powers by a summary proceeding to decide questions of title with respect to property which is claimed by third persons." In *Maddipati Peramma v. Gandrapu Krishnayya* (5) the learned Judges held that an order passed by the Insolvency Court on the application of the purchaser from the Official Receiver directing a third party to deliver possession of the property purchased to the applicant, was without jurisdiction. *Bakewell, J.*, expressed the view that the power conferred by section 18 (3) was not intended to provide for the determination of questions of title as between the insolvent and third parties:

(4) 42 Ind. Cas. 525; 41 M. 440; 6 L. W. 694; (1917) M. W. N. 857.

(5) 47 Ind. Cas. 308; 8 L. W. 136; (1918) M. W. N. 791; 4 M. L. T. 106.

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whereas Krishnan, J., was of the opinion that the Insolvency Court has jurisdiction in a proper proceeding instituted by the Receiver to enquire into and decide on the merits of an adverse claim set up by a stranger. It must be observed, however, that the observations of Krishnan, J., were *obiter*.

In *Official Receiver, Tinnevely v. Santharalinga Mudaliar* (1) the question that arose was of a very different character. After the Receiver had been appointed for the estate of an insolvent the latter's properties were sold in auction by a District Munsif's Court in execution of a decree for money, passed by the latter Court prior to the order of adjudication. It was held that the Insolvency Court was competent on the application of the Receiver to annul the sale and direct delivery of possession to the Receiver. The sale was held after the date of adjudication, but the Receiver was not a party to the proceedings, and the ground of the decision seems to be that a dealing with the property which had vested in the Receiver without notice to him was unauthorised and that under section 18 (3) the Court was competent to direct delivery of possession of the property to the Receiver on his application.

On the general question of the power of the Insolvency Court to decide claims of or against a third party, the judgments contain some observations and the *dictum*, especially of Seshagiri Iyer, J., "I am of opinion that section 4 declares what has been the law all through," was strongly pressed upon us, but the observations were not necessary for the determination of the question before the Court and the decision cannot be said to be authority either way.

In *Ramaswami Chettiar v. Ramaswami Iyengar* (6) on facts similar to those that existed in *Guntapalli Narasimhayya v. Malapati Veeraraghavulu* (4) and *Maddipati Peramma v. Gandhapu Krishnayya* (5), it was held that the Insolvency Court had jurisdiction to deal with claims of third parties, but it was a decision under the Provincial Insolvency Act of 1920.

Turning to the cases decided by the Calcutta High Court, we have first *Satya*

Kumar Mukherjee v. Manager, Benares Bank, Limited (7). I understand the effect of this decision to be that the question of title can be decided only in a regular suit and not in insolvency. I may, however, state that there is a passage in the judgment which may lend support to the argument that the learned Judges did not decide that the Insolvency Court had no jurisdiction, but merely held that it had a discretion and that the proper exercise of the discretion would be to refer the parties to a regular suit. The passage to which I refer is this:

"If the question of title is seriously in dispute, we state for the information of the Judge that we think he should direct the Receiver to bring a suit to have the question determined."

In *Nilmony Chowdhury v. Durga Charan Chander* (8) the transfer having been admitted not to be within two years of adjudication, it was held that section 18 (3) did not authorise the removal of a person whom the insolvent could not remove without the aid of legal proceedings. Again, I must add that the observation in the judgment "if the veil is transparent the Court may order the delivery of the property to the Receiver," impairs the value of this decision and in this respect this case bears a strong resemblance to the case already referred to, *Satya Kumar Mukherjee v. Manager, Benares Bank, Limited* (7).

Joy Chandra Das v. Mahamed Amir (9) is more direct on the point. A creditor alleged that the insolvent's wife was merely a *benamidar* for the insolvent, and the question was whether the Insolvency Court had jurisdiction to summon the insolvent's wife to examine her and direct her to transfer to the Receiver the property which stood in her name if the property was proved to belong to the insolvent. It was held that the Insolvency Court had no power to adjudicate upon the title of the third party under the provisions of the Provincial Insolvency Act, III of 1907.

To the same effect was the decision of another Bench of the Calcutta High Court in

(6) 65 Ind. Cas. 394; 45 M. 434; 15 L. W. 273; (1922) M. W. N. 110; 42 M. L. J. 185; 31 M. L. T. 86; (1922) A. I. R. (M.) 147.

(7) 46 Ind. Cas. 335; 22 C. W. N. 700.

(8) 46 Ind. Cas. 377; 22 C. W. N. 704.

(9) 44 Ind. Cas. 143; 22 C. W. N. 702.

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Amina. Khatun v. Nafar Chandra Pal Chowdhury (10).

Gaura v. Nawab Mohammad Abdul Majid (11) is a decision of the Allahabad High Court, but it contains only a non-committal statement and it cannot be regarded as an authority on the subject.

Bansidhar v. Kharagjit (12) decided that the Insolvency Court had jurisdiction to adjudicate upon claims against third parties.

On a review of these decisions it seems to me that the preponderance of authority is in favour of holding that under Act III of 1907 the Court in the exercise of its Insolvency Jurisdiction cannot decide questions relating to adverse claims by or against third parties.

In my opinion, however, as I observed at the outset, the case before us can be decided with reference to altogether different considerations. Section 16 (5) of Act III of 1907 saves the rights of secured creditors but the Court has in certain circumstances to decide questions in relation to secured creditors in the course of its administration of the insolvent's property. Section 21 (c) is an instance in point. Section 24 deals with proof of debts and section 38 enumerates the debts which are proveable in insolvency. Secured debts are not excluded. Section 31 relates to proof of debts due to secured creditors. It will be seen from the sections to which I have adverted that a secured creditor may tender proof of his debt subject to certain conditions and limitations. Section 26 empowers the Court when a debt has been improperly entered in the schedule to expunge the debt in its entirety or reduce the amount of the debt. The power is expressed in general terms and no distinction is drawn between debts unsecured and debts secured. The Court has to prepare a schedule of creditors, which may be amended from time to time and this function cannot be properly or adequately performed unless the Court has equal power to deal with secured as well as unsecured debts. To a proceeding appro-

priate to this enquiry the parties are not a person subject to the Insolvency Court and a stranger. On the other hand, the secured creditor whose debt is attacked is as much subject to the jurisdiction of the Insolvency Court as any other creditor, the Receiver or the insolvent. The authorities to which reference has been made deal with claims as between the insolvent's estate and third parties, but the respondent before us is not a third party. On the contrary, he alleges himself to be a creditor and it is impossible to frame a proper schedule without determining the existence of his debt and the extent of it.

In *Ellis v. Silber* (3) the distinction I have indicated is clearly set forth in the following passage in the judgment of Lord Selbourne, L. C. The passage is at page 86 :—

"That which has to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditors, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or the assignees as the persons entrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of any thing in the Acts of Parliament and wholly unsupported by any trace or vestige whatever of authority."

In this connection I may refer to *Khushalram v. Bholar Mal* (13). It was held that when a creditor of the insolvent challenged the validity of a debt set up by another creditor the Judge was bound to enquire into the truth of the allegation in insolvency and the parties should not be referred to a regular suit. The case would be exceed-

(10) 45 Ind. Cas. 180.

(11) 64 Ind. Cas. 523; (1922) A. I. R. (A.) 443.

(12) 26 Ind. Cas. 926; 37 A. 65; 12 A. L. J. 1373.

(13) 28 Ind. Cas. 573; 37 A. 252; 13 A. L. J. 720.

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ingly valuable as an authority but for the fact that the mortgage-deed which was questioned was within two years of the adjudication and the decision could, therefore, be founded on the express terms of section 36 of the Provincial Insolvency Act, but the observation at page 253* "whether the application is to be regarded as one asking for the removal of the name of Bholar Mal from the schedule of creditors, as one falling under the provisions of section 36 of the Provincial Insolvency Act, III of 1907, the matter was one which required investigation" and certain other similar observations to the same effect at page 254* lend support to the view I am inclined to take.

I am, therefore, of the opinion that the Insolvency Court has jurisdiction to record a finding as to the existence of the debt alleged to be due to the respondent.

But then it is argued that sections 36 and 37 confer a limited jurisdiction upon the Insolvency Courts and that to hold that the Court possesses the power in question will be inconsistent with the assumption involved in the said provisions. In my opinion, these two sections enact special rules of substantive law to be followed by the Courts in the exercise of insolvency jurisdiction. The law enunciated in the said sections is not a part of the general law and is to be applied only in cases which come up before the Tribunals exercising powers conferred by the Insolvency Act. A comparison of the terms of section 53 of the Transfer of Property Act with the terms of section 36 of the Provincial Insolvency Act, III of 1907, will make the point clear. A settlement made by a person whose insolvency is beyond question, but who, owing to unforeseen circumstances, becomes an insolvent within two years of the date of the settlement cannot be set aside under the general law which is contained in section 53 of the Transfer of Property Act. But it can be annulled under section 36 of the Provincial Insolvency Act. I have said that sections 36 and 37 enact rules of substantive law for the Insolvency Courts. Looking at the sections from a slightly different point of view, they may, in my opinion, be described as laying down rules of

evidence. Wherever a voluntary transfer or a preference of a creditor on the one hand and adjudication of the transferor or the debtor on the other hand, are brought into contiguity, the law peremptorily requires a certain inference to be made, enquiry is altogether excluded and the inference will not be allowed to be displaced by any contrary proof, however strong. The Insolvency Court shall presume that the transfer was made or preference shown by the insolvent with the intent to defeat his creditors. The presumption to be made is absolute or irrebuttable like the presumption contained in section 112 of the Indian Evidence Act as to the paternity of a child whose parents had access to each other.

In this view, sections 36 and 37 do not deal with the jurisdiction of the Insolvency Court and if, on a reference to other sections of the Act, the Courts are found to possess certain powers, the jurisdiction is not affected by anything contained in the two sections above referred to.

Here I must turn to the unfortunate course the proceedings took before the District Munsif. The insolvency petition was presented by the debtor. His adjudication was opposed by several creditors and they filed what are described as counter-petitions. Some of the creditors objected that the amount due to the respondent (secured creditors) was considerably less than what was alleged by the insolvent to be due to him. Others took a different line and made an allegation which is very indistinct in character but which is practically tantamount to an attack on the genuineness of the mortgage transaction. Although one of the creditors had by then been appointed a Receiver, he in that capacity took no action to question the debt. The District Munsif, however, proceeded to enquire into the existence or otherwise of the debt upon the petition and the counter-petitions before him thus adopting a course which has been condemned in *Guntu Appireddi v. Guntu Chinna Appireddi* (14). In his judgment he states that the only point to be considered was whether the deed

(14) 66 Ind. Cas. 271; 45 M. 189; 14 L. W. 639; 41 M. L. J. 606; (1921) M. W. N. 816; (1922) A. I. R. (M.) 246.

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of mortgage was supported by consideration. He is alive to the fact that section 36 had no application because the transfer was made about four years previous to the date of adjudication. Still, having recorded a bare finding that the deed was not supported by consideration, he directed that the name of the respondent should be deleted from the list of the creditors. This course was obviously wrong. The mere fact that a transfer is voluntary will not justify the Insolvency Court in setting aside the transfer. The District Munsif has not found that the mortgage amounted to a fraudulent transfer under section 53 of the Transfer of Property Act. He has not found that the transaction was fictitious or was a mere pretence and there was no intention to transfer; that is to say, that there was in effect no transfer at all, in other words, that the transferee was a mere *benamidar* for the transferor.

It is argued before us that there is a distinction between a transfer intended to defeat creditors and "a sham transfer so intended," and reliance was placed on *Swaminatha Aiyar v. Rukmani Ammal* (15). I do not feel myself called upon to express my view of this ruling because in the present case it is immaterial whether the transfer is merely declared fictitious or an order is made annulling it. In either event, the effect will be to refuse recognition to the debt evidenced by the transfer. It was the duty of the District Munsif to have directed his attention to this aspect of the case and then only to have pronounced upon the validity or otherwise of the transaction in question. While disagreeing with the District Judge in his view that the Insolvency Court had no jurisdiction to deal with the question, I cannot, however, owing to the irregular and defective trial before the District Munsif, restore the order of the latter. He must be directed to frame proper issues and after giving the parties an opportunity to let in evidence, adjudicate upon the question which has been raised.

Costs will be costs in the cause and will be provided for in the order to be made by the District Munsif.

V. N. V.

Order accordingly.

Z. K.

(15) 35 Ind. Cas. 766; 11 L. W. 106.

PATNA HIGH COURT.

FIRST CIVIL, APPEAL, No. 232 OF 1921

March 8, 1923.

Present:—Sir Dawson Miller, Kt.,
Chief Justice, and Mr. Justice Foster.
Miss C. K. H. STONEY *alias* KATH-
LEEN STONEY—APPELLANT

versus

MISS MYRTLE STONEY—RESPONDENT.

Succession Act (X of 1865), ss. 204, 225—Joint administration, whether desirable—Practice—Persons equally entitled—Selection how to be made.

Section 204 of the Succession Act does no more than state that those who are in equal degree of kindred to the deceased are all, from that point of view alone, equally entitled to be appointed administrators, but the section nowhere says that they are all entitled to be appointed jointly. Under section 225 of the Act the Court is given very wide powers, where it considers it necessary or convenient to appoint some person to administer the estate other than the person who in ordinary circumstances would be entitled to the grant. [p. 814, cols. 2.]

There is nothing in the Succession Act which makes it obligatory upon the Court to grant Letters of Administration to all the persons who may be entitled thereto merely by reason of their equal nearness of kinship to the deceased. [p. 814, col. 2.]

It is well settled that the Court should prefer a sole to a joint administration and even where several persons stand in the same degree of kinship to the deceased, it is the rule to select one only, the selection being made according to certain recognised principles. The interest of the estate which has to be administered and the interests of the parties entitled thereto must be primarily looked to and, other things being equal, a person with business experience and capacity will be preferred to one who has none. [p. 813, col. 2.]

Warwick v. Greville, (1809) 1 Phill. Ecc. 123; at p. 125; 161 E. R. 934, relied upon.

Again, where two persons are equally entitled by reason of consanguinity, preference will frequently be given to the one chosen by the majority of those entitled to distribution of the assets, although other considerations may be sufficient to overrule the wishes of the majority of those interested. [p. 813, col. 2.]

A son, as a rule, will be preferred to a daughter and where none of the usual tests can be applied the Court frequently appoints the applicant who is first in the field. [p. 813, col. 2.]

Cordeux v. Trasler, (1865) 4 Sm. & Tr. 48; 34 L. J. P. 127; 11 Jur. (N. S.) 587; 164 E. R. 1433, relied upon.

The Court never forces joint administration on unwilling parties. [p. 813, col. 2.]

Bell v. Timiswood, (1812) 2 Phill. Ecc. 22; 161 E. R. 1066, *In the goods of Newbold*, (1867) 1 P. 285; 36 L. J. P. 14; 15 L. T. 248; 15 W. R. 262, relied upon.

Appeal from an order of the District Judge, Manbhum, dated the 16th July 1921.

STONEV v. STONEY.

Mr. B. N. Mitter, for the Appellant.
Messrs. B. C. Mitter and A. N. Das, for
the Respondent.

JUDGMENT.

Miller, C. J.—This is an appeal on behalf of Miss Clara Katherine Helen Stoney, otherwise Kathleen Stoney, from an order of the District Judge of Manbhum granting to the appellant jointly with her sister, Myrtle Stoney, Letters of Administration to the estate of their deceased father. The appellant, Kathleen contends that she alone ought to be appointed administratrix of the estate.

George Edwin Blackburn Stoney, the father of the parties, was a Guard in the employment of the Bengal Nagpur Railway Company and died intestate on the 30th December 1920. He left a small estate valued at about Rs. 4,000, Rs. 1,480 of this represents the sum payable by the Railway Company to his nominees or representatives after his death from the Railway Provident Institution to which the deceased contributed during his lifetime. The balance consists of furniture and other moveables and small interest in immoveable property. It appears from the evidence that the deceased during his lifetime in December 1914, presumably in conformity with the rules of the Railway Provident Institution, signed a nomination form addressed to the Railway Company declaring his daughter Kathleen, the appellant, to be the person who, in the event of his death, would be entitled to receive the sum due to him from the Provident Fund. The nomination paper was produced in Court it having been obtained from the Railway Company direct by the District Judge himself. It was sent in a letter of the Railway Company to the District Judge. It was not strictly proved in evidence, if strict proof were required, but it was relied upon by the learned Judge and referred to and it has been suggested to-day, for the first time, that this document ought not to be accepted in evidence. There can to my mind be little to be gained by remitting the case for proper proof of this document and the learned Vakil for the respondent has not insisted upon the case going back for that purpose. I think he has exercised a very wise discretion.

On the 16th March 1921 the appellant, who appears to have resided with her

father during his lifetime, at Chakradharpur filed an application before the District Judge of Manbhum for Letters of Administration of her father's estate. In her petition she alleged that she was the sole heir to her father and that her sister Myrtle, whose address she gives as Jamshedpur, was an illegitimate daughter. It also appears from her petition that Myrtle, the other sister, had made some attempt to get hold of the deceased's property shortly after his death, and there can be no doubt that the relations between these two sisters are considerably strained. After the appellant's application for Letters of Administration was filed, namely, on the 5th April 1921, the respondent Myrtle Stoney obtained an *ex parte* order from the Deputy Commissioner of Singhbhum for a Succession Certificate in respect to the assets of the deceased's estate. When the application for that Succession Certificate was made, has not been disclosed nor do I think it is material for the purpose of determining the matters in dispute in this case. The appellant was not served with notice of that application, and on the 30th April when she came to hear of it, she petitioned the District Judge of Manbhum to transfer the Succession Certificate case from the Court of the Deputy Commissioner to his own Court. The District Judge on the 2nd May consequently requested the Deputy Commissioner to withhold the certificate pending the disposal of the appellant's application for Letters of Administration. The Deputy Commissioner thereupon stayed further proceedings in that matter then before him and it does not appear that the Succession Certificate was actually issued. In fact, the order granting a certificate was afterwards set aside on appeal. By that time the respondent had appeared in the Letters of Administration case and applied for an adjournment which was granted.

In due course, the appellant's petition came on for hearing before the District Judge and on the 16th July judgment was delivered. The respondent produced in support of her legitimacy, which had been challenged, a baptismal certificate showing that she was baptized on the 5th June 1889 and she was therein stated to have been born on the 16th February 1889. Her parents' names are also given. The marriage certificate of her parents was also

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produced showing that they were married at Lahore on the 16th August 1885. The parents of both parties are, I understand, the same. The respondent also filed a petition dated the 18th June 1921 contending that she was entitled to a half share in her father's estate and praying that Letters of Administration should be granted jointly to herself and the appellant.

The learned District Judge found that the certificates of baptism and marriage, the authenticity of which was not challenged, sufficiently proved the legitimacy of the respondent. He, quite properly in my opinion, refused to decide whether the nomination form signed by the deceased constituted a gift in favour of the nominee or merely gave her power to collect the money due after his death from the Provident Fund for whomsoever might be entitled to it and what the effect of that document may be is a matter which cannot be determined in the present proceedings. The learned Judge considered, however, that the proper course was to make a grant in the name of the two sisters and ordered accordingly that Letters of Administration should be granted to both.

From this decision Miss Kathleen Stoney has appealed. It is contended on her behalf, in the first place, that the petition of the respondent of the 18th June is not an application made in conformity with section 246 of the Indian Succession Act which requires certain particulars to be stated in the application. The learned District Judge considered that the respondent's application under the Succession Certificate Act which was before him and her objection petition of the 18th June praying for joint administration were a sufficient compliance with the section. Moreover, there was already the petition of the appellant before the Court which gave the Court all the necessary particulars and the respondent was, I think, entitled to accept this and ask the Court to act upon it except in so far as she challenged the allegation as to her illegitimacy. In my opinion, the appeal upon this ground fails.

It was next contended that separate Letters of Administration should in any case be granted to the appellant in respect of the Rs. 1,480 payable from the Provident Fund and in support of this contention

sections 227 and 228 of the Indian Succession Act were relied upon. Had the deceased made a Will as to this part of his property and died intestate as to the rest the case might have required that Letters of Administration should be granted to the person legally entitled except as to the property dealt with in the Will. That might arise if an executor appointed under the Will was not legally entitled to the administration of the rest of the estate but there are not, in my opinion, any circumstances arising here which require that an exception should be made within the meaning of these sections.

It was lastly contended that specific circumstances should be made out before granting joint Letters of Administration and even where the claimants are equal in degree of kindred to the deceased, only one should be appointed according to the established practice. This contention, is, in my opinion well founded. It is well established according to the English cases that the Court should prefer a sole to a joint administration and even where several persons stand in the same degree of kinship to the deceased, it is the rule to select one only, the selection being made according to certain recognised principles. The interest of the estate which has to be administered and the interests of the parties entitled thereto must be primarily looked to and, other things being equal, a person with business experience and capacity will be preferred to one who has none. [See *Warwick v. Greville* (1).] Again, where two persons are equally entitled by consanguinity preference will frequently be given to the one chosen by the majority of those entitled to distribution of the assets although other considerations may be sufficient to overrule the wishes of the majority of those interested. A son as a rule will be preferred to a daughter, and where none of the usual tests can be applied the Court frequently appoints the applicant who is first in the field. [See *Cordeux v. Trasler* (2).] Moreover, the Court never forces a joint administration upon unwilling parties [See *Bell v. Timiswood* (3).] *In the goods of Newbold*

(1) (1809) 1 Phill. Ecc. 123 at p. 125; 161 E. R. 934.

(2) (1865) 4 Sw. & Tr. 48; 34 L. J. P. 127; 11 Jur. (N. S.) 587; 164 E. R. 1433.

(3) (1812) 2 Phill. Ecc. 22; 161 E. R. 1066.

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(4), and it is obvious that where the applicants for administration are quarrelling between themselves and are antagonistic to each other the administration of the estate is likely to suffer. As they must act jointly one of them, if obstinate, could defeat the proper administration of the estate. This has also undoubtedly been held to be the practice in this country where administration has frequently been refused to more than one person even where the claimants by reason of kinship are equally entitled to it. In the Calcutta High Court in the case of *Nittyo Kali Dabea v. Kedar Nauth* (5) where two widows of a deceased Hindu gentleman applied for administration of his estate the High Court supported the decision of the District Judge refusing to grant a joint administration following as he said the practice of his Court. The learned Judges in that case when it came on appeal to the High Court said: "We are of opinion that the Judge is perfectly entitled to follow the practice of his Court, which is a usual and reasonable practice, that administration should be granted only to one person." That case was decided in 1879 and, although the Indian Succession Act of 1865 was at that time in force certain of the sections including section 204 did not apply to the case of Hindus, but I refer to this case, and there are others of a similar nature, to show that even in this country the practice has been only in very special circumstances to grant administration to more than one person.

The respondent relies upon the provisions of section 204 of the Succession Act which states that those who stand in equal degree of kindred to the deceased are equally entitled to administration. He argues from that, where you have got two or more persons, and in some cases it may be considerably more, who stand in equal degree of kinship the Court is bound to grant Letters of Administration to them jointly. In my opinion such an interpretation ought not to be given to the section. That section and some of the preceding sections, beginning with section 200, indicate who are the

proper persons to be appointed administrator of the estate of a deceased person and lay down certain rules which shall guide the Court in selecting the people to whom Letters of Administration should be granted. It deals first of all with the case of a widow and then refers to certain exceptions in which the widow should not be appointed. Then it deals with the case in which there is no widow or the cases in which the Court sees cause to exclude the widow and in such cases the person to be appointed is the person or persons who would be beneficially entitled to the estate in accordance with the rules for the distribution of an intestate's estate. Then comes section 204 which states that those who stand in equal degree of kindred are equally entitled to administration. It then refers to the case of a husband surviving his wife. He has the same right of administration of the estate as the widow has in respect of the estate of her husband. Then it refers, in the absence of the persons already described, to the rights of creditors. Section 204, in my opinion, does no more than state that those who are in equal degree of kindred to the deceased are all, from that point of view alone, equally entitled to be appointed administrator, but the section nowhere says, that they are all entitled to be appointed jointly, and when one turns to section 225 of the Act it seems quite clear that the Court is given very wide powers, where it considers it necessary or convenient, to appoint some person to administer the estate other than the person who, in ordinary circumstances, would be entitled to the grant. There is, therefore, in my opinion, nothing in this Act which makes it obligatory upon the Court to grant Letters of Administration to all the persons who may be entitled thereto merely by reason of their equal nearness of kin to the deceased. In the present case the applicants have quarrelled between themselves. They are apparently living apart and it would be very difficult, in my opinion, for them to work together in harmony. The estate has to be administered, and, although it is a small one, there may be creditors whose claims have to be satisfied. We are asked by the respondent to appoint her jointly with her sister in order to protect her interests but it seems to me quite clear that her interests will be sufficiently protected by the

(4) (1867) 1 P. 285; 36 L. J. P. 14; 15 L. T. 248; 15 W. R. 262.

(5) 3 C. L. R. 368.

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operation of section 256 of the Succession Act which requires a bond to be executed by the person to whom a grant is made for the due administration of the estate, and if she should fail to provide such a bond then the other applicant has means within her power of applying herself for an appointment or preventing the appointment of the appellant. The only question to determine is which of the claimants should be appointed administratrix. The appellant was the first to apply for Letters of Administration. It is true that the respondent made an application for a Succession Certificate which she was not entitled under the law to obtain, but it is not in evidence whether that application was before or after the application for Letters of Administration made by her sister. At all events, so far as the application for Letters of Administration is concerned, the appellant was the first in the field. She was living with her father before he died and as long ago as 1914 it appears the deceased appointed her as the proper person to receive the sum due to him on his death from the Provident Fund. Although this document is not a Will, it is an indication of the deceased's wishes, and I think that the considerations which I have mentioned are sufficient to turn the scale in favour of the appellant for, in my opinion, there are in this case insuperable objections to granting a joint administration.

In the result, the order granting Letters of Administration to the appellant and the respondent jointly made by the learned District Judge will be set aside and in lieu thereof an order will be made directing Letters of Administration to be granted to the appellant Kathleen Stoney, otherwise Clara Katherine Helen Stoney. In so far as the costs of this appeal and of the proceedings in the Court below are concerned I think that the respondent, having regard to the fact that her legitimacy had been attacked was perfectly entitled to come before the Court and endeavour to prove her legitimacy, and once she did prove that, she has an equal chance at the outset with the appellant in obtaining Letters of Administration and, in these circumstances, I think that the whole of the costs of this litigation including the costs of this appeal should come out of the estate. Having regard to all the

circumstances, I think a hearing fee of Rs. 150 would be proper in this case. Before I conclude this judgment, I wish to say that I think that it is a deplorable thing that these two young ladies, whatever terms they may have been upon in the past, should be so foolish, to put it upon no higher basis, as to quarrel between themselves as to their right to inherit their father's property. It would appear from the baptismal certificate that Miss Myrtle Stoney is, what she alleges she is, the legitimate daughter of her parents and one thing is perfectly obvious that if she in fact is the legitimate daughter she is entitled equally to a half share in her father's property with her sister. The estate is a very small one, and if merely for personal reasons these parties are going to quarrel between themselves on a matter of this sort they will find that before very long the whole of the estate will be swallowed up in litigation and there will be nothing left for either of them in the end. I, therefore, earnestly suggest for their consideration that they should, without any further delay, come to an amicable settlement about the matter instead of foolishly wasting their substance, which is very small, in litigation.

Foster, J.—I agree.

D. Z. K.

Order modified.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 386 AND 387 OF 1918.

September 19, 1922.

Present.—Mr. Justice Spencer, and Mr. Justice Devadoss.

IN APPEAL NO. 386 OF 1918,

V. S. V. SUBBAROYA MUDALI—

PLAINTIFF—APPELLANT

*versus*THANGAVELU MUDALI AND OTHERS—
RESPONDENTS.

IN APPEAL NO. 387 OF 1918.

V. S. V. SUBBAROYA MUDALI—

—DEFENDANT NO. 4—APPELLANT

*versus*NAMASEVAYA CHETTY AND OTHERS
—RESPONDENTS.

Hindu Law—Joint family—Trade debts—Minor, share of, whether liable—Civil Procedure Code (Act V of 1908), s. 34—Interest at contract rate during pendency of suit—Discretion of Court.

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Where the managing member or any other accredited agent of a Hindu trading family who carries on the family trade contracts debts for bona fide trading purposes, the creditors are entitled to proceed against the whole family property including the shares of minor members, and such liability is not confined to the assets of the business. In cases of such trading families, the trade assets are not limited to the good will, stock in trade and outstandings of the business but comprise the entire family properties, in the absence of evidence to show that the trade was carried on without reference to the family property. [p. 818, col. 2; p. 819, col. 1.]

Sanka - Krishnamurthi v. Bank of Burma, 11 Ind. Cas. 79; 35 M. 692; (1911) 1 M. W. N. 385; 21 M. L. J. 620; 11 M. L. T. 56, *Ramlal Thakursidas v. Lakshminchandra*, 1 B. H. C. R. App. II (51), *Muthaya Pillai v. Tinnevely South Indian Bank*, 37 Ind. Cas. 230; 5 L. W. 341, *Raghunathji Tarachand v. Bank of Bombay*, 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255, *Thammanina Chinna Lakshminarasimha v. Akarapu Venkanna Chinnaiah*, 55 Ind. Cas. 64; 38 M. L. J. 55; 11 L. W. 55; (1920) M. W. N. 112; 27 M. L. T. 83 and *Malai-perumal Chettiar v. Arunachella Chettiar*, 41 Ind. Cas. 224; 6 L. W. 417, followed.

Section 34 of the Code of Civil Procedure gives the Court a discretion in awarding interest at the contract rate from the date of the plaint to the date of decree. [p. 819, col. 2.]

Ramachandra v. Devi, 12 M. 485; 4 Ind. Dec. (N. S.) 687, not followed.

Rajagopala Chetty v. Kandappa Chetty, 28 Ind. Cas. 429, followed.

Appeals in forma pauperis against the decrees of the District Court, Chingleput, in Original Suits Nos. 18 of 1916, 49, 67 and 82 of 1915, 1, 5, 6, 9 and 49 of 1916 and 25, 26, 28, 30, 31, 32, 34, 35, 36, 37, 38, and 39 of 1917, respectively.

Appeals Nos. 386 and 390 of 1918 coming on for hearing on the 23rd August 1922, in respect of the delay in the presentation of the appeals the Court made the following

ORDER.—The delay in filing appeals is excused under section 5 of the Limitation Act. It was necessary to refer to both judgments in order to prepare grounds of appeals, as the cases were tried together.

Mr. S. Krishnamachariar, for the Appellant.

Mr. T. Narasimha Iyengar, for the Respondent.

Appeal No. 386 of 1918 coming on for hearing on the 23rd, 24th, 25th, 28th, 29th, 30th and 31st August 1922 and having stood over for consideration till the 11th September 1922, the Court delivered the following

JUDGMENT.

Devadass, J.—This is an appeal against the preliminary decree of the District Judge of Chingleput, in Original Suit No. 18 of 1916 by the plaintiff, who sued the defendants Nos. 1 to 5 for partition of the family properties and impleaded certain alienees and creditors as defendants. The 1st defendant was the father of the plaintiff and defendants Nos. 2 and 3. Fourth defendant is the brother's son of the 1st defendant. Fifth defendant is the mother of the plaintiff. Defendants Nos. 6, 31, 32, 33, 34, 35, 37 and 39 are alienees. The rest are creditors.

The plaint allegations are:—The 1st defendant was the manager of the joint family of which plaintiff and defendants Nos. 2 to 4 were members. The properties set out in B Schedule are the joint family properties. The plaintiff's family carried on a cloth trade under the name and style of V. S. Varadaraja Mudali in shop No. 154. The 2nd defendant who was at enmity with the rest of the family carried on a separate trade in another shop under a different Vilasam. He contracted debts and purchased some properties, and the plaintiff is not liable to pay from his share of the family property the debts contracted by the 2nd defendant, which were not for family purposes and which could not bind the family.

C Schedule properties were purchased by the 2nd defendant and the plaintiff did not claim any share in them but stated that should the Court hold that the 2nd defendant purchased them out of the family funds, the plaintiff would be entitled to his share in them also.

The 1st defendant died before notice of the suit could be served on him. Second defendant was *ex parte*. Third defendant filed a written statement supporting the plaintiff's case. Fourth defendant supports the case of creditors. The creditors and alienees pleaded that the 1st defendant was too old to manage the family concern, that 2nd defendant was managing the affairs of the family, that the trade carried on by him was a family trade, the debts were incurred for purposes of the trade, that the plaintiff, the 1st defendant and other members of the family were benefited by the trade, and the debts are binding upon the plaintiff and the

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plaintiff cannot question the alienations made by the 2nd defendant.

The learned District Judge in a very careful and elaborate judgment held that the trade carried on by the 2nd defendant was a family trade and that the debts were contracted and the alienations were made for purposes which could bind the family and gave a preliminary decree for partition and directed that Rs. 300 should be paid for the marriage expenses of the plaintiff. The plaintiff now appeals *in forma pauperis* against that portion of the decree which declares that this share is liable for the debts contracted by the 2nd defendant and the alienations are binding upon him. Original Suit No. 18 of 1916 was tried along with several other suits brought by the creditors against plaintiff and defendants Nos. 1 to 4 for recovery of the amounts due to them and the evidence was recorded by consent in Original Suit No. 18 of 1916. The main judgment is in Original Suit No. 18 of 1916 and the learned District Judge has written separate judgments in the other suits dealing specifically with the case of each plaintiff.

The issues common to all the cases are Issues Nos. 6, 7 and 15. They are:—

(1) Whether the 1st defendant was not the manager of the family or whether the 2nd defendant was constituted its manager?

(2) Whether the trade referred to in paragraph 6 of the plaint is also family business?

(3) Whether the plaintiff and defendants Nos. 1 and 4 undertook, to pay the debts alleged to be due to defendants Nos. 7, 8 and 9 and if they did, whether any objection in respect thereof is supported by consideration?

It was agreed at the Bar that Issues Nos. 6, 7 and 15 which are dealt with by the District Judge in his judgment in Original Suit No. 18 of 1916 should be tried first, and after their disposal the appeals against the decrees in favour of the creditors should be heard and decided.

The first point for consideration is, whether the business carried on by the 2nd defendant at shop No. 172 was a joint family business or not.

[His Lordship then dealt with the evidence on the point—*Ed.*]

Taking all these circumstances into consideration and after carefully weighing the evidence I come to the conclusion that the business carried on at 172 was a family business and that the 2nd defendant acted as the accredited agent of the family in carrying on that business. Therefore, I agree with the finding of the learned District Judge on Issues Nos. 6 and 7.

It was urged by Mr. Ramachandra Ayyar that the 2nd defendant led an immoral life and that the debts contracted by him could not bind the plaintiff. There is no satisfactory evidence that the 2nd defendant led an immoral life. There is a vague allegation to that effect; but there is no specific proof that he kept a dancing woman or that he contracted debts for the purpose.

It was next urged that the 2nd defendant had no right to incur debts for buying property. No member of a joint family has a right to incur debts for buying property. But in this case there is no specific evidence except in the case of the loan of the 14th defendant that any money which was borrowed was utilised for buying property. It may be that the 2nd defendant thought he was making a large income and was investing a portion of the income upon immovable property. If there is specific evidence that any loan was given for the purpose of buying property it may be contended with some show of reason that that loan could not bind a minor member of the family unless it was shown that the buying of property was a necessary purpose.

Mr. Ramachandra Ayyar urged that the plaintiff being a minor member of a joint Hindu family which carried on trade, his share of the trade assets alone could be made liable for debts contracted for trade purposes, and he relied upon *Sanka Krishnamurthi v. Bank of Burma* (1). In that case it was held that a minor member of a joint Hindu family was liable on a bill drawn by the manager, his liability being limited to his share in the business, on the analogy of section 247 of the Contract Act (IX of 1872). Mr. Justice Wallis (as he then was) in the course of the judgment quotes the well-known observations of Sausse, C. J., in

(1) 11 Ind. Cas. 79; 35 M. 692; (1911) 1 M. W. N. 385; 21 M. L. J. 620; 11 M. L. T. 56.

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Ramlal-Thakursidas v. Lakshminichand (2) "the power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade," and observes "This does not seem to mean more than that it is unnecessary to enquire whether there are minors or not." The principle of that decision is that, on a bill drawn by the managing member, a creditor could obtain a decree only against the trade assets of a minor member of a joint Hindu family. That case does not consider what the trade assets are. If credit is got on the strength of the family possessing immovable property it cannot be said that the assets of the trade are limited to the good will, stock-in-trade and outstandings. This is quite clear from a decision reported as *Muthaya Pillai v. Tinnevely South Indian Bank* (3), where a Bench of this Court held that the minor's liability was not confined to the trade assets alone. The learned Judges observe at page 342*, after referring to the cases reported as *Ramlal Thakursidas v. Lakshminichand* (2), *Raghunathji Tarachand v. Bank of Bombay* (4) and *Chalamayya v. Varadaya* (5): "Those decisions held in clear terms that in the case of an ancestral business all the members of the family including the minors are liable for debts incurred in the course of the business to the extent of their share in the family property and that seems to be only reasonable, because a business like the one in question is carried out on the credit of the entire family property. The family property is swelled by the profits earned in the business and it would be not only unjust to confine liability to the extent of the appellant's share in the assets of the business but it would be impossible in a case of this nature to say what is the extent of the property embarked on the business." The decision in *Raghunathji Tarachand v. Bank of Bombay* (4) lays down "where a family carries on a business or profession and maintains itself

by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family." Chandavarkar, J. says at page 81. "Where a minor is a co-parcener in a joint family, his share in the family property is liable for debts contracted by his managing co-parcener for any family purpose or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference: that the term *family purpose* or *purposes incidental to it*, must here give way to the expression *trading purpose* or *purpose incidental to it*, having regard to the nature and objects of the family business." It is, therefore, clear that where an accredited agent of the family, who carries on a business on behalf of the family, contracts debts for purposes of the trade the purpose for which he contracts the debt is a family purpose because the trade is a family concern and the creditors are entitled to go against the whole of the family property and a minor member is bound inasmuch as the debt is borrowed for a family purpose. It would be quite different if it could be established that the loan was not given for the purpose of the trade but for some other purpose which was not necessary for carrying on the trade. This principle is made quite clear by a later decision of the Madras High Court reported as *Thammanina Chinna Lakshminarasimha v. Akarapu Venkanna Chinniah* (6). There Sir Abdur Rahim, Officiating C. J. and Odgers, J., held that "in the case of trading families like the Kometti Chetties, if monies are borrowed for the purpose of an ancestral business carried on by the members of the joint family, all the members of the family including minors are liable for the re-payment of such sums, to the extent of their share in the whole family including the assets of the business." They follow the ruling in *Muthaya Pillai v. Tinnevely South Indian Bank* (3) and observe: "This view of the law is followed in the case just referred to in

(2) 1 B. H. C. R. App. II (51).

(3) 37 Ind. Cas. 230; 5 L. W. 341.

(4) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.

(5) 22 M. 166; 9 M. L. J. 3; 8 Ind. Dec. (N. S.) 118.

(6) 55 Ind. Cas. 64; 38 M. L. J. 55; 11 L. W. 55; (1920) M. W. N. 112; 27 M. L. T. 83.

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Malathenmal Chettiar v. Arunachalla Chettiar (7), where it is laid down that the ordinary presumption in the case of such business is that the entire family property is embarked in the business and forms part of the assets of the business. It is unnecessary to pursue this matter further as it is quite clear that a minor member is bound to pay out of his share of the family property the debts contracted for bona fide trading purposes when the trade is a family trade managed by the managing member or some one deputed by the managing member to do so.

Mr. Ramachandra Ayyar relied upon *Sahu Ram Chandra v. Bhup. Singh* (8) as supporting his contention that a minor is not bound to pay out of the family property the debts contracted by the managing member. That case was one of alienation and it was held in that case that the father could alienate joint family property for necessity or for an antecedent debt. That case has no application to the present, as the 2nd defendant was managing the family trade and contracted debts for the purpose of carrying it on. The trade carried on by the 2nd defendant has been shown to be one that was started in the lifetime of the grandfather and carried on by the plaintiff's uncle Singaravelu Mudaliar till his death, and afterwards continued by the 2nd defendant. The family is a trading family and there is nothing to show that the assets of the trade were confined to the stock-in-trade and outstandings. Evidently the family property was acquired out of the savings from the income of the trade and it cannot be said after a number of years that the immoveable property of the family became dissociated from the trade in such a way as to make the trade a separate entity altogether from the family property. There may be cases where the family trade is carried on without any reference to the family property, but in this case the income of the immoveable property belonging to the family

was brought into the trade, was credited in the books kept for the purposes of the trade and the expenses of the family were met from the trade funds. It cannot be contended in this case that the family property was not embarked on the trade carried on by the family. It must, therefore, be held that the plaintiff's share in the family property is liable for such of the debts as were incurred for the purposes of the trade. If it could be shown that any particular debt was not incurred for the purpose of the trade but for some purpose of the 2nd defendant without any reference to the family or for an object which was not a family purpose then it might be contended with success that that debt could not bind the minor's share in the family property.

* * * *

In the result, the preliminary decree of the lower Court will be modified by declaring that the alienations in favour of defendants Nos. 32, 33, 34, 35, 37 and 39 do not bind the plaintiff's share of the family property. The plaintiff is entitled to proportionate costs from defendants Nos. 32, 34, 35, 37 and 39.

The question of costs and the reliefs in respect of the debts will be decided after the connected appeals are heard.

Spencer, J.—I agree.

Appeal No. 387 coming on for hearing on the 18th September 1922, and this day and Appeal No. 386 of 1918 coming on again for hearing this day, the Court delivered the following.

JUDGMENT.—In this appeal the only question argued was whether the plaintiffs was entitled to claim interest at the contract rate from the date of plaint to the date of decree. The Court has a discretion in the matter and the learned District Judge has allowed interest according to law. The case in *Ramachandra v. Devu* (9) is relied upon as showing that the Court has no discretion in the matter, but there is a later decision of the learned Chief Justice and Seshagiri Aiyar, J., in *Rajagopala Chetty v. Kandappa Chetty* (10) to the effect that the Court has a discretion in the matter under section 34 of the Civil Procedure Code. Therefore,

(9) 12 M. 425; 4 Ind. Dec. (N. S.) 687.

(10) 28 Ind. Cas. 429.

(7) 41 Ind. Cas. 224; 6 L. W. 417.

(8) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 J. A. 126 (P. C.).

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the learned District Judge's order is correct and the appeal is dismissed with costs.

V. N. V.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 10 OF 1921.

January 15, 1923.

Present:—Sir Walter Schwabe, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Wallace.

N. V. E. NACHIAPPA CHETTIAR—
PETITIONER—APPELLANT

versus

N. A. K. SUBBIEF AND OTHERS—
RESPONDENTS Nos. 1 TO 4—

RESPONDENTS,

Civil Procedure Code (Act V of 1908), s. 73, O. XXXVIII, r. 5—“Assets held by the Court”, meaning of—Rateable distribution—Attachment before judgment, effect of.

The expression “assets held by the Court” in section 73 of the Civil Procedure Code does not include all money lying in Court to the credit of the judgment-debtor but only the assets levied in execution or paid into Court in satisfaction of the decree under execution and there is no receipt of assets within the meaning of the section until the Court holding the money comes to the conclusion that no objection exists and orders the money to be transferred to the credit of the first attaching creditor's suit, the decree in which it is engaged in executing. [p. 822, col. 1.]

Viswanadhan Chetti v. Arunachalam Chetti, 60 Ind. Cas. 302; 44 M. 100; 39 M. L. J. 608; 12 L. W. 744; 28 M. L. T. 412; (1921) M. W. N. 14 (F. B.), relied on.

Umma Venkatratnam & Co. v. Methewala Adamji Usman & Co; 50 Ind. Cas. 925; 42 M. 692; 26 M. L. T. 822; (1919) M. W. N. 623, overruled.

Bisheshwar Das v. Ambika Pershad, 29 Ind. Cas. 622; 37 A. 578; 13 A. L. J. 732, dissented from.

Where on attachment before judgment in a suit certain moveables of the judgment-debtor were sold and the proceeds deposited to the credit of the suit and before any decree was passed, another creditor got a decree against the judgment-debtor in the same Court and in execution thereof applied in the first suit for payment of his decree amount but before any order was passed thereon, a third creditor got a decree against the same judgment-debtor and applied for payment and then the first creditor obtained a decree and applied for payment:

Held, that the money in Court had never been levied in execution or transferred to the credit of any other suit than that of the first attaching creditor and did not become “assets held by the Court” under section 73 until an order was made on application by him for execution of his decree; and that all the creditors who had applied were, accordingly, entitled to rateable distribution. [p. 822, col. 1.]

Per Schwabe, C. J.—Quære.—Whether property which has been attached before judgment can be said to belong to the judgment-debtor within the meaning of section 60, Civil Procedure Code, and whether it can be taken in execution, so long as the custody Court holds it pending the decision of the suit before it, so as to defeat the right of the attaching creditor as against a subsequent decree-holder. [p. 822, col. 2.]

Per Wallace, J.—An attachment confers no sort of lien or charge on the attached property and is not effective to create any sort of legal rights in the attaching creditor to have the property earmarked for the satisfaction of any decree he has obtained or may obtain, and it is in no sense to be regarded as the inception of execution on behalf of the attacher. Much less does it enure to create any such right for the benefit of other creditors seeking for decrees or for execution of decrees or for rateable distribution under section 73 of the Code. It can then be used only for one purpose, namely, to defeat and render void any private alienation made during its continuance. [p. 824, cols. 1 & 2.]

Annamalai Chettiar v. Palamalai Pillai, 43 Ind. Cas. 539; 41 M. 265; 22 M. L. T. 461; 33 M. L. J. 707; (1917) M. W. N. 882; 7 L. W. 208 (F. B.) and *Mina Kumari Bili v. Bijoy Singh Dudhuria*, 40 Ind. Cas. 242; 44 C. 662; 1 P. L. W. 425; 5 L. W. 711; 32 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 424; (1917) M. W. N. 473; 44 I. A. 72 (P. C.), relied on.

In the ordinary case of assets realised by Court sale under a decree, the assets are held when the whole of the sale-proceeds are paid into Court and it is only when the assets are actually realised that any question of the title of anyone to rateable distribution can arise. [p. 825, col. 2.]

But when the sale-proceeds are actually in Court prior to decree, they become assets only (1) when the debtor becomes a judgment-debtor, and (2) execution is taken out against him either by a judgment-creditor entitled by decree and by his position as the plaintiff in the suit to the credit of which the money lies to put in a valid execution petition; or by a judgment-creditor entitled by an order of Court transferring the fund to the credit of his suit to put in a valid execution application. It is only then at the earliest that they can become assets held and received in execution. But the actual point of time when they do become so is when the Court says “I, as attaching Court, take this property of the judgment-debtor lying in this Court as custody Court and make it property available for distribution in satisfaction of decrees against him.” [p. 825, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Sadasiva

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Aiyar, in Letters Patent Appeal No. 53 of 1919, printed as 70 Ind. Cas. 20, preferred against the judgment of Mr. Justice Bakewell, in Civil Revision Petition No. 1309 of 1917, preferred to the High Court against an order, dated the 31st August 1917, of the Court of the District Munsif, Periakulam, in I. A. No. 496 of 1917, in Original Suit No. 566 of 1917.

Mr. K. S. Jayarama Iyer, for the Appellants.

JUDGMENT.

Schwabe, C. J.—Early in 1917 the first respondent Subbier brought a suit, Original Suit No. 566 of 1917, in the Court of the District Munsif of Periakulam against Kumaraswamy Mudali. In March 1917 he attached before judgment certain piece-goods, the property of the defendants. They were sold and the proceeds deposited to the credit of this suit on April 11th 1917. The present appellant, Nachiappa Chettiar, brought a suit in the same Court against the same defendant, Original Suit No. 678 of 1917, and on April 14th 1917, attached before judgment the money in deposit in Subbier's suit. He got a decree on April 19th, 1917, and on June 7th, 1917 he applied in Subbier's suit for payment out to him of the money in the Court. While this application was pending Subbier got a decree on July 2nd 1917 and on July 3rd applied for payment to him, or, as it is called, applied for cheque. The present second and third respondents, Rangasami Iyer and Sundara Rao, brought suits in the same Court against the same defendant, Original Suits Nos. 617 of 1917 and 785 of 1917, and obtained decrees and applied for payment out of them, one on June 29th, that is, before Subbier's application, and the other on July 20th, that is, after Subbier's application. Subbier first got an attachment before judgment and the money was deposited to the credit of his suit, but Nachiappa Chettiar and Rangasami Aiyar got decrees and applied for payment out of the money to them, one before Subbier got his decree, and applied for payment, one after Subbier got his decree and applied for payment.

The question for determination is which of these four plaintiffs is entitled to be paid. The question depends upon the interpre-

tation of section 73, Civil Procedure Code, which is in the following terms: "Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of the decrees for the payment of the money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons." The District Munsif held that as none of the other three had applied before the receipt of the assets into the Court in Subbier's suit, they had no rateable distribution under section 73 and refused their application, and ordered that Subbier should draw the whole amount but stated that his order did not preclude the rival decree-holders from setting up their rights, which would have to be determined in a suit. The matter then came up on a civil revision petition before Bakewell, J., and he held, following *Umma Venkataratnam & Co. v. Methewala Adamji Usman & Co.* (1), that Nachiappa Chettiar being the first decree-holder to apply for payment was entitled to the money. On the Letters Patent Appeal from that order Sadasiva Aiyar, J., held, following *Visvanadham Chetti v. Arunachalam Chetti* (2), that section 73 applied to the first three decree-holders and awarded rateable distribution among them. Coutts-Trotter, J., differed and proposed to follow Bakewell, J., and held that the petitioner Nachiappa Chettiar ought to be given preference. Owing to this difference of opinion the matter now comes before us under section 15 of the Letters Patent. In *Umma Venkataratnam & Co. v. Methewala Adamji Usman & Co.* (1) and in *Bisheshar Das v. Ambika Pershad* (3) it was decided in similar circumstances that the person entitled is the first decree-holder who applied to the Court in which the money is deposited on the same principle as applied in the case of an ordinary judgment-debtor's property in his own

(1) 50 Ind. Cas. 925; 42 M. 692; 26 M. L. T. 828; (1919) M. W. N. 623.

(2) 60 Ind. Cas. 302; 44 M. 100; 39 M. L. J. 608; 12 L. W. 744; 28 M. L. T. 412; (1921) M. W. N. 14 (F. B.).

(3) 29 Ind. Cas. 622; 37 A. 578; 13 A. J. J. 732.

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possession, namely, the first in order of time has the preference.

The whole matter was, however, reconsidered in *Visvanadhan Chetti v. Arunachalam Chetti* (2) by a Full Bench of this Court and the proper interpretation of section 73 was laid down. The Court was unanimous. It was held that "assets held by a Court" did not include all money lying in Court to the credit of the judgment-debtor, but only the assets levied in execution or paid into Court in satisfaction of the decree under execution, and that there is no receipt of assets within the meaning of section 73 until the Court holding the money comes to the conclusion that no objection exists, and orders the money to be transferred to the credit of the first attaching creditor's suit, the decree in which it is engaged in executing. This is the effect of the judgment of Wallace, C. J., with which Ayling, J., and Napier, J., agreed. Sadasiva Aiyar, J., held that the words "before receipt of such assets" must be qualified by an implication of the words, "levied in the course of the execution and paid into Court in satisfaction of any of the decrees under execution, or transferred for purposes of execution to the credit of one or more of the decrees under execution." Krishnan, J., put it that only when the money is transferred to the credit of the suit in which the attachment takes place can the attaching Court be said to have received the assets and hold them within the meaning of section 73, and that the decree-holders who have attached prior to that are entitled to rateable distribution. In view of this decision, in my judgment, *Umma Venkataratnam & Co. v. Methewala Adamji Usman & Co.* (1) and *Bisheshar Das v. Ambika Pershad* (3) cannot be considered as good law. In this case the money in Court has never been levied in execution nor transferred to the credit of any other suit than Subbier's and did not become available as assets held by the Court under section 73 until an order was made on the application by Subbier for execution of his decree. Under O. XXXVIII, r. 11, he, having attached before judgment, was excused from applying for re-attachment in execution, and there being already other applications to the Court for attachment of this money in execution of decrees against the same judgment-deb-

tor, the amount in Court should have been rateably distributed between these applicants. In this case the persons entitled to rateable distribution are Subbier, Nachiappa Chettiar and Rangaswami Aiyar. The fourth decree-holder, Surendra Rao, has not appealed, and it is not necessary to consider his claim and he must be excluded.

That is enough to determine this appeal, but speaking for myself I desire to say that I am not at present satisfied that the position of a person attaching the property before judgment as against a subsequent decree-holder against the same defendant does not require further consideration. It has apparently been accepted as concluded that because the property attached, or the proceeds thereof being in Court it is not the property of the attaching creditor it is available for any subsequent decree-holder against the same defendant. Under section 60 of the Civil Procedure Code any property can be attached which belongs to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit. Under O. XXI, r. 52, Civil Procedure Code, where the property to be attached is in the custody of any Court a request must be made to that Court that the property may be held subject to the orders of the Executing Court, but the Court having custody shall determine all questions of priority and the claim of any person having an interest in such property by virtue *inter alia* of any attachment. There is no doubt that the money in one Court is available for the decree of another Court subject to the consent of the former and its decision as to priorities. In the case of money simply lying to the credit of the judgment-debtor no difficulty arises, as by this form of equitable execution it can be reached by a decree-holder but there is no doubt that the judgment-debtor has no power of disposing of property attached before judgment for his own benefit, and I very much doubt whether such properties can be said to belong to him within the meaning of section 60, Civil Procedure Code; or whether it can be taken in execution so long as the custody Court holds it pending the decision of the suit before it. If the prevalent view referred to above is correct, the result is that a plaintiff

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iff, who gets an order to attach before judgment because he satisfies the Court that there is a danger of the property being made away with, and that enough ought to be preserved pending his suit to satisfy any decree he may get, may find that the property he has preserved is taken away from him pending his suit by a decree-holder who is lucky enough to get a decree more quickly. Indeed, it would be easy for a defendant, who wishes to take his property out of the reach of the attaching creditor, after attachment to get, or even create, a friendly creditor for an amount large enough and allow him to take judgment and get the property attached in execution, while he delayed the suit of original attaching creditor. It seems to me that it is possible that the Court with custody of the property under attachment before judgment might properly refuse to allow to be attached in execution until after the decision of the suit in which it was originally attached. In *Bisheshwar Das v. Ambika Pershad* (3), Order XXXVIII, r. 10, Civil Procedure Code, was considered to be conclusive in favour of the decree-holder, but it is possible that the interpretation of that rule requires further consideration. I have referred to this matter here as the point was discussed before us. It may be that the solution is to be found in the exercise of discretion of the custody Court. It is, however, unnecessary to give a decision upon it in this case.

This appeal must be dismissed, and the case sent back to the District Munsif directing him to make rateable distribution between the present appellant and the present respondents Nos. 1 and 2. The parties will bear their respective costs throughout except this appeal. None of the respondents appeared in this appeal and there will be no order for their costs.

Krishnan, J.—I agree with the learned Chief Justice in the order proposed by him. As pointed out in his judgment the present case is really governed by the recent Full Bench ruling *Visvanadhan Chetti v. Arunachalam Chetti* (2). In that case the money attached was lying in Court to the credit of the judgment-debtor, the custody Court and the attaching Court being the same Court. In the present case the attachment before judgment was, no doubt,

in the first instance of some piece-goods belonging to the judgment-debtor; but as the price was falling in the market and delay might cause loss, the goods had been sold by order of the Court under O. XXXIX, r. 6, Civil Procedure Code, and the money obtained had been paid into Court in Subbier's suit in which that attachment had been made. The conversion of the piece-goods into money by sale was not, however, a "realization of assets" within the meaning of section 73, Civil Procedure Code, as the District Munsif held, for the sale was not in execution of any decree. The result of the sale proceedings was only to substitute the money paid into Court for the goods and subject it to the same attachment before judgment as was levied on the goods. We have thus here also a case of money in Court being attached by the same Court as in the Full Bench case. According to the ruling in the Full Bench case that money became assets held by the Court and available for payment out in execution only after the District Munsif passed the order for payment. Till then it remained in Court as money under attachment; the attachment before judgment having become in effect an attachment after decree (under O. XXXVIII, r. 11) when the decree was passed. Prior to the order of the Munsif the other decree-holders before us had obtained decrees and had applied for execution and had attached the money in question. The case seems therefore, to be clearly one to which section 73, Civil Procedure Code, applies.

It is, true that the appellant before us, Nachiappa Chetty, had obtained his decree before Subbier and the other creditors had obtained theirs and his attachment before judgment of the money had thus taken effect as an attachment in execution before that of any of the others. But in applying for execution by issue of a cheque to him, he applied to the Court in Subbier's suit, Original Suit No. 566 of 1917. So far as he was concerned, the Court acting in that suit was the custody Court, the attaching Court being the Court acting in his own Suit No. 678 of 1917. The custody Court could not pay out the money to him without an order of the attaching Court to that effect as it has to hold the money subject to the orders of the attaching Court under r. 52,

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Civil Procedure Code. If he wanted payment out he should have applied in his own suit and obtained an order from the Court as attaching Court for payment in execution before asking the custody Court to pay or he should have applied in his own suit for transferring the amount to the credit of his suit and then get that Court to pay the money to him. His application to the custody Court for payment was not a proper application and was rightly disregarded by the District Munsil. In these circumstances, it is not necessary to decide the question whether if he had made a proper application according to law to have his decree amount paid out, the fact that Subbier had a prior attachment before judgment on that money would have in any way justified his application being refused. I do not propose, therefore, to discuss the question raised by the learned Chief Justice in the latter part of his judgment regarding the effect of an attachment before judgment. I desire to reserve my opinion on it for the present. In my view Nachiappa Chetty got no right for the payment of the whole of his decree amount as claimed before us and, as was held by Bakewell, J., nor did Subbier get such right as held by the Munsif. An order for rateable distribution is, in my view, the proper order to make in the case. The fourth decree-holder, Sundara Rao, not having applied in revision is not entitled to the benefit of our order, he must be excluded.

Wallace, J.—I agree.

Appellant urges strongly that the attachment before the judgment by Subbier in March 1917 of the funds of the common debtor in the custody of the Court cannot confer on Subbier any sort of lien or charge on these funds; and could not be used to defeat the right of himself as first applicant for execution to have his decree satisfied in full, when he applied for cheque on 7th June 1917, at a time when no other creditor had obtained his decree or was entitled to apply in execution. It is well-recognised law that an attachment confers no sort of lien or charge on the attached property and is not effective to create any sort of legal right in the attaching creditor to have the property marked for the satisfaction of any decree he has obtained or may ob-

tain and it is in no sense to be regarded as the inception of execution on behalf of the attacher. Much less does it enure to create any such right for the benefit of other creditors seeking for decrees or for execution of decrees or for rateable distribution under section 73. And it then can be used for one purpose only, viz., to defeat and render void any private alienation made during its continuance, see *Annamalai Chettiar v. Palamalai Pillai* (4) and *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (5). There is in the present case no such private alienation in question and hence, for the purposes of this case, the attachment before judgment by Subbier created or maintained for him no legal right to the fund in the custody of the Court.

So that, on 6th July 1917, when appellant applied for his cheque, he was in a strong position, with no legal bar to his having his decree satisfied out of this fund, provided his execution application was in order and the Court chose to grant it. But his application was not in order. It was an application in his own suit, the only suit in which he had then any *locus standi*, to operate on a fund in another suit. That he could not do until he had the fund transferred to the credit of his own suit. His application did not include any request to the Court to transfer to the credit of his suit, the amount at credit of Subbier's suit. Possibly, the omission was intentional, as such a request would have at once raised in the custody Court the question of the priority of the first attaching creditor Subbier. In any case, the appellant's application was thus not in form, and the Court, either for this reason or some other, did not choose to act on it then. Had it then ordered payment, one might infer that it had, as custody Court, settled the question of priority, and had itself, as attaching Court, transferred the money at credit of Subbier's suit to the credit of the appellant's suit. But it refrained, and the money re-

(4) 43 Ind. Cas. 539; 41 M. 265; 22 M. L. T. 461; 33 M. L. J. 707; (1917) M. W. N. 882; 7 L. W. 298 (F. B.).

(5) 40 Ind. Cas. 242; 44 C. 662; 1 P. L. W. 425; 5 L. W. 711; 32 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 424; (1917) M. W. N. 473 44 I. A. 72 (P. C.).

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maintained where it was, held as before, money in the Court as custody Court held subject to the disposal of the Court as attaching Court, in suspense, as it were, until the attaching Court had before it a proper execution application, i. e., an execution application in the suit in which the first attachment took place, or an execution application in another suit praying for transfer to that suit of the money from the suit in which it was. When that occurred, it was then for the attaching and Executing Court to decide to work out the attachment and call up the attached money for satisfying the various applicants. There was no such application until Subbier put in his application on 2nd July 1917 for cheque. In my opinion the Court ought to have then proceeded to execute Subbier's decree with due regard to the claims of persons entitled under section 73 to rateable distribution. There was no reason then for delaying matters further. However, the Court still refrained from moving, and, so far as one can see, the fund remained in the custody Court in the same state as it had been from the beginning, until on 31st August 1917 the Court decided to distribute and determined that the whole of it should go to Subbier. Only then can it be said that the attaching Court called up the fund in the custody Court for use in execution of pending unsatisfied decrees, and only then can it be said that the assets were received within the meaning of section 73.

The same conclusion follows also from a strict examination of the terms "assets held" and "receipt of the assets" in section 73. In the ordinary case of assets realised by Court sale under a decree, the assets are held when the whole of the sale-proceeds in execution are paid into Court, and it is only when the assets are actually realised that any question of the title of anyone to rateable distribution will arise, see *Krishnaswamy Mudaliar v. Official Assignee of Madras* (6). But when the sale-proceeds are already in Court prior to the decree it must be that they cannot become assets before (1) the debtor becomes a judgment-debtor, and (2) execution is taken out against them either by a judgment-creditor

entitled by decree and by his position as the plaintiff in the suit to the credit of which the money lies, to put in a valid execution application; or by a judgment-creditor entitled by an order of Court transferring the fund to the credit of his suit, to put in a valid execution application. It is only then at the earliest that they can become assets held and received in execution, but it does not follow that it is then they do become so. The point of time of conversion is the point of time at which the Court says, "I, as attaching Court, take this property of the judgment-debtor lying in this Court as custody Court and make it property available for distribution in satisfaction of the decrees against him."

In the present case there is nothing to show that the Court made this conversion earlier than the date, 31st August 1917, on which it directed rateable distribution. It might have done it, as I have indicated, on 7th June 1917, when appellant applied for cheque, or on 29th June 1917, when the decree-holder in Suit No. 617 of 1917 applied for cheque, or most reasonably of all, on 3rd July 1917 when Subbier applied for cheque or on 29th July 1917 when the decree-holder in Suit No. 785 of 1917 applied. The fact that on none of these dates did it make any pay order shows that on none of these dates did it decide to effect the necessary conversion. I am not satisfied that the Court exercised its discretion judicially in withholding that conversion beyond 31st July 1917 which has had the effect of bringing in a fourth claimant for rateable distribution, who seems, so far as we have heard, to have had no particular claims to such indulgence. But that matter is now not before us. I do not think that the Court had no power to delay the conversion, or that this Court has power to alter the date of receipt of assets.

In the case like the present then section 73 leaves a wide discretion to the Court, which is both custody Court and attaching Court, to fix the date of "receipt of assets" within the meaning of section 73, and I am clear that we are not justified in holding that the Court exercises its discretion unjudicially when it fixes that date so as to enable the creditor who

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has been the first to attach the property and thus hold it, it may be, for all creditors as well as for himself, to obtain his decree, provided that creditor shows all due diligence in obtaining it and that the delay is due to the complexity of the suit or the dilatoriness of the Trying Court or some other cause over which he has no control, and it would certainly exercise its discretion wisely in so delaying the conversion, if the alternative was to permit a later attaching creditor who obtained his decree earlier merely because his suit was simpler, or because the common debtor did not choose to contest the claim, from going off with the whole fund which had been secured by the diligence and foresight of another creditor. It might, no doubt, be contended that, if the debtor's property had not been attached, he might have satisfied the less diligent creditor out of Court, and that such preference is not illegal, but I do not see why, when a Court has custody of the debtor's property, it should be bound to imitate the debtor's personal preferences, while it would in all cases be a matter of idle speculation whether the first holder of a valid application for execution was the one whom the common debtor, if left to himself, would have preferred to pay. On the other hand, it may well be argued that the object of O. XXXVIII, r. 5 was to put it out of the power of the common debtor to give such preferential treatment and thus to prepare in advance for some equitable rateable distribution. Such delay in conversion will, no doubt, at times have the result that other belated and perhaps indifferent and inactive creditors may also be unable to come in under section 73, when the assets are received, but even so, as a rule, I think it preferable that that should happen rather than that the most diligent creditor should be wholly deprived of a share in the assets which were secured by his forethought and promptitude.

This, I think, is the logical result of the principles laid down in *Visvanadhan Chetti v. Arunachalam Chetti* (2) as applied to a case like the present, and it will deviate from those laid down in *Ummia Venkataratnam & Co. v. Metheemala Adamji Usman & Co.* (1) in allowing the Court to exercise

its discretion in favour of a diligent creditor who has attached before judgment the property of his debtor in the custody of the Court. The insistence in the latter case on the reward of diligence may be carried so much further forward. The Court will then exercise its discretion in favour of all diligent creditors, diligence being tested either (1) by promptitude in obtaining attachment before judgment, followed up by diligence in prosecuting the suit and, when the decree is obtained, in applying for execution, or (2) by promptitude in obtaining a decree and applying for execution.

I, therefore, agree in the order proposed by the learned Chief Justice.

V. N. V.

Appeal dismissed.

MADRAS HIGH COURT.

REFERRED CASE NO. 6 OF 1922.

November 15, 1922.

Present.—Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

V. PARTHASARATHI AIYANGAR AND OTHERS—PLAINTIFFS

versus

DORAISAMI NAICKER AND ANOTHER—DEFENDANTS.

Madras City Tenants' Protection Act (III of 1922), ss. 2 (3), 9—Tenant, whether entitled to enforce compulsory sale of trust property.

A tenant in occupation of trust land belonging to a temple or mosque is not entitled to enforce a compulsory sale of the land under section 9 of the Madras City Tenants' Protection Act and require the trustee to deliver the land to him on a valuation to be made by the Court. [p. 829, col. 1.]

The term "landlord" as defined by clause (3) of section 2 of the Madras City Tenants' Protection Act is comprehensive enough to include the trustee of a charitable endowment, but trust property is not "land" within the meaning of s. 9 of the Act which can be conveyed "under any power." [p. 830, col. 1.]

Per Venkatasubba Rao, J.—"Land" in section 9 of the Act does not mean the full interest which a trustee can convey under the power possessed by him to convey trust property when necessity exists or when the alienation is for the benefit of the estate. [p. 831, cols. 1 & 2.]

Case referred under section 113 and O. XLVI, r. 1, of the Code of Civil Procedure, by the City Civil Judge, Madras in Letter No. D. 405, dated the 20th June 1922, in

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Original Suits Nos. 75 and 76 of 1921 on his file for the opinion of the Hon'ble the Judges of the High Court on the following question :—

"Can a tenant in occupation or trust land belonging to a temple or mosque enforce a compulsory sale of the land under section 9 of the Madras City Tenants' Protection Act and require the temple or mosque to deliver the land to him on a valuation to be made by the Court."

Mr. N. Srinivasachariar, for the Plaintiffs :—Section 2 of the Madras City Tenants' Protection Act defines a "landlord" and the trustee of a religious endowment, whatever may be his powers of disposition, is a landlord within the meaning of that section. Landlord includes a person who is entitled to collect the rent on behalf of the trust whose representative he is.

Section 9 enables the tenant to apply to the Court for an order for compulsory sale of land in a suit on ejectment. Land itself is defined in the explanation to the section. It means the interests of the landlord and all other interests, "he can convey under any power." A trustee of an endowment has no power to convey ordinarily speaking. The restricted power of disposition under certain circumstances is irrelevant. That a trustee as a limited owner has ordinarily no power of disposition over *debutter* property is now well-settled law. *Hunoomanpersad Panday v. Musammat Babooee Munsraj Koonweezee* (1), *Prosunno Kumari Debya v. Golab Chand Baboo* (2), *Palaniappa hetty v. Sreemath Deivasikamony Pandara Sannadhi* (3), *Magniram Sitaram v. Kasturbhai Manibhai* (4).

Section 32 of the Land Acquisition Act throws considerable light on the meaning of the expression "interest he can convey

under power." That section provides for directions as to investment of the amount awarded in cases of acquisition of trust property and a trustee is dealt with as a person "who has no power to alienate."

The decision in *Kamini Debi v. Promotho Nath Mookerjee* (5) is conclusively in my favour. I rely on the observations of Justice Mukerjee that the trustees come under category of persons who have no power to alienate land. See also *Ramprasanna Nandi Chowdhuri v. Secretary of State for India* (6). The word 'power' occurs both in section 9 of the Madras Act and section 32 of the Land Acquisition Act and must receive the same construction.

The absence of a provision in the Madras Act similar to that in section 32 of Land Acquisition Act also indicates that trust property was not intended to be brought within the scope of the Act, and a construction which would facilitate the committing of a breach of trust must be avoided.

Further, section 31 of the Land Acquisition Act refers to persons who have a limited interest in land and also provides for cases where there is no person competent to alienate the land. Such provision is not found in the present Act.

Mr. Aiyasami Sastriar, for the Defendant-tenant :—The question is, whether a trustee is a landlord who has an interest "to convey under any power." A trustee like every other limited owner has a disposable interest.

It is clear law that an alienation by a limited owner is not void but voidable, good and valid until it is set aside in the appropriate manner. In *Kadiri Masthan Rowther v. Segammall* (7) it was held an alienation by a trustee is a not void *ab initio*. The law gives power to a trustee to alienate. It is immaterial it is not an unrestricted power.

The analogy with the Land Acquisition Act is not sound. The power of directing investment of trust funds is an inherent power and there is nothing in law to prevent a Court, in allowing a compulsory sale, to direct the investment of the sale-proceeds in some approved security.

(5) 10 Ind. Cas. 491; 39 C. 33 at p. 38; 13 C. L. J. 597.

(6) 22 Ind. Cas. 272; 40 C. 895; 19 C. W. N. 652.

(7) 55 Ind. Cas. 655; 43 M. 433; 38 M. L. J. 198; 11 L. W. 197; (1920) M. W. N. 185; 27 M. L. T. 286.

(1) 6 M. I. A. 393; 18 W. R. 811; Sevestre 253 n; 2 Suth P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(2) 2 F. A. 145 at p. 151; 14 B. L. R. 450; 3 Sar. P. C. J. 449; 23 W. R. 253; 3 Suth. P. C. J. 102.

(3) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 (P. C.).

(4) 66 Ind. Cas. 162; 49 I. A. 54; 26 C. W. N. 473; 42 M. L. J. 501; 30 M. L. T. 268; 20 A. L. J. 371; 35 C. L. J. 421; 24 Bom. L. R. 584; (1922) M. W. N. 319; 46 B. 481; (1922) A. I. R. (P. C.) 63 (P. O.).

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The phrase "which he could convey under a power" is only descriptive of the powers of the landlord and has reference to the quantum of interest passing. The object of the Act was to benefit tenants and it was most unlikely that all landlords with limited powers of disposition were intended to be excluded. The construction suggested by the other side would only involve great hardship and would exclude the very common cases of a manager of a Hindu family, a widow, a guardian, and in fact every limited owner. Unless compelled by the language of the Act, a construction which would fail to carry out the manifest purpose of the Act ought to be avoided. Construed in the ordinary sense, a trustee is a landlord who has a power of disposition. Neither the restriction in the exercise of the powers of disposition nor the absence of the circumstances in particular cases would necessarily connote the non-existence of such power itself.

Under the Estates Land Act it is settled that permanent rights of occupancy can be acquired against trustee landlord as well.

In the absence of specific words excluding trusts from the scope of the Act, the beneficent operation of the section should not be unduly narrowed.

The decisions in the Insolvency Act also show that the son's undivided interest passes, on the father's insolvency, to the Official Assignee, the father having a "disposing power" over the son's share of the properties.

The obvious and plain meaning of the section, when read in the light of the obvious purpose of the Act, avoids a construction which would defeat the object of the Legislature in a considerable body of cases. The plain meaning does not involve any hardship. It is always within the inherent powers of the Court to direct an investment. The absence of a provision for it is far from conclusive. The Madras Act only settles a doubtful legal position in favour of the tenant and purports to confer certain special benefits on tenants, of which the Courts should not lightly deprive them.

Mr. Srinivasachariar replied.

JUDGMENT.

Spencer, J.—The question referred to us is, whether a tenant in occupation of trust lands belonging to a temple or mosque can enforce a compulsory sale under sec-

tion 9 of the Madras City Tenants' Protection Act and require the temple or mosque to deliver the land to him on a valuation to be made by the Court.

There is no difficulty, to my mind, in including the trustees of temples, mosques and other religious endowments within the definition of "landlord" in section 2 of Madras Act III of 1922, as they certainly are persons entitled to collect the rent of the land on behalf of another person. A greater difficulty arises when we come to consider section 9. This section provides for the compulsory sale by a landlord of land in the possession of a tenant in the City of Madras from which the tenant is sought to be ejected in a suit instituted under the Presidency Small Cause Courts Act. The explanation to this section defines "land" as "the interest of the landlord in the land and all other interests which he can convey under any power." If they signify easements and other subsidiary interests, it would have been easy for the Act to so describe them. If the title to the land is intended to be included, has a trustee power "to convey it?" In *Palaniappa Chetty v. Sreemath Deivasikamony Pandara Sannadhi* (3), the Judicial Committee, quoting the words of Lord Justice Knight Bruce in *Hunoomanpersaud Panday v. Musammatt Babooze Munraj Koonweree* (1), observe, "the power of the manager for an infant heir to charge an estate not his own, is under the Hindu Law a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate." And at page 716*, quoting Sir Montague E. Smith's words, they say: "There is no doubt that, as a general rule of Hindu Law, property given for the maintenance of religious worship and of charities connected with it, is inalienable." They then proceed to consider what kind of benefit will justify an absolute alienation of temple property. Among benefits to an estate they include the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it from injury or deterioration. These and such like things they say would obviously be benefits. In *Magniram Silaram v. Kasturbhai Manibhai* (4), there is an observation: "The disability of a *shebait*

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to make a permanent grant is not absolute." A trustee then, like the guardian of an infant, has power to convey portions of the corpus of trust property under circumstances of necessity or where the conveyance will be for the benefit of the estate. As the Act which we are considering creates a statutory necessity for landlords to sell portions of their land where the conditions fulfil the terms of the Act, it may be argued that even trustees landlords are under the necessity of selling land to their tenants as provided in section 9. A similar statutory necessity arises when land is acquired by Government under the Land Acquisition Act. Section 31 of that Act speaks of persons "having a limited interest" in land and provides for cases where there is "no person competent to alienate the land." Section 32 also speaks of certain persons as having "now power to alienate" lands acquired under the Act. In *Kamini Debi v. Promotho Nath Mookerjee* (5). Mookerjee, J., observes, that the trustees will come under the category of persons who have "no power to alienate" land dedicated to an idol or to religious and charitable purposes. In this Presidency also it is the practice to apply these sections whenever land belonging to temples and mosques is acquired for a public purpose. But section 32 provides a safeguard for the preservation of the money awarded as compensation by directing that it shall be invested in the purchase of other lands and meanwhile deposited or invested in some approved securities. Madras Act III of 1922 does not contain any such safeguard. The presumption, therefore, is that the Legislature did not intend to so endanger the preservation of trust properties as to include them under the definition of "land" which can be conveyed "under any power." I am, therefore, of opinion that the question referred to us should be answered in the negative.

Venkatasubba Rao, J.—I entirely agree.

The question to be determined in this Reference is whether a tenant can compel a trustee of a temple under section 9 of the Madras City Tenants' Protection Act Madras Act III of 1922, to sell him the land on which the tenant has constructed a building. The point has been referred for the opinion of the High Court by the Judge of the City

Civil Court, Madras, who states that more than a hundred ejectment suits are now pending disposal in respect of land belonging to a temple or mosque or other charitable or religious trust and that he entertained considerable doubt regarding the interpretation of the word "land" in section 9 of the said Act.

The object of the Act is stated to be to give protection to tenants who, in many parts of the City of Madras, have constructed buildings on others' lands in the hope that they will not be evicted so long as they pay a fair rent for the land.

Section 3 provides that every tenant shall on ejectment be entitled to be paid as compensation the value of any building erected upon the land.

Section 4 enacts that, in a suit for ejectment in which the landlord succeeds, the Court shall ascertain the amount of compensation payable under section 3, and direct that, on payment by the landlord of the amount so found due, the tenant shall put the landlord into possession of the land with the building thereon.

It will be seen that the effect of sections 3 and 4 is that the landlord becomes on payment of a price the owner of the tenant's building.

Section 9 provides for cases where tenants are not anxious to obtain compensation for the buildings, but, on the contrary are desirous of obtaining the land on which the buildings stand. It enacts that any tenant, who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted, may apply to the Court for an order that the landlord shall be directed to sell the land for a price to be fixed by the Court. The Court shall then fix the price and shall order that the tenant shall pay into Court the price so fixed. On payment of the price, the Court shall pass a final order directing the conveyance of the land by the landlord to the tenant. Under section 9, therefore, the tenant, instead of parting with his building, becomes the owner of the land on which the building has been constructed.

The term "landlord" is defined by clause (3) of section 2. "Landlord" means any person owning any land, and includes every person entitled to collect the rent whether on his own account or on behalf of

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another person or by virtue of any transfer from the owner or of any order of a competent Court or of any provision of law.

The definition is comprehensive enough to include trustee of a charitable endowment. I may state that a farmer of rents, a usufructuary mortgagee, a Receiver appointed by Court, a committee of a lunatic or a guardian of a minor would undoubtedly come within the definition. The difficulty is created by the Explanation to section 9. It runs thus: "Land means the interests of the landlord in the land and all other interests which he can convey under any power." A person absolutely owning the land can convey it, but what is the interest that can be conveyed in the case of a person who is entitled to an interest short of absolute ownership? If a lease is granted by a usufructuary mortgagee or by lessee for a term of years, if either of them files a suit against a tenant who has erected a building it cannot possibly be contended that by a conveyance under section 9 a higher right can pass to the tenant than is possessed by the mortgagee or the lessee, the plaintiff in the suit. But there is a class of landlords who occupy a position very different from that occupied either by absolute owners or persons with admittedly a very limited right in the property such as lessees for a term of years or usufructuary mortgagees. To take only a few cases, managers of joint undivided Hindu families, Hindu widows, trustees of temples or other religious endowments, and guardians of minors would fall in this category. There are no words in the Act which indicate the intention of the Legislature in regard to these various classes of landlords. It is indeed strange that an Act, whose assumed object is to afford protection to tenants, should be silent in matters so vital as this. On behalf of the tenants it has been argued before us that we must presume that the Legislature intended to protect tenants irrespective of considerations that have reference to the extent of interest possessed by the landlords in the land leased. I do not think we would be justified in presuming anything of the kind. We must gather the intention of the Act, if possible, from the words used.

What is the meaning of the words "under any power" used in section 9? The word "power" occurs both in Indian Acts and

decisions of the Judicial Committee of the Privy Council and of various Courts in India. Confining my observations to the case of trustees, I may first refer to *Prosunno Kumari Dehya v. Golab Chand Baboo* (2), where Sir Montague E. Smith in delivering the judgment of their Lordships observes: "But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is, in their Lordships' opinion, competent for the *shebait* of property dedicated to the worship of an idol... to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile religious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the *shebait* of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir."

Regarding the power of the manager for an infant heir, the observations of Lord Justice Knight Bruce in *Hunoomanpersaud Panday v. Musammatt Babooee Munraj Koonwerree* (1) are quoted: "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate."

In *Palaniappa Chetty v. Sreemath Devisakamony Pandara Sannadhi* (3), the power of a trustee to grant a permanent lease or temple lands was considered. Their Lordships of the Judicial Committee held that, unless a trustee is constrained thereto by unavoidable necessity or any benefits accrued to the charity, he cannot grant a lease in perpetuity of *debutler* lands at a fixed rate. They observe that it is impossible to give a precise definition of "benefit to the estate," but they indicate that the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation would be benefits.

Referring to *Hunoomanpersaud's case* (1) their Lordships observe, "in that particular case in reference to which this language was used, the 'necessity' for the loan would appear to have been plain and imperative, the benefit to the estate, the

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preservations of its existence; obvious."

This and similar passages in the judgment will make it clear that the word "benefit" is used in this context in a special sense.

In the course of the judgment their Lordships further observe that it is a breach of duty on the part of a *shebait* in the absence of necessity or benefit to grant a lease in perpetuity at a fixed rent.

An argument was advanced before the Judicial Committee that the charity will be benefited by a transaction which put at the *shebait's* disposal a sum of money capable of being profitably used. Their Lordships say that no authority has been cited giving any countenance to the notion that a *shebait* is entitled to sell *debutter* lands solely for the purpose of investing the price so as to bring in an income larger than that derived from the probably safer and certainly more stable property, the land itself.

These principles have not in the slightest degree been departed from in *Bawa Magnum Sita Ram v. Kasturibhai Manibhai* (4), where it was held that the disability of a *shebait* to make a permanent grant is not absolute and that, although the manager for the time being has no power to make a permanent alienation in the absence of proved necessity, yet the existence of justification may be presumed from the long lapse of time between the alienation and the challenge of its validity. In that particular case there was an interval of a hundred years between the date of sale and the date of the challenge of its validity.

It is not necessary to refer to further decisions on this subject and it may be taken to be settled law that the power of a trustee of temple property is limited and that an alienation by him in the absence of necessity or benefit will not be upheld.

This being the state of the law, what do the words "under any power" in section 9 connote? Can it be said that the trustee can convey the interest which he can convey only, when necessity exists or when the alienation is for the benefit of the estate?

In other words, if the construction urged on behalf of the tenants is adopted, the explanation to section 9 will be equivalent to this: "Land" means the full interest which a trustee can convey under the power possessed by him to convey trust

property when necessity exists or the alienation is for the benefit of the estate.

I do not think that this construction can be adopted. It has been argued that there is a statutory liability imposed by virtue of the Act itself, upon trustees to convey the land and that this constitutes sufficient necessity to justify an alienation. The argument begs the question because the point to be decided by us is—Does the Act impose such a statutory liability?

The decisions bearing upon the interpretation of the word "power" used in the various Acts, such as the Civil Procedure Code and the Insolvency Act, gives us very little assistance in understanding the expression "under any power" in section 9. I may refer to *Fakir Chand Motichand v. Motichand Hurruckchand* (8), which deals with the power vested in the Official Assignee to dispose of the insolvent's son's interest in ancestral property for the payment of his debts and two other similar cases, *Rangayya Chetti v. Thamkachalla Muddali* (9) and *Nunna Brahmayya Setti v. Chidaraboyina* (10). I may also refer to *Jagabhai Lalubhai v. Vijbhukandas Jagjivandas* (11), which refers to the expression in section 266 of the Civil Procedure Code (Act XIV of 1882) "has disposing power which he may exercise for his own benefit."

The provisions of the Land Acquisition Act, I of 1894, seems to me to furnish a guide in regard to the determination of the question at issue. In that Act are to be found three expressions (1) persons interested in the land, (2) persons entitled to act, and (3) persons competent to alienate the land or having power to alienate the same. Section 3 (g) mentions trustees among persons entitled to act. The clause runs thus, "the following persons shall be deemed persons entitled to act as and to the extent hereinafter provided, that is to say, trustees for other persons beneficially interested shall be deemed the persons entitled to act with reference to any such case, and that to the same extent as the persons beneficially

(8) 7 B. 438 at p. 441; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294.

(9) 19 M. 74; 6 Ind. Dec. (N. S.) 757.

(10) 26 M 214.

(11) 11 B. 37; 6 Ind. Dec. (N. S.) 24.

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interested could have acted if free from disability." If there are no persons competent to alienate the land, the Act prescribes that the compensation shall be deposited in Court and the Court shall order the money to be invested in the purchase of other lands. In *Kamini Debi v. Promotha Nath Mookerjee* (5) and *Ramprasanna Nandi Chowdhuri v. Secretary of State for India* (6), it was held that a *shebait* is a person incompetent to alienate for the purposes of sections 31 and 32 of the Land Acquisition Act, I of 1894.

Section 10 contemplates various interests possessed by co-proprietors, sub-proprietors, mortgagees and tenants.

Sections 29 and 30 deal with the apportionment of the compensation. In great detail provision is made in the Land Acquisition Act to safeguard the interests possessed by various persons in the land acquired. No such provisions are to be found in the Act under consideration. Are we to assume that the Legislature intended that the trustees should be compelled to sell the land and that he should in lieu of it receive money which should be hence forward at his absolute disposal? If the lands in possession of trustees were intended to be included certainly we should expect to find some provisions in the Act dealing with the investment of the funds. To adopt the construction suggested on behalf of the tenants would be in effect to hold that the Legislature intended the conversion of trust lands into money without providing for the protection of the money so obtained.

We cannot assume that breaches of trust were intended to be facilitated by the Act.

These observations may apply to the cases of all limited owners but we have nothing to do with the consequences that may follow from our interpretation of the sections of the Act. If the Legislature dees it necessary or desirable to extend further protection to tenants, the Act may be amended but we have nothing to do with it.

It is said that this interpretation will cause hardship to the tenants. Under section 9 the tenant may apply for an order directing the landlord to sell the land. There is nothing in the section to compel the tenant to do so. On his applying for a direction,

the Court is required to pass an order directing the conveyance of such interest as the landlord can pass. If the landlord cannot pass any interest, the tenant cannot acquire it.

The contrast between section 9 of the Act and section 16 of the Land Acquisition Act is very marked. Under the latter when the Collector has made an award the land "vests absolutely in the Government free from all incumbrances." The absence of these words in section 9 indicates conclusively that the sale to the tenant does not vest in him the land absolutely.

For these reasons, I would answer the question referred to us in the negative.

Memorandum of costs will follow.

V. N. V.

Z. K. Reference answered in the negative.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 236 OF 1922.

November 2, 1922.

Present:—Mr. Dalal, A. J. C.

RAM RATAN AND OTHERS—DEFENDANTS
—APPELLANTS

versus

BINDA AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Estoppel—Voluntary statement about title of another—Admission of claim.

Where a person makes a statement in a Revenue Court that another person and himself are entitled to certain property and asks for mutation of names to be made accordingly, such statement does amount to an admission of the claim of the other person, where there has been no claim on the part of the latter, and the person making the statement is not prevented from asserting his right to the entire property in a Civil Court subsequently. [p. 833, cols. 1 & 2.]

Chekhay Singh v. Jote Singh, 1 Ind. Cas. 166; 12 O. C. 288; 31 A. 73; 11 Bom L. R. 69; 13 C. W. N. 274; 6 A. L. J. 100; 9 C. L. J. 151; 5 M. L. T. 167; 19 M. L. J. 123; 36 I. A. 11 (P. C.) followed.

Second appeal against a decree of the Subordinate Judge, Unao, dated the 18th April 1922, modifying a decree, dated the 12th August 1921, of the Munsif, Shafipur at Unao.

Mr. Girja Saran Lal, for the Appellants.

JUDGMENT.—The view of the law taken in the first Appellate Court appears to be correct. No mention is made

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of the mortgage at this stage because the mortgagee has not appealed. One *Musammal Radha*, who had a life-interest in the property in suit, died and admittedly the plaintiff Binda was the next reversioner to the property and entitled to succeed to the entire property. His nephews, the defendants, however, with his consent obtained mutation of names about a month after *Musammal Radha's* death. This was in 1916. Consequently, the plaintiff who appears to have got into the hands of some money-lenders asserted his claim to the entire property by this suit.

The Court of first instance, the Munsif of Shafipur, held that the plaintiff was bound by his statement in the mutation proceedings and entitled to only one-sixth of the property in suit. The learned Subordinate Judge as an Appellate Court held that the plaintiff Binda's statement did not act as an estoppel and decreed the entire property to him. From that decree in favour of Binda the defendants have appealed to this Court.

Admittedly, the plaintiff is the owner of the property in suit and has not lost his title by adverse possession of the defendants. The only estoppel of his title is said to be his statement (Exhibit B-2) made by him on 4th May 1916 in the Court of Assistant Collector. What he stated there was that he and his nephews were heirs of *Musammal Radha* meaning really that they were next reversioners of the property. He desired that mutation of one-sixth of the property may be made in his favour and of the rest in the names of the defendants. It was argued in this Court that this statement amounted to an admission of a claim. But as there was no claim I do not think that there can be any admission of one. The facts of this case are similar to the facts of the Privy Council case, *Chokhey Singh v. Jote Singh* (1). In that case also what was urged by way of estoppel was a statement in the Court of an Assistant Collector during the mutation proceedings to the effect that the plaintiff and two others were in possession of the

property in equal shares and that mutation of names may be made accordingly. It was held that such a statement did not prevent the plaintiff from asserting his right to the entire property in a Civil Court subsequently. Knowing this difficulty of the defence the defendants attempted in the first Court to make out that there was some dispute between the parties and that they arrived at a family settlement or family arrangement by which the plaintiff accepted one-sixth of the property in order to avoid family litigation. This case completely broke down in the First Court and it is certain that the plaintiff's statement was not the result of any family settlement, arrangement or compromise.

N. H.

MADRAS HIGH COURT.

SECOND APPEAL NO. 1653 OF 1920.

November 15, 1922.

Present:—Sir Walter S. Schwabe, Kt., Chief Justice, and Mr. Justice Wallace.

KOTTAL KUNHALIKUTTI HAJI
KARNAVAN AND MANAGER OF HIS
PUTRAVAKASA TAVAZHI TARWAD—
DEFENDANT NO. 1—APPELLANT

versus

MALIKKARAVIDAKOTTAL KUNHAMAYAN AND OTHERS—RESPONDENTS.

Malabar Law—Tarwad—Maintenance of junior members—Principles applicable—Decree against karnavan, form of.

The junior members of a Malabar *tarwad* are entitled to receive maintenance out of the *tarwad* house, when there is no room for them in that house, and if the *karnavan* makes an insufficient allowance, they are entitled to apply to the Court to determine what allowance is sufficient having regard to the circumstances of the family. [p. 834, col. 2.]

The general principle governing such cases is that, *prima facie*, the junior members living out of the *tarwad* house should be treated equally, but the circumstances of each particular member can be taken into consideration and it is for the *karnavan* to judge how much each particular member should get. He may take into account, circumstances like the health of a particular child, or the education of a particularly intelligent child or a child with small intelligence, or the earning capacity of the junior member or apparently even a rich marriage connection by him. Property given to a *karnavan* while he was junior member before he became *karnavan* can also be taken into account. [p. 734, col. 2; 735, col. 1.]

To some extent, this discretion of the *karnavan* can be controlled by the Court and if a junior

(1) 1 Ind. Cas. 166; 12 O. C. 288; 31 A. 73; 11 Bom. L. R. 69; 13 C. W. N. 274; 6 A. L. J. 109; 9 C. L. J. 151; 5 M. L. J. 167; 19 M. L. J. 123; 36 I. A. 38 (P. C.)

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member is aggrieved, he can apply to the Court for fixing his rate of maintenance. On such application very great weight should be given to the decision of the *karnavan* and it should not be lightly interfered with. What is a reasonable amount of maintenance is a question of fact. [p. 835, cols. 1 & 2.]

Ekanat Thayu Kunji Ama v. Ekanat Shungunni Valia Kymal, 5 M. 71; 2 Ind. Dec. (N. S.) 50, relied on.

Ordinarily, a decree in favour of a junior member for maintenance against the *karnavan* should not, in the absence of special circumstances, be a personal one; but must direct him to pay maintenance out of the income and corpus of the *tarwad* properties. [p. 836, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Tellicherry in A. S. No. 19 of 1919, preferred against the decree of the Court of the District Munsif, Kuttuparamba, in O. S. No. 285 of 1916.

Mr. C. Madhavan Nair, for the Appellant.

Messrs. K. P. M. Menon, C. V. Ananta Krishna Iyer, T. S. Viswanatha Iyer, P. R. Narayana Iyer and Karunakara Nambiar, for the Respondents.

JUDGMENT.

Schwabe, C. J.—In this case the District Munsif and the lower Appellate Court have awarded to the plaintiffs maintenance, the lower Appellate Court at rather a higher rate than the District Munsif. The plaintiffs are the junior members of a *tarwad*. The 1st defendant is the *karnavan* of the *tarwad*. The 2nd defendant is the next to him for that position. The decree has been made for arrears of maintenance at the rate which has been found by the Subordinate Judge to be the proper rate, personally against the *karnavan* in the following terms: "that the 1st defendant personally and as *karnavan* of his *tarwad* do pay" * * * * This form of decree does not seem to me to be right. I see no reason for a personal decree against the *karnavan* which would involve the right of the minor members of this *tarwad* to arrest him if he did not pay forthwith, although it may be, he may have none of the property in his hands available for immediate payment. We have had several decrees, which have come before this Court looked up and I have found none in which this form of decree has been used. In No. 1036 of 1918 [*Govindan Nair v. Kunja Nayyar* (1)], on second appeal from the

South Malabar District; the form of decree approved by this Court was: "that this Court doth order and decree that the 1st defendant, as *karnavan* and manager of his *tarwad* and from the income of the *tarwad* properties and also from the properties of the *tarwad* do pay the plaintiff Rs. 216 for his maintenance due for the past three years." In No. 48 of 1916 [*Kozhipurath Kunnikrishna Menon Karnavan v. Kozhipurath Kunhikavamma* (2)], on appeal from the same District, the decree approved by this Court was: "that the plaintiffs do recover from their and the defendant's *tarwad* Rs. 1136 being the amount of maintenance due for the plaint period, that is, 6 years." On the whole, I think, the former of those two forms, namely, that approved in *Govindan Nair v. Kunja Nayar* (1) is the better form, and the decree of the lower Appellate Court in this case must be amended by being made to conform with that form.

It is then argued that the amount of maintenance allowed in this case is wrong, because the lower Appellate Court has not applied the right principle in arriving at the proper figure and has allowed too much, and it is argued on the other side that too little has been allowed. Now, the law seems to be this, as stated by Turner, C. J., and Kindersley, J., in an apparently unreported case of the Madras High Court the judgment in which is set out clearly in Moore's Malabar Law and Custom at page 132: "The members of the *tarwad* are entitled to receive maintenance out of the *tarwad* house, when there is no room for them in that house, and if the *karnavan* makes an insufficient allowance, the Anandravans are entitled to apply to the Court to determine what allowance is sufficient, having regard to the circumstances of the family." The circumstances which may be taken into consideration on such discussion before the Court are dealt with in the case *Ekanat Thayu Kunji Ama v. Ekanat Shungunni Valia Kymal* (3). The general principle is this: *Prima facie* the junior members living out of the *tarwad* house should be treated equally, but the circumstances of each particular one can be taken into consideration and it is for the *karnavan* to

(1) 51 Ind. Cas. 326; 36 M. L. J. 565; (1919) M. W. N. 302; 26 M. L. T. 189; 42 M. 686.

(2) 49 Ind. Cas. 471; 35 M. L. J. 565; (1918) M. W. N. 761; 24 M. L. T. 448.

(3) 5 M. 71; 2 Ind. Dec. (N. S.) 50.

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judge how much each particular one should get. He may take into consideration, no doubt, things like the health of a particular child, or the education of a particularly intelligent child or a child with small intelligence, he can take into account the earning capacity of the junior member; apparently it has been laid down that he can also take into account the fact that a particular person has himself made a rich marriage; and there are many other things which the *karnavan*, in exercising his discretion as, so to speak, the father of this family, can take into consideration. To some extent all these are things which can be controlled by the Court; if a junior member is aggrieved, he can come to the Court and apply for maintenance and ask the Court to say what allowance is sufficient. I think it is enough to say that, on any such application to the Court, very great weight indeed should be given to the decision of the *karnavan* and his decision in such a matter would not be lightly interfered with. In this case it is proved that certain members of the *tarwad* and, in particular, the 2nd defendant have had provisions made for them by way of maintenance not by the present *karnavan* but by his predecessors, he having been *karnavan* only for a short period; and both the District Munsif and the Subordinate Judge have, to a great extent, in arriving at what they considered to be a proper maintenance for these plaintiffs, eliminated the individual arrangements which had been made by those previous *karnavans* in regard to the 2nd defendant and other members of the *tarwad*. But they have both, in arriving at what they think the right amount, taken the generality of those members so provided for and said that that on an average works out so much and I think quite properly the Subordinate Judge took that into consideration as a guide provided by past *karnavans* as to what was the sort of maintenance this *tarwad* was capable of paying to its minor members. I do not find that he did anything more than look at it as a guide. It is also true that, in making that calculation for the purpose, he eliminated from consideration the amount which was going to the 2nd defendant. He does not seem to have had before him anything about the 2nd defendant to show why he got a considerably larger amount

than other members. I do not see any reason for saying that the figure arrived at is wrong, and certainly I find no reason for saying that it is wrong in law, what was the reasonable maintenance is a question of fact and on the facts before the Courts the figure was arrived at. I cannot find any reason to say that there was any error in law in arriving at that figure. I think it right to say something further. In this case a discussion took place in both the Courts below as to whether some property which the *karnavan* had got for his own maintenance before he became *karnavan* was to be taken into consideration, or whether the amount that he was getting and wanted as *karnavan* should be taken into consideration. In my judgment, he is, in respect of property which he is using for his own maintenance, in the same position as other members of this *tarwad* who have got similar property made available for their maintenance. In arriving at the amount of maintenance that should be paid, the income is, of course, to be considered and as against the income, the proper expenditure to be met by the *karnavan* for managing this *tarwad* is to be taken into consideration. But the property that the *karnavan* is in enjoyment of himself under some arrangement by a previous *karnavan* is merely useful as a guide in the same way as the properties in the possession of other members of the *tarwad* are useful as a guide in arriving at the reasonable amount. But all those grants, the grant to the present *karnavan*, the grant to the 2nd defendant and the grant to the other members of property in lieu of maintenance are subject to revision by the *karnavan* in a proper case. It has been laid down, and I think rightly laid down, that that revision can only take place if he proposes to substitute for the maintenance provided in this way some other proper maintenance. How this decree is to be met, how the maintenance of those minor members for the future is to be paid, is a matter for the *karnavan* to decide, and he can, if he thinks it right, look into the position of every member to the *tarwad*, and he would be perfectly justified in saying that one member was getting too much and another member was getting too little and he could alter and re-adjust the incidence of the burden of the expenditure

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of this *tarwad*. I need hardly add that he must, in exercising any such powers, act honestly and in the general interest of the *tarwad* and not of course in his own personal interest as opposed to the general interest.

I think that disposes of everything in this case and this appeal must be allowed to the extent of varying the order in the way suggested by me.

My brother points out to me that it may be too general a statement to say that a personal decree against a *karnavan* can never be given. I can conceive those cases where it would be right that there should be a personal decree. All I meant to convey is that the ordinary decree in the first instance in the absence of special circumstances should be a decree in the form suggested by me.

As regards costs, on the whole, I think that respondents Nos. 1 to 9 must have their costs against the *tarwad*. The memorandum of objections of respondents Nos. 1 to 9 is dismissed with costs of the appellant and the memorandum of objections of the 10th respondent is dismissed without costs.

Wallace, J.—I agree and have nothing to add.

V. N. V.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 59 OF 1920.

January 24, 1923.

Present.—Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

K. V. R. RM. VR. RAMANATHAN CHETTIAR DEAD AND OTHERS—APPELLANTS
versus

A. VENKATACHELLAM CHETTIAR
DEAD AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, 2—Agreement pending appeal not to execute decree against certain defendants—Appeal dismissed as settled out of Court—Agreement whether can be pleaded in bar to execution—Payment mentioned in execution application whether amounts to certi-

fication—Order fixing upset price in sale proclamation—Appeal.

An agreement pending an appeal from a decree by which the plaintiff agrees to forego a portion of the decree amount and to recover the balance from certain defendants only and not to proceed against others, and in pursuance of which the appeal is dismissed as having been settled out of Court, cannot be pleaded in bar to the execution of the *appellate decree* as against any of the defendants.

Arumugam Pillay v. Krishnaswami Naidu, 56 Ind. Cas. 576; 43 M. 725; 12 L. W. 41; 39 M. L. J. 222, followed.

Chidambaram Chettiar v. Krishna Vathiyar, 37 Ind. Cas. 836; 40 M. 233; 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 44; 32 M. L. J. 13, distinguished.

O. XXI, r. 2 of the Civil Procedure Code which relates to adjustments subsequent to the decree sought to be executed is inapplicable to the case of an adjustment of the decree of the Trial Court pending an appeal from it.

The fact that payments are mentioned by a decree-holder in his execution application as having been made towards the decree in pursuance of an adjustment of the decree does not amount to a certification of the adjustment within the meaning of O. XXI, r. 2 of the Civil Procedure Code.

Birao Gorain v. Jaimurat Koer, 13 Ind. Cas. 63; 16 C. W. N. 923; 16 C. L. J. 174, dissented from.

An order fixing the upset price in a sale proclamation in execution proceedings cannot be questioned in appeal.

Sivagami Achi v. Subrahmaniam Ayyar, 27 M. 259; 14 M. L. J. 57 and *Ramanathan Chetty v. Semasundaram Chettiar*, 37 Ind. Cas. 897; (1917) M. W. N. 141, followed.

Appeal against the order dated the 21st January 1920 of the Court of the Subordinate Judge, Ramnad at Madura in E. P. No. 142 of 1919 (in O. S. No. 1 of 1916 on the file of the Court of the Additional Subordinate Judge, Ramnad).

Messrs. S. Subrahmanya Iyer and T. G. Ramasami Iyer, for the Appellants.

Messrs. T. M. Krishnasami Iyer, M. Subbaraya Iyer and M. S. Vidianatha Iyer, for the Respondents.

JUDGMENT.—In this case the first defendant appeals against the order of the lower Court sanctioning the proclamation of sale, fixing the upset price and the date of sale. The appeal is on the ground that under an agreement dated 20th July 1918 the decree cannot be executed against the 1st defendant. The lower Court's reasons for rejecting this contention are not clear but it appears to have rejected it with reference to O. XXI, r. 2 of the Civil Procedure Code. In fact, the agreement was

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made after the date of the decree of the Court of first instance, but before the date of appellate decree of this Court, that appellate decree being one dismissing the appeal as the matter had been settled out of Court.

It is urged, with reference to *Chidambaram Chettiar v. Krishna Vathiyar* (1), that the first defendant should have been allowed to prove the agreement. The terms of the agreement are that, of the decree amount of Rs. 36,000, only Rs. 33,750 shall be recovered, the recovery to be made as regards half of that sum from the 2nd defendant and half from the 3rd defendant within specified periods. In case of default at the end of those periods the decree is to be executable, against at least those two defendants. For it is said (though this is disputed) that it is another term of the agreement that there is to be no recovery from the 1st and 4th defendants. It is not necessary to settle that dispute, because the question is whether the agreement can be proved at all. We think that it resembles the agreement dealt with in *Arumugam Pillay v. Krishnaswami Naidu* (2) and not that dealt with in *Chidambaram Chettiar v. Krishna Vathiyar* (1). It no doubt contains a provision for postponing the liability, and it also contains a provision—this is its main provision—for the relinquishment of the right to recover Rs. 2,250 odd out of the decree amount. It has been suggested that *Arumugam Pillay v. Krishnaswami Naidu* (2) was wrongly decided and that we should refer the case before us to a Full Bench with reference to an alleged conflict between those decisions. We do not think that there is any sufficient reason for distinguishing the present case from *Arumugam Pillay v. Krishnaswami Naidu* (2) or doubting the correctness of that decision. In fact, if necessary, we should have been prepared to consider the propriety of making a reference in respect of *Chidambaram Chettiar v. Krishna Vathiyar* (1). We may, before parting with this portion of the case, observe that there is no question of the application of O. XXI r. 2 as the lower Court appears to have supposed; because

that rule relates to adjustment subsequent to the decree and Exhibit A was before the decree to be executed was passed in appeal, and the ground on which the agreement is useless to the 1st defendant in these proceedings is, that it was superseded by the decree of the Appellate Court, made after it.

Taking this view, we turn to other contentions, which have been relied on, that the agreement can be regarded by an effort of construction as in fact an agreement made subsequently to the decree, since it had in fact been certified to the Executing Court under O. XXI, r. 2. We are unable to understand how an agreement made on one date can be regarded as having been made on another or how there has been any certification, such as would be necessary to support the argument. Reliance has been placed on *Birao Gorain v. Jaimurat Koer* (3). But we are unable to follow the course of that decision and can only suppose that it was justified by the apparently exceptional circumstances of the case dealt with in it. We further cannot understand how, even if this agreement could be treated as made after the decree, there has been anything resembling a certification of it. The mere fact that payments are mentioned in the execution application as having been made consistently with it is certainly not a certification.

The appeal failing on this ground also, there remains only an objection to the figure, which the lower Court fixed as the upset price at which the sale was to be held. *Sivagami Achi v. Subrahmaniam Ayyar* (4) and *Ramanathan Chetty v. Scmasundaram Chettiar* (5) negative the right of a party to execution proceedings to raise any such question by appeal at this stage.

The result is that the appeal against order fails and is dismissed with costs with the legal representative of the 1st plaintiff.

The memorandum of objections are not pressed and are dismissed. There will be no order as to costs in them.

V. N. V.

Appeal dismissed.

(1) 37 Ind. Cas. 836; 40 M. 233; 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 44; 32 M. L. J. 13.

(2) 56 Ind. Cas. 976; 43 M. 725; 12 L. W. 41; 39 M. L. J. 222.

(3) 13 Ind. Cas. 63; 16 C. W. N. 923; 16 C. L. J. 174.

(4) 27 M. 259; 14 M. L. J. 57.

(5) 37 Ind. Cas. 897; (1917) M. W. N. 141.

POKKUNURI DASARATHA RAO V. CHEVURU SUBBA RAO.

MADRAS HIGH COURT.CIVIL MISCELLANEOUS PETITION No. 2068
OF 1922.

January 24, 1923.

Present:—Mr. Justice Krishnan and Mr.
Justice Venkatasubba Rao.

POKKUNURI DASARATHA RAO—

PETITIONER—(PETITIONER IN C. M. P.

No. 2537 OF 1921 ON THE FILE OF
THE HIGH COURT).*versus*

CHEVURU SUBBA RAO PANTULU,

SECRETARY CO-OPERATIVE STORES, LTD.

VIZIANAGARAM, VIZAGAPATAM DISTRICT

—RESPONDENT.

*Co-operative Societies Act (II of 1912), s. 43
(2) (i), scope of—Dispute between officer and Society,
whether can be referred—"Disputes touching business
of Society," interpretation of.*

Under a resolution of a Co-operative Stores, a purchase committee was constituted consisting of a certain number of members and one of them was entrusted with a sum of money for the purchase of certain articles. The Stores claimed a balance, and the liability was disputed by the member. The Secretary of the Stores thereupon made a reference in writing under section 43 (2) (i) of the Co-operative Societies Act to the Assistant Registrar of Co-operative Societies who held an inquiry and passed a decree against the member. On an objection by the member that the whole reference was outside the scope of the section and was invalid:

Held, (1) that the dispute which arose out of a particular transaction of the Society was a dispute "touching the business of the Society" and, therefore, within the scope of the section;

(2) that a dispute between a member who happened to be an officer, on the one hand, and the Committee or an officer, on the other, fell within the purview of the section;

(3) that the reference was, therefore, valid. The expression "disputes touching the business of a Society" in section 43 (2) (i) of the Co-operative Societies Act is not confined to disputes regarding the internal management of the affairs of the Society or the regulation of the conduct of its business, but includes all disputes arising out of any transaction of the Society.

Application under O. XLVII, r. 1 of the Civil Procedure Code for review of the order of the High Court dated the 28th day of July 1922 in Civil Miscellaneous Petition No. 2573 of 1921 presented against the order, dated 1st February, 1921, of the Court of the Assistant Registrar of Co-operative Societies of Vizagapatam Section, in Dispute Petition No. 90 of 1920-1921.

The Advocate-General and Mr. Y. Suryanarayana, for the Respondent.

ORDER.

Venkatasubba Rao, J.—The question that was argued before us turns on the construction of section 43 (2) (i) of the Co-operative Societies Act, II of 1912.

The dispute arose between the petitioner, P. Dasaratha Rao, and the Co-operative Stores, Vizianagaram, in regard to sums of money that were entrusted to the former for purchase of certain articles. The Stores, claimed a balance on the ground that, after some adjustments had been made, the sums were found due and that the petitioner was wrongfully withholding it from the Stores. The liability was disputed and the Secretary of the Co-operative Stores made a reference in writing to the Assistant Registrar who held an enquiry and passed a decree against the petitioner.

Two contentions were raised before us by Dasaratha Rao. The first contention had reference to the interpretation of the words "touching the business of a Society" in section 43 (2) (i). He contended that the present dispute does not fall within the said words and that the clause refers only to disputes regarding the internal management of the affairs of a Society or disputes in regard to the principles which would regulate the conduct of business; a dispute, for instance, whether the Society should purchase and deal in a particular commodity or should take up a particular line of business would, according to this construction, come within the terms of the clause; but a dispute arising out of any particular transaction would be outside the scope of the section. The words are quite general and I am unable to accept this contention. If the restricted construction contended for is to be adopted, I find great difficulty in understanding how such a dispute can arise between the past members of a Society *inter se*.

The second contention was that the petitioner was a Director, and that therefore, was an officer and that the words in the section exclude the case of a dispute between an officer and the Committee or between an officer and an officer. This contention, again, I am unable to accept. A dispute between a member and the Committee or a dispute between a member and an officer is admittedly within the purview

NANDIGAM GANGAYYA V. MADUPALLI VENKATARAMAYYA.

of the section. It was brought to our notice that, under a resolution of the Society, a Purchase Committee was constituted consisting of six, of whom four were Directors and two were members but not Directors and in his capacity as a member of this Committee the petitioner became indebted to the Society. For the respondent it was argued that the dealings which the Society had with the petitioner were with him *qua* member and not *qua* Director. This argument, so far as it goes, seems to me correct. But I am prepared to go further and hold that, on a true construction of the words of the clause, a dispute between a member who happens, to be an officer on the one hand, and the Committee or an officer, on the other, does fall within the words of the section.

I, therefore, reject both the contentions advanced by the petitioner and in this view it becomes unnecessary to decide the other questions argued by the learned Advocate-General before us on behalf of the respondent.

The application for review is, therefore, dismissed. In the circumstances, I would make no order as to costs.

Krishnan, J.—I agree.

V. N. V.

Application dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 660 OF 1921.

September 11, 1922.

Present:—Mr. Justice Krishnan and

Mr. Justice Venkatasubba Rao.

NANDIGAM GANGAYYA

PETITIONER—APPELLANT

versus

MADUPALLI VENKATARAMAYYA

AND OTHERS—COUNTER-PETITIONERS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 64, 115, O XXI, r. 2—Execution of decree—Attachment—Transfer with consent of decree-holder, effect of—Transferee of decree, whether bound—Refusal to exercise power—Revision.

Section 64 of the Civil Procedure Code is intended

for the benefit of the decree-holder and it is open to him to waive the benefit. There is no public policy making it incumbent on a Court to avoid an alienation pending an attachment. [p. 840, col. 2.]

An attaching decree-holder who, for valuable consideration, agrees with a purchaser of the attached property to withdraw the attachment is not entitled to go back on his agreement and a transferee from him with notice of the agreement is not entitled to apply for execution of the decree by attachment of the same property. [p. 840, col. 2.]

O. XXI, r. 2 of the Civil Procedure Code does not bar the purchaser in such a case from setting up the agreement as against the decree-holder's claim for execution. [p. 840, col. 2.]

The transferee of a decree is not in a better position than the decree-holder himself and can put forward only such rights as the decree-holder himself had at the time of transfer and is bound by any agreement made by his transferor of which he had notice at the time of transfer. [p. 841, col. 1.]

P. S. Krishna Aiyar v. Savurimuthu Pillai 50 Ind. Cas. 584; 36 M. L. J. 376; 9 L. W. 443, 42 M. 338; (1919) M. W. N. 248, distinguished.

Where a Court under an erroneous view of the law declines to give effect to its own findings and to release certain property from attachment it refuses to exercise a jurisdiction vested in it by law and its order is subject to revision under section 115 of the Civil Procedure Code. [p. 841, col. 2.]

Sundaram v. Mamsa Mavuthar, 63 Ind. Cas. 937; 44 M. 554; 40 M. L. J. 497; 13 L. W. 498; 29 M. L. T. 269; (1921) M. W. N. 272, relied upon.

Appeal against appellate order of the Court of the Additional Subordinate Judge at Ellore, dated the 26th July 1921, in Appeal No. 38 of 1921, (A. S. No. 458 of 1920 on the file of the Court of the Subordinate Judge, Ellore, preferred against the order, dated the 19th July 1920, in C. M.P. No. 1189 of 1920, in O. S. No. 755 of 1915, on the file of the Court of the Principal District Munsif, Ellore.

Mr. C. Ramarao, for the Appellant.

Mr. V. Suryanarayana, for the Respondents.

JUDGMENT. This case arises from an application put in by the appellant before us to exclude from Court sale a property which he had purchased while it was under attachment under an agreement made between him, the decree-holders, and the judgment-debtor that, on the purchase-money Rs. 200 being paid to the former, he should no longer execute the decree against the property purchased and that the attachment should be withdrawn.

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The decree-holders have now transferred their decree to one Venkataramayya, the first respondent, and he is now trying to execute the decree by selling this very property. He has also applied for execution against the other properties as well; but we are not concerned with that portion of the execution application. The main question that has to be decided in this case, on the facts found is, whether, because the property was under attachment at the time that the appellant purchased it, section 64 of the Civil Procedure Code is a bar against his plea that the property should not be proceeded against in execution.

The District Munsif held that the section was not a bar as it did not make the alienation absolutely void but only void to the extent of the claims enforceable under the attachment and that the decree-holders having entered into an agreement and received full consideration for it that they would not proceed against the appellant's property, they were bound by that contract and could not rely upon section 64 and insist on selling the property again. According to him, section 64, being a section enacted for the benefit of decree-holders, it was open to them to waive such a benefit.

Against the order of the Munsif there was an appeal to the Subordinate Judge. He also found all the facts in favour of the purchaser, namely, that the sale-deed, Exhibit A, by which he purchased the property had full consideration, that the agreement set up by him was true and that the purchase-money was paid to the decree-holders in pursuance of that agreement. There seems to have been at the same time an agreement that the purchase-money was to be taken in full satisfaction of the decree. That was, however, an arrangement primarily for the benefit of the judgment-debtor; that arrangement as it amounted to an adjustment of the decree between parties, would fall under O. XXI, r. 2 and could not be pleaded in execution; but so far as the appellant's claim is concerned, his plea is only that the property purchased by him should not be sold and the only objection that could be raised against him is that section 64 bars his pleas.

The Subordinate Judge in appeal, though he found all the facts in favour of the present appellant, nevertheless, came to the conclusion that it could not be disputed that, no satisfaction of the decree having been recorded, the decree continued in force and was executable against all the attached properties. He thought that the transferee decree-holder was entitled to sell again the present appellant's property as it had not been sold to him at all. It is not, however, clear whether he puts the case under O. XXI, r. 2 or under section 64 of the Civil Procedure Code. If it is the former, it is clear that the rule has no application so far as the purchaser, the appellant, is concerned. He is not interested in insisting upon any adjustment of the decree. All that he is concerned with is, that his property should not be sold in execution. It does not matter to him whether the decree should be executed or treated as adjusted so long as the contract between him and the original decree-holders is enforced as against the latter and their transferee. O. XXI, r. 2 does not, therefore, bar his contention.

As already stated, the question that really arises is one of the construction and effect of section 64, Civil Procedure Code. We are inclined to think that the view taken by the Munsif is the correct one. The section is really one intended to benefit the decree-holders so that they may not be impeded by any alienation pending attachment in executing their decrees. The benefit being for the decree-holders we are inclined to think that he could waive the benefit and as, in the present case, the decree-holders had entered into an actual contract with the purchaser, they cannot be permitted to go back upon their contract and insist upon the application of section 64 in their favour. To allow them to do so would be clearly to perpetrate a fraud. We see nothing in section 64 that necessitates such a construction as that.

Numerous authorities have been cited to us regarding the application of O. XXI, r. 2 but none of them have got any bearing on the present case and, therefore, we do not propose to refer to any of them. No case has been cited as regards the construction of section 64. We have, therefore,

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to decide the question arising here on the language of that section. There is no particular public policy underlying the section which makes it incumbent on the Court to void an alienation pending an attachment, the section being intended only to help the decree-holder to realise his decree amount.

It was finally argued that, whatever obligations there might be upon the decree-holder to act according to his agreement, such obligations did not pass to the transferee-decree-holder and that it was open to him to sell the property in execution. We are unable to accept this argument; for the transferee decree-holder in this case is proved to have had knowledge of the agreement between the decree-holders and purchaser before transfer. Furthermore, a transferee decree-holder can be allowed to put forward only such rights as the decree-holder had at the time of transfer; and as, in this case, the decree-holder was bound by the arrangement, we must take it that the transferee was also bound by it. The case cited in *Krishna Aiyar v. Savurimulhu Pillai* (1) has no bearing on the present case at all for there the transferee decree-holder was entirely within his rights because the decree-holder himself had the right of executing the decree in spite of the anterior adjustment with the judgment-debtor as the adjustment had not been certified to the Court under O. XXI. r. 2. If we may respectfully say so, it was rightly held that there was no cause of action against the transferee. The cause of action against the decree-holder was based on his failure to perform his statutory duty of certifying to the Court the adjustment that he had entered into with the judgment-debtor. Such a duty did not devolve upon the transferee at all.

The point has also been taken before us that no second appeal lies in this case as the matter arises in the execution of a small cause decree. This seems to be so and the second appeal must, therefore, be dismissed; but we are prepared to allow the second appeal to be converted into a revision petition under section 115 of

the Civil Procedure Code. It is argued for the appellant that, in that view, we should set aside the decree of the lower Court as well. But section 102 does not affect the right of appeal from such a decree but only the right of second appeal. It is not necessary to decide if there was a right of appeal in this case under section 47 of the Civil Procedure Code on the ground that the purchaser of a property attached is a representative of the judgement-debtor, in disputing the right of the decree-holder to sell it, as we are setting aside the Subordinate Judge's order on another ground.

Assuming the appeal was a competent one we must still hold that the order of the Subordinate Judge was one falling under section 115, Civil Procedure Code as he entirely misconstrued the legal position in the case and refused to release the property from attachment as he should have done. Having found that there was an agreement as pleaded by the purchaser, and having found all the facts in his favour, the Subordinate Judge has, by a mistake of the law that he made, declined to give effect to his findings and to release the property from attachment as he should have done. Where a Court by an erroneous view of the law refuses to exercise a power which it has got or exercises a power which it assumes it has, but it has not really got, the case would be one falling under section 115 of the Civil Procedure Code. We may refer to the most recent decision of the Full Bench of this Court in *Sundaram v. Mamsa Mavuthar* (2) for this view.

In these circumstances, we think this is a fit case for interference under section 115 of the Civil Procedure Code and we set aside the order of the Subordinate Judge and restore that of the District Munsif. As regards costs, we think it right to make the parties bear their own costs in the lower Appellate Court and in this Court.

V. N. V.

Order set aside.

(2) 63 Ind. Cas. 937 44 M. 554; 40 M. L. J. 497; 13 L. W. 498; 29 M. L. T. 269; (1921) M. W. N. 272.

(1) 50 Ind. Cas. 584; 36 M. L. J. 376; 9 L. W. 443; 42 M. 338; (1919) M. W. N. 248.

KISHTAPPA CHETTY v. LAKSHMI AMMAL.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 17 OF 1922.

January 11, 1923.

Present:—Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Wallace.

KISHTAPPA CHETTY—DEFENDANT—
APPELLANT

versus

LAKSHMI AMMAL—

PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 10, Sch. I, Arts. 49, 120, 145, applicability of—"Trust for specified purpose", meaning of—"Deposit," what is—Suit to recover property entrusted—Limitation.

Plaintiff gave certain jewels to the defendant, a co-parcener in the same family, to enable the latter to raise a loan by a pledge of the jewels. Subsequently, by a family arrangement, it was agreed that the plaintiff should get a life interest in the jewels and the defendant undertook to get back the jewels and return the same to the plaintiff in a few days. In a suit by the plaintiff for recovery of the jewels:

Held, that the defendant was constituted an express trustee in whom the jewels became vested for a specific purpose within the meaning of section 10 of the Limitation Act and the suit was, therefore, governed by that section.

Per *Schwabe, C. J.*—Assuming that there was no express trust under section 10 of the Limitation Act, the case would be governed by Art. 145, and if not covered by Art. 145, would be covered by Art. 120 of Schedule I to the Limitation Act.

The phrase "trust for a specified purpose" in section 10 of the Limitation Act connotes the same idea as "express trust" in English Law, and is used in the section in contradistinction to trusts arising by implication of law, trusts resulting and trusts constructive. [p. 843, col. 2.]

The word "vested", in section 10 of the Limitation Act means no more than properly having control of the property. [p. 843, col. 2.]

Bhurabhai v. Bai Rukmani, 32 B. 394; 10 Bom. L. R. 540; *Soar v. Ashwell*, (1893) 2 Q. B. 390; 4 R. 602; 69 L. T. 585; 42 W. R. 165 and *Administrator-General of Bengal v. Kristo Kamini Dassee*, 31 C. 519; 8 C. W. N. 500, relied on.

The word "deposit" in Art. 145 of Schedule I to the Limitation Act is not confined to the strict meaning of "depositum" in Roman Law, but extends to all cases where one man's property is handed by that man to another, so that, the latter becomes a "depository" of it unless there is something in the terms of the handing over, which would prevent his being treated as a person with whom it was deposited at all. [p. 843, col. 2.]

Gopalsami Iyer v. Subramania Sasri, 12 Ind. Cas. 207; 35 M. 636; (1911) 2 M. W. N. 190; 10 M. L. T. 572; 22 M. L. J. 152, Observation of Sadasiva Aiyer, J., in *Narayanasamy Thevar v. Aiyasamy Iyengar*, 18 Ind. Cas. 921; 24 M. L. J. 184 and of Hill, J., in *Administrator-General of Bengal v. Kristo Kamini Dassee*, 31 C. 519; 8 C. W. N. 500, not followed.

Coggs v. Bernard, 1 Sm. L. C. (11th Ed. 173 at p. 191; 2 Ld. Raym. 909; 92 E. R. 107, referred to.

Art. 49 of Sch. I to the Limitation Act deals not with suits for recovery of property deposited with another but only with those in respect of property wrongfully taken or wrongfully detained. [p. 844, col. 2.]

Appeal against a decree of the Court of the City Civil Judge, Madras, dated the 9th March 1922, in Original Suit No. 132 of 1921.

Mr. M. A. Thirunarayanachariar, for the Appellant.

Mr. C. V. Anantakrishna Aiyer, for the Respondent.

JUDGMENT.

Schwabe, C. J.—This is an appeal from the City Civil Court in a suit in which the plaintiff sought to recover certain jewels or their value, and an order was made for their return or for their value, Rs. 1,000.

The facts of the case are that the jewels in question being in the possession of the plaintiff were handed by her to the defendant on terms that he might pledge them for a short time for his own benefit and then should redeem them and return them to the plaintiff. While the jewellery was still in his possession or in the possession of the pledgee with whom he had pledged them, the plaintiff and the defendant and other members of the same family, the plaintiff being the widow of a brother of the defendant, entered into an agreement Exhibit A. By that agreement the jewels in question were settled on the terms of Exhibit A, which was to the effect that they should be enjoyed by the plaintiff during her life without power of alienation and upon her death they should be divided between the defendant and other parties to the agreement. Within a short time of the making of that agreement the jewellery, if it was not already in the hands of the defendant, came into his hands, for he was under a duty to redeem it and there is no evidence that he did not do so. At the time that Exhibit A was executed there was an express promise by the defendant that he would within ten days obtain the jewels and deal with them in accordance with Exhibit A. In 1916 the plaintiff demanded from the defendant the return of the jewels and he refused. She subsequently took criminal proceedings against him but was referred by the Criminal Court to the Civil Court, and in 1921 she brought

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this suit. She alleged that she had discovered in 1917 that the defendants had sold the jewels in 1912. The defendant denied that he did sell the jewels in 1912 or at any time and there has been no finding of fact as to whether he has or has not sold them.

The learned Judge has held that the suit is not barred by limitation because section 10 of the Limitation Act applies and that the defendant is a trustee for the plaintiff. It is contended before us that section 10 has no application and that the case is governed by Art. 49 and is, therefore, barred because the suit was not brought in three years after the demand and refusal referred to above. Section 10 applies only to "suits against persons in whom property has become vested in trust for any specific purpose." It has been held in *Bhurabhai v. Bai Rukmani* (1) that "the phrase 'trusts for a specific purpose' in this section is merely a more expanded mode of expressing the same idea as that conveyed by the expression 'express trust' in English Law: and it is used in this section in contradistinction to trusts arising by implication of law, trusts resulting and trusts constructive." In my judgment that is a correct statement of the law and I think it is right to say that, wherever you have an express trust, the trustee comes under section 10 and no period of limitation avails him. What amounts to an express trust as opposed to a constructive trust was fully discussed in *Soar v. Ashwell* (2). That was a case in which a Solicitor for some trustees received some of the trust monies on the terms that he was to invest them for the trust. It was held that he, by those terms, became an express trustee of those monies. In my judgment, in this case the true position of the execution of Exhibit A was that, when the jewellery came into the hands of the defendant, a party to that agreement, he, by his agreement, had undertaken to hold it and apply it in accordance with the terms of Exhibit A and was thereby constituted an express trustee in whom the property was vested for that purpose. I do

not think that the word "vested" in section 10 means anything more than properly having control of the property. The jewellery was accordingly held by him from that time forward on terms that he should hand it over to the plaintiff, if alive, or, if dead, should hand it over to himself and others entitled to it in reversion. I, therefore, agree with the decision of the learned Judge of the City Civil Court. I agree with the decision of the majority in *Administrator-General of Bengal v. Kristo Kamini Dassee* (3) which supports this view.

I wish, however, to deal also with the other point, namely, whether, assuming that there is no trust, the case is governed by Art. 145 or by some other Article of the Schedule to the Limitation Act. For this purpose one has to consider the terms on which the defendant originally got the jewellery into his possession. The terms were that he might use the jewellery for his own benefit by pledging it and, if not so required, if and when redeemed, he should hand it over to the plaintiff. Art. 145 refers to suits against depositories or pawnees to recover moveable property deposited or pawned; the period of limitation is 30 years from the date of the deposit or pawn. It is argued that the word "deposit" there must be confined to the strict meaning of "*depositum*" in Roman Law and there is some authority in support of that view. There is a judgment to that effect of Sadasiva Iyer, J., in *Narayanassamy Thevar v. Aiyasamy Iyengar* (4) where it was unnecessary for the decision, and of the Bench in *Gopalasami Iyer v. Subramania Sastri* (5) where, as the Court was holding that the time had not expired, it was also unnecessary for the decision. There is also the dissenting judgment of Hill, J., in *Administrator-General of Bengal v. Kristo Kamini Dassee* (3). Looked at from the point of view of the Roman Law, I do not think that the handing over of property in this case by the plaintiff to the defendant was a *depositum*. I think it is more in the nature of *commodatum*. There are six kinds of bailment referred to in Roman Law and set out in

(1) 32 B. 394; 10 Bom. L. R. 540.

(2) (1893) 2 Q. B. 390; 4 R. 602; 69 L. T. 585; 42 W. R. 165.

(3) 31 C. 519; 8 C. W. N. 500.

(4) 18 Ind. Cas. 921; 24 M. L. J. 184.

(5) 12 Ind. Cas. 207; 35 M. 636; (1911) 2 M. W. N. 190; 10 M. L. T. 572; 22 M. L. J. 152.

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Detail in the famous judgment of Holt, C.J., in *Coggs v. Bernard* (6). But the Indian Limitation Act was meant to provide a simple guide to cover every possible case that might come before the Courts in India. It is obvious that the intention was merely to have to look up the particular suit and you find the answer in the First Schedule. The results, it is true, are not very happy, but I cannot believe that it was the intention of the framers of the Statute that the various District Munsifs throughout India or other Subordinate Judges who have to administer the law should study either *Coggs v. Bernard* (6) or the Roman Law in order to ascertain what was the true meaning of the Art. 145. I think they meant to use simple and plain language and they used the word 'depository' and, in using that word, they meant simply to say that, where one man's property was handed by that man to another he became a depository of it, unless, of course, there was something in the terms of the handing over which would prevent his being treated as a person with whom it was deposited at all. It is almost impossible that, when they were making a period of 30 years applicable to cases of goods handed over either for safe custody or in pledge, they should have intentionally made a shorter period for cases of goods handed over for the advantage of the person to whom they were handed. It would be most illogical to allow a shorter period in the case where the depositor, if I may use the word, gets the advantage than is allowed in the case where deposit is merely doing something for the advantage of the depositor, and it is to be observed that cases not coming under Art. 145 come nowhere, unless indeed they can be brought within the words of Art. 49. Art. 49, if intended to cover cases like the present, is most curiously worded, for it is for suits for other specific moveable property than property lost or acquired by theft or dishonest misappropriation or conversion or for compensation for wrongfully taking or for wrongfully detaining the same, and the period of limitation is three years from the time when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful. It seems to

(6) 1 Sm. L. C. (11th Ed.) 173 at p. 191; 2 Ld. Raym. 909; 92 E. R. 107.

me that an entirely different class of suits is being dealt with—not suits for recovery of property deposited with another but suits in respect of property wrongfully taken or wrongfully detained. It is to be observed that, if this is not so, there would be two different periods allowed in respect of goods deposited strictly so called; for, where goods are deposited for safe custody only, and a demand is made for their return and refused, those goods become wrongfully detained and there would be a period of 30 years under Art. 145 and a period of three years under Art. 49 and it is not probable that the Legislature intended to arrive at that result. I think that that is an argument in favour of the view that Art. 49 is not dealing with the articles deposited in any sense, and it would follow that it is an argument in favour of holding that Art. 145 covers more than the *depositum* of Roman Law. In my judgment, if this case were not covered by section 10, it would be covered by Art. 145, and if it is not covered by Art. 145, it is not provided for at all and would, therefore, be covered by Art. 120, and the suit is in time.

For these reasons, in my judgment, this appeal must be dismissed with costs.

Wallace, J.—I agree that section 10 of the Indian Limitation Act applies and it is sufficient to dispose of this case.

This is in effect a suit by a widow for property in which she had a life-interest under a deed of maintenance executed by all the members of the joint family property withheld from her by the manager of the joint family. Whatever were the terms by which the defendant originally came into possession of the jewels, he, whenever he subscribed to Exhibit A, which declared that the jewels were to be the property of the plaintiff for her life time and then promised, as was found in the judgment in the previous case, Original Suit No. 427 of 1919, on the file of the lower Court, to return them to her within ten days, evidently then either having them himself in his possession or being able to obtain them within that period, constituted himself, so long as he held them and did not return them to her, a trustee of them on her behalf. And having regard to his definite promise to return them he

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had them in trust for a specific purpose, while from his promise and the terms of Exhibit A it seems to me clear that the jewels were considered then to be in the possession of the first defendant and, therefore, vested in him. I see no difference in his position from that of a managing member of a joint family, who is withholding from a widow in the family entitled to maintenance property which that widow on the arrangement of the joint family itself is entitled to have in her own possession and which the manager is bound at her request to hand over to her for her lifetime. That would clearly be a case in which the property has become vested in the manager for a specific purpose, as soon as he continued to hold it after the family arrangement came into force, and where the manager would be in the fiduciary relationship from that time and would be bound to hold the property for her as directed by her. In this view, the defendant is, at the very least, a trustee *de son tort* if that expression may be used, and is certainly an express trustee in English Law as laid down in *Soar v. Ashwell* (2). It seems to me further clear, as indicated above, that the property was, on the date of Exhibit A, vested in the defendant for a specific purpose.

I, therefore, agree that section 10 applies in terms and that the appeal must be dismissed with costs.

V. N. V.
Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 507 OF 1918.
November 28, 1922.

Present:—Mr. Justice Broadway and Mr.
Justice Campbell.

NAJIM-UD-DIN AND ANOTHER—PLAINTIFFS
—APPELLANTS
versus

ABDUL HAMID AND OTHERS—
DEFENDANTS—RESPONDENTS.

Custom, proof of—Migration, effect of—Hindu converts to Islam—Law applicable—Presumption—Sheikh converts to Islam in Jullundur Doab—Succession—Daughters v. Sons—Family migrating

from one place to another—Presumption.

Custom is not always logical and Courts should guard against the danger of seeking to extend custom by logical processes, e.g., by analogy. [p. 854, col. 1.]

Bhambul Devi v. Narain Singh, 29 Ind. Cas. 572; 39 P. R. 1915; 103 P. W. R. 1915; 8 P. L. R. 1916, referred to.

Custom is not a matter of inference but of proof and it is the evidence adduced in support of the custom set up that can and must alone be looked at to ascertain whether or not it has been proved to exist. [p. 854, col. 1.]

Proof of custom is not confined to judicial precedents alone and the fact that no contest has taken place in the past may well raise a presumption that the custom was so well recognised that no one thought of contesting it. [p. 850, cols. 1 & 2.]

Hassan v. Jahana 71 P. R. 1904; 96 P. L. R. 1904, referred to.

The presumption in the case of a family descended from Hindu converts to Islam is that they follow Muhammadan Law. The presumption is, however, a rebuttable one. [p. 849, col. 1.]

Mahomed Sidick v. Haji Ahmed, 10 B. I. 5 Ind. Dec. (N. S.) 383, *Bai Baiji v. Bai Santok* 20 B. 53; 10 Ind. Dec. (N. S.) 594, *Mahomed Ibrahim Rowther v. Ibrahim Rowther*, 67 Ind. Cas 115; 45 M. 308; 30 M. L. T. 85; 26 C. W. N. 793; (1922) A. I. R. (P. C.) 59; 43 M. L. J. 69; 36 C. L. J. 64; (1922) M. W. N. 470; 24 Bom. L. R. 944, referred to.

Where a person migrates from one place to another but maintains a close connection with his family and brotherhood at his original home, the presumption is that the members of his family are governed in matters of succession by the same rules as are in force in the original home of the family. [p. 848, col. 2; p. 849, col. 1.]

Parbati Kumari Devi v. Jagadis Chunder Dhabal, 29 C. 433; 29 I. A. 82; 6 C. W. N. 490; 4 Bom. L. R. 365; 8 Sar. P. C. J. 205 (P. C.), followed.

Among the Sheikhs, converts to Islam from Hindu Khatriis, residing in the Jullundur Doab, a custom prevails whereby sons exclude daughters in the succession to their maternal estates, and brothers exclude sisters in the succession to the estate of a childless brother. [p. 855, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated the 29th October 1917.

Lala Mool Chand, R. S. and Lala Devi Das, for the Appellants.

Bakhshi Tek Chand, and Lala Hargopal, for the Respondents.

JUDGMENT.—A pedigree table showing the relationship of the parties and of the important witnesses in the case is attached to this judgment.*

On the 25th June 1913 Najim-ud-Din, son of Munshi Badr-ud-Din, Sheikh of Lahore

*Not material to this report, so not printed. —[Ld.]

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instituted a suit against his brother-in-law, Abdul Hamid, a minor, his daughter, *Musammât* Aziz Fatima, a minor, through the guardianship of Khan Bahadur Dr. Sayad Amir Shah and the said Sayad Amir Shah himself. With him as co-plaintiff was joined one Girdhari Lal, son of Lala Wasdev, as Najm-ud-Din had assigned to the said Girdhari Lal $\frac{1}{4}$ th of his interest in the property in suit. The suit was for possession by partition of $\frac{5}{6}$ ths share of certain moveable and immoveable property described in detail in the plaint and $\frac{1}{4}$ th share of certain ornaments which were also detailed. It was alleged in the plaint that *Musammât* Aziz Begam, wife of Sheikh Aziz Din, and mother of Abdul Hamid, had died at Lahore on the 12th September 1908 leaving her surviving her sons Abdul Hamid and Muhammad Said and a minor daughter *Musammât* Hamida Begam; that Muhammad Said had died on the 13th September 1908 and that the plaintiff Najm-ud-Din had married *Musammât* Hamida Begam. It was further alleged that *Musammât* Aziz Begam had left considerable moveable and immoveable property succession to which had devolved on her issue under Muhammadan Law and that, on the death of Muhammad Said, his property had devolved on his brother and sister under the same law. It was then alleged that on the 11th October 1910 *Musammât* Hamida Begam had died leaving a daughter *Musammât* Aziz Fatima and that the plaintiff Najm-ud-Din, his daughter, *Musammât* Aziz Fatima, and her brother, Abdul Hamid, succeeded to her estate in accordance with the Muhammadan Law of Succession. The plaint then went on to recite that, on the 23rd May 1911, the District Judge of Lahore had refused to recognize the plaintiff Najm-ud-Din and his daughter, *Musammât* Aziz Fatima, as the heirs of *Musammât* Hamida Begam's estate and the plaintiff was thus forced to bring this suit. On behalf of *Musammât* Aziz Fatima the claim was admitted but the suit was contested by the other defendants, it being pleaded that the parties followed custom and not their personal law. After protracted proceedings the suit was finally disposed of on the 29th October 1917, the plaintiff being awarded a decree against Abdul Hamid, defendant, for Rs. 550. The Court below has held that the parties are

governed by custom and not by Muhammadan Law and that by the custom found to have been established *Musammât* Hamida Begam was excluded from succession to her mother's estate by her brothers, Abdul Hamid and Muhammad Said, and to her brother Muhammad Said's estate by Abdul Hamid. The amount decreed was the share claimed by the plaintiff in the ornaments said to have been left by *Musammât* Hamida Begam.

Against this decree the plaintiffs have preferred this appeal, while the respondents have filed cross-objections. On behalf of the appellants we have heard Mr. Mool Chand while Bakhshi Tek Chand has addressed us on behalf of the respondents.

At the outset, it was sought to make Dr. Amir Shah personally liable for the share claimed in the ornaments said to have belonged to *Musammât* Hamida Begam, but Abdul Hamid having assumed all responsibility Dr. Amir Shah has been absolved from liability and Mr. Mool Chand has not asked for any relief against him.

The property in suit originally belonged to M. Aziz Din who belonged to a family of *Pirs* whose home is at Sham Chaurasi in the Hoshiarpur District. It is said that the family was founded by one Abu Nabi who (or whose father) was a convert to Islam from Hinduism, originally being Bahal Khatri by caste. Fazal Elahi, father of M. Aziz Din, was apparently the last member of the family to act as the manager and guardian of the shrine. Instead of following in his father's footsteps M. Aziz Din entered Government service and succeeded in amassing a considerable fortune. He married three wives from each of whom he had issue—sons and daughters. He was on bad terms with the sons of his first two wives and, in order to assure the further comfort of his sons by his third wife, *Musammât* Aziz Begam, he made an arrangement by which he sold and gifted to her, in lieu of her dower of Rs. 20,000 the property the succession to which is now in question. With his other property this suit is not concerned.

It is alleged, and has been found, that the property so sold and gifted to *Musammât* Aziz Begam became her absolute estate. An effort was made on the part of Abdul Hamid to show that the property in suit really belonged to M. Aziz Din and that the

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transaction in favour of *Musammât Aziz Begam* was merely *benami* for the benefit of her two sons. This contention formed the subject of Issue 12 which was decided against Abdul Hamid, and has been again advanced in ground 3 of the cross-objections. There is, however, no material on the record to support this contention which was not seriously pressed. M. Aziz Din's Will, Exhibit D 4, (page 106 of printed book) and a lease, Exhibit P. 40 (page 5 of printed book) were referred to and commented on but there is nothing in these documents to suggest that the transactions were *benami* and the view of the Court below is obviously correct. It must, therefore, be held that *Musammât Aziz Begam* was the absolute owner of the property in suit. She died on the 12th September 1908 leaving her surviving two sons, Abdul Hamid and Muhammad Said, and a daughter *Musammât Hamida Begam*.

On the same, or the following day, *Musammât Hamida Begam* was married to the plaintiff Najm-ud-Din, a *kabin-nama* being executed by him in which her dower was fixed at Rs. 20,000. Muhammad Said died on the 13th September 1908 and Dr. Amir Shah was appointed guardian of Abdul Hamid and *Musammât Hamida Begam* by Court. *Musammât Hamida Begam* gave birth to a daughter, *Musammât Aziz Fatima*, (defendant No. 2) and died on the 11th October 1910.

Najm-ud-Din's claim is that he is entitled under the Muhammadan Law of Succession to a share in (1) the property left by *Musammât Aziz Begam*, (2) the property left by Muhammad Said, and (3) the jewellery left by *Musammât Hamida Begam*. Abdul Hamid's defence is that the parties follow custom and not Muhammadan Law and that by this custom sons exclude daughters from succession to their father's or mother's estate, and brothers exclude sisters from succession to the estate of a brother. He also contends that none of the ornaments in which Najm-ud-Din claims a share belonged to *Musammât Hamida Begam*. This last question was put in issue as Issue No. 3 and was decided against Abdul Hamid. This decision is attacked in grounds Nos. 1 and 2 of the cross-objections. The finding of the Court below on this point is to be

found at page 637 of the printed book from line 21 to line 47.

It will be seen that the conclusions are based on certain admissions made by (1) Dr. Amir Shah as guardian of Abdul Hamid and (2) Elahi Bakhsh, an old man who had been connected with the family for a very long time and was assisting Abdul Hamid. It has also been concluded that, "in all probability" these ornaments had been given to *Musammât Hamida Begam* as her dowry.

This last theory is obviously untenable. At the time of *Musammât Hamida Begam*'s marriage both her parents were dead, her two brothers were minors and there was no one who could have given her anything by way of dowry.

The admissions attributed to Dr. Amir Shah are to be found at pages 28 and 33 of the printed book. At page 28 is an application dated the 12th December 1909, (Exhibit P-31) in which Dr. Amir Shah asks the Court's sanction to the sale of certain ornaments with the exception of "the ornaments valued at Rs. 2,500 approximately, belonging to *Musammât Hamida Begam*, minor daughter of *Musammât Aziz Begam*, in respect whereof a separate application will be submitted." At page 33 is another application dated the 7th October 1909, Exhibit P. 35, in which Dr. Amir Shah points out that the weights given in a former list of the ornaments sold were not accurate, and that "the gold *wala* (ear ring) was, by mistake, entered in the list of the ornaments of *Musammât Hamida Begam*, minor. Therefore, I have penned through the entry in the list in red ink to-day."

At pages 38, 39 and 74 are the lists referred to. Doubtless, these applications contain admissions that *Musammât Hamida Begam* had ornaments to the approximate value of Rs. 2,500, but, as pointed out by the learned Senior Sub-Judge, Dr. Amir Shah's admissions cannot bind Abdul Hamid. Their value is also very considerably reduced, if not entirely taken away, when Dr. Amir Shah's evidence at page 422 is considered.

Admittedly, at the time when these applications were made and the lists prepared, there was no dispute between the minors, and Najm-ud-Din was rendering Dr. Amir Shah assistance in the collection and management of the estate. Dr. Amir

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Shah states in his cross-examination that he was sent for some 5 or 6 hours after *Musamm*at Aziz Begam's death and the property was made over to him on that or the following day in the presence, *inter alia*, of *Musamm*at Hamida Begam and Najm-ud-Din and that neither of them advanced any claim to any of the property or ornaments which were all said to belong to *Musamm*at Aziz Begam, and, further, that it was not until the death of *Musamm*at Hamida Begam that Najm-ud-Din advanced any claims. The applications were brought to him by Najm-ud-Din or the Munshi and were signed by him without his having any knowledge as to who was the heir of the deceased lady. The ornaments were with him for a year or so and given by him to *Musamm*at Hamida Begam to wear. In the circumstances disclosed by this statement, it is clearly impossible to place any value on the admissions in the applications and, still more impossible, to regard them as binding on Abdul Hamid.

There is no admission by Elahi Bakhsh and the mere fact that he wrote the applications and lists cannot be regarded as amounting to one. Further, in his statement at page 417 he distinctly states that he wrote these documents at the instance of Najm-ud-Din and that he had no personal knowledge of the ornaments but thinks they belonged to *Musamm*at Aziz Begam. Eliminating these so called admissions and the mere "probability" of dowry having been bestowed, Mr. Mool Chand has not been able to refer to any other evidence on which the decision of this issue can be supported, and it must, therefore, be held that the plaintiffs have failed to prove that *Musamm*at Hamida Begam died possessed of the ornaments in suit.

The real contention between the parties is, whether the family in matters of succession follows Muhammadan Law or custom. On this point, at first, the following issues were settled:—

"(3) Whether the parties are not governed by Muhammadan Law?

"(4) If issue No. 3 is found in favour of the defendants, whether they are governed by custom which excludes daughters from inheritance in the presence of sons?"

On the 1st December 1914 Mian Yar Muhammad Khan of Jahan Khelau was

appointed a Commissioner to make an enquiry into the question of custom and was asked to enquire into and report on the following questions:—

(1) Was Sheikh Aziz Din, whose property is now in dispute, a permanent resident of Sham Chaurasi in the Hoshiarpur District and had removed to Lahore for temporary purposes only, or was he a permanent resident of Lahore?

(2) Do the Muhammadan Sheikhs of the *Biradri* of Sheikh Aziz Din who was a converted Bahal Khatri follow custom in matters of succession whereby sons exclude daughters entirely?

Parties took no exception to the terms of this reference and an enquiry was made by the Commissioner who furnished his report on the 10th April 1915. Some other evidence was then led by the defendants and the case was set down for arguments, when it was pointed out that the real question, *viz.*, the rule of succession to the property of a mother, had been lost sight of; issue No. 11 was then settled in the following terms:—

"Does a custom prevail among the Sheikhs, who are converts from Hindu Khatri, whereby sons exclude daughters from succession to the property of their mother and brothers exclude sisters from succession to the property of a brother?" (*Vide* order dated 10th November 1915, page 517 of printed book).

Lala Madan Gopal, Pleader of Jullundur, was appointed Commissioner for the purpose of recording evidence and holding an enquiry into this issue. He submitted a report in due course (page 579 of printed book) and witnesses were also examined on interrogatories and in Court, and ultimately issues Nos. 3, 4 and 11 were, as already stated, decided in favour of Abdul Hamid. It was contended in the Court below that inasmuch as M. Aziz Din had left Sham Chaurasi and settled in Lahore any custom that may be found to exist at the former place was not binding on the parties.

This point has not been pressed in this Court and there is ample evidence on the record to show that, though M. Aziz Din came to Lahore, he continued to maintain a close connection with his family and brotherhood at Sham Chaurasi. The presumption, therefore, is that his family is governed

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in matters of succession by the same rules as are in force in its original home : *Parbati Kumari Devi v. Jagadis Chunder Dhabal* (1). Mr. Mool Chand contended, however, that as the family is descended from converts from Hinduism the presumption is that they follow Muhammadan Law, and in this connection reference was made to *Mahomed Sidick v. Haji Ahmed* (2) *Bai Baiji v. Bai Santok* (3) and *Mahomed Ibrahim Rowther v. Ibrahim Rowther* (4). This contention was not contested by Mr. Tek Chand, who drew attention to the fact that these same authorities point out that the presumption is a rebuttable one and indicate that, as often as not, such converts do not follow strict Muhammadan Law in matters of succession and inheritance. He further claimed that in the present case this presumption had been rebutted and that it had been proved that *Sheikh* converts from Hindu Khatri follow the custom set up.

Next, it was urged that this is a non-agricultural family of "*Sahibzadas*" who are in no way bound by any custom that may be found to exist among *Sheikh* converts from other *gots*, of Hindu Khatri, and that, therefore, instances of succession by custom among other sections of *Sheikhs* were irrelevant and should be eliminated. Mr. Tek Chand admitted that the family was not agricultural and, being descended from *Pirs*, came within the *Sahibzada* class, but he contended that in the Jullundur Doab all *Sheikh* converts from Hindu Khatri followed the same custom in matters of succession and, therefore, instances among other *gots* were to the point.

That any such distinction existed among the various '*gots*' does not appear to have been asserted during the trial. Indeed, both sides seem to have recognised that all *Sheikh* converts from Hindu Khatri in the Jullundur Doab irrespective of their various *gots* were governed by the same rules of succession.

D. W. Bashir Ahmad, at page 425, line 51 of printed book, clearly stated that "all the *Sheikhs* have one custom." Again, at page 426, Mr. Tirath Ram for the defendants states that "converted Muhammadans from Hindu Khatri have all the same custom." While at page 427 Najm-ud-Din is recorded as having stated that "all the *Sheikhs* converted from Hindu Khatri resident in towns follow "*Sharah Muhammadi*." Khan Sahib Sheikh Rahim Bakhsh, a Sahgal Sheikh asserted that the *Sheikhs* generally followed custom, pages 430-431. The same may be deduced from the evidence of Sheikh Taj Din (a Sahgal Sheikh) pages 438-447, of Muhammad Kushaish page 452, of Muhammad Bakhsh page 467, of Wazir-ud-Din page 468, and of Chiragh-ud-Din page 475, while the report dated 9th March 1915 (page 463) of Mian Yar Muhammad, Local Commissioner, is to the same effect. No objection was taken to this report and the witnesses' assertion in this connection were not challenged in cross-examination. Again, when the new issue No. 11 was settled, objection was not taken to its terms though the language used clearly showed that no distinction was made so far as the various *gots* were concerned.

In the evidence led subsequent to the settlement of this issue, it is clear that both parties fully realised that the enquiry related to the custom followed by all *Sheikh* converts to Islam from the Khatri caste of the Hindus, page 518, line 10. A number of similar statements were referred to, but it is not necessary to discuss this matter further as there can be no doubt that the distinction now sought to be made by Mr. Mool Chand does not exist and was never thought of by Najm-ud-Din himself who has all along maintained that all *Sheikh* converts to Islam from Hindu Khatri, irrespective of their different '*gots*,' were, in matters of succession, governed by Muhammadan Law. Instances from other *gots* in the Jullundur Doab, therefore, must be held to be relevant to the matter under investigation.

In support of their respective cases the parties have produced a certain number of instances. The Court below has placed these instances under four heads and it will

(1) 29 C. 433; 29 I. A. 82; 6 C. W. N. 490; 4 Bom. L. R. 365; 8 Sar. P. C. J. 205 (P. C.).

(2) 19 B. 1; 5 Ind. Dec. (N. S.) 383.

(3) 20 B. 53; 10 Ind. Dec. (N. S.) 594.

(4) 67 Ind. Cas. 115; 45 M. 308; 30 M. L. T. 85; 26 C. W. N. 793; (1922) A. I. R. (P. C.) 59; 43 M. L. J. 69; 36 C. L. J. 64; (1922) M. W. N. 470; 24 Bom. L. R. 944 (P. C.).

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be convenient to maintain that division. These four heads are:—

I. Instances among *Bahal* and other Kanungo *Sheikhs* where sons succeeded to father's property to the total exclusion of daughters.

II. Instances where daughters were excluded from inheritance to maternal estates.

III. Instances where on death of a childless brother his brothers succeeded excluding sisters.

IV. Other instances opposed to Muhammadan Law.

The defendants have produced instances under all these heads while the plaintiff has confined himself to Heads I, II and III. Each side has filed a list under each head giving the details of the instances relied on and the learned Counsel have examined and criticised each instance minutely and at great length.

Under Head I, the defendants' instances number 46. Of these the first 17 relate to *Bahal*, or *Bahal*, *Sahibzada*, *Sheikhs*, chiefly of Sham Chaurasi and there are instances in the family of M. Aziz Din, while No. 3 is an instance showing that when Najm-ud-Din's father died succession to his estate was according to the custom set up and not according to Muhammadan Law. Instances 18 to 39, both inclusive, relate to *Sahgal Sheikhs*, and the remainder to other *Khatri Sheikhs*. With the exception of instances 41, 43 and 44 all the others are amply proved by the witnesses deposing to them.

Mr. Mool Chand has urged that in many of these instances the property in question was of so small a value that the daughters who had married into wealthy families had not considered it worth while to advance any claim, and that none of these instances, appear to have been before the Courts, the evidence regarding them consisting only of the oral testimony of witnesses. While giving due weight to these contentions, there seems to be no reason to doubt the correctness of the instances. The fact remains that in the cases cited daughters did not inherit any portion of the paternal estate, the sons taking the whole.

Proof of custom is not confined to judicial precedents alone and the fact that no contest has taken place in the past may well raise a presumption that the custom was so well recognized that no one thought

of contesting it. In this connection the remarks quoted by the learned Senior Subordinate Judge from *Hassan v. Jahana* (5) are apposite.

The witnesses produced by the defendants in support of these instances are mostly of good position and unexceptionable character. e.g., Mian Sir Abdul Hamid Khan, and Khan Bahadur Sheikh Rahim Bakhsh, and their position and connection with the brotherhood very considerably enhances the value of the defendants' evidence.

It must be held then that the defendants have proved 43 instances in which sons excluded daughters from succession to their father's property. As against these instances the plaintiff has produced 10 in which he has attempted to show that Muhammadan Law was followed.

As to No. 1, it has not been shown who *Musammam Bhagan* was. Her brother was Haji Shah and the probability is that *Musammam Bhagan* was not a *Sheikh*. The witness who deposes to this instance, Muhammad Amir, admits that he never saw *Musammam Bhagan* and his evidence is hearsay. This instance has not been proved.

As to No. 2, there is the same witness whose knowledge of the facts is obviously hearsay and worthless. He has made contradictory statements, cf. page 575 and page 478, line 21.

As to No. 3, it is to be noted that while the witness asserts that his father's sister succeeded to their father's estate, he admits that his father is alive, yet he has not been produced. Further, it does not appear from the witness's statement that the succession was really according to Muhammadan Law.

The next three instances Nos. 4, 5 and 6 are strictly not relevant as they relate to *Sheikhs* of Lahore who have not been shown to have had any connection with Sham Chaurasi. In instances Nos. 5 and 6 the parties have not even been shown to be converts from *Khatri*s. P. W. Maulvi Abdul Hakim shows that he has been endeavouring to induce the *Sheikhs* of Lahore to adopt Muhammadan Law in matters of succession, but not with any apparent success, while Gulzar Muhammad,

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another witness, admits (page 485 line 14) that in his family the rule of succession has not been in accordance with Muhammadan Law.

Instance No. 7, is deposed to by the aforesaid Maulvi Abdul Hakim, but it is clear that Muhammadan Law was not followed in the case as the witness's wife received nothing till her mother had died.

Instance No. 8, again it has not been shown that the witnesses's aunt received her proper share and that Muhammadan Law was followed has not been proved. The evidence is also clearly hearsay as the witness is deposing to events that took place 60 or 70 years ago while he gives his own age as 30.

Instance No. 9 relates to the succession to the moveable property of one Sheikh Gauram Muhammad. A succession certificate was applied for and granted to the deceased's widow and father. No question of a succession by a daughter or a son arose, and the order granting the certificate (page 40) indicates that there was no son.

Instance No. 10 refers to *Sheikhs* of Kulnaur and is scarcely relevant. No connection with Sham Chaurasi has been shown and the instance is not a case of succession.

It will be seen that in not a single one of these ten instances has it been proved that succession was in accordance with Muhammadan Law and these instances have no weight as against those proved by the defendants. Finally, there is M. Aziz Din's Will (page 106) in paragraph 7 of which he distinctly refers to the devolution of his property according to custom.

It must, therefore, be held that the defendants have proved a custom by which sons exclude daughters from succeeding to their father's estate. That in this family itself this custom prevails seems to be clearly established by the three instances brought forward. The first relates to the succession to the estate of Fazal Elahi, father of Aziz Din, and even if it be held that Fazal Elahi's estate was a small one, the same cannot be said with regard to the estate of Aziz Din himself in the succession to which Aziz Din's sons excluded his daughters.

Under-Head II, (succession to maternal estates). The defendants have produced evidence relating to 24 instances. In criti-

cising them Mr. Mool Chand pointed out that they were only brought forward after the settlement of issue No. 11 and during the enquiry that followed. This matter has been dealt with above. There can be no doubt that during the enquiry by the first Local Commissioner this extremely important part of the case was completely lost sight of by all concerned. The mere fact then that these instances were brought forward during the second enquiry cannot in any way minimise any value they may otherwise possess.

Mr. Mool Chand then contended that in none of the instances had it been shown that the property held by the mother had been acquired by her purchase or gift. The importance of this is not very apparent. The present dispute relates to the succession to property of which *Musammam* Aziz Begam was the absolute owner and the instances relate to the succession to estates held by women absolutely.

It was next contended that there is only oral evidence to support these instances. This matter has been dealt with above. If the oral evidence is reliable there is no reason why a custom cannot be based on it. Instances Nos. 1, 2, 3, 4 and 22 relate to *Bahal Sahibzadas* and are obviously pertinent. The first shows that Aziz Din succeeded to the property of his mother, while the second refers to the estate of Najm-ud-Din's own mother, and shows that the daughters took nothing. This could have been explained or refuted by Najm-ud-Din but has not been. In the fourth instance the property (ornaments) were worth from Rs. 1,000 to Rs. 1,200, not an insignificant amount. In the 22nd instance, again, the property was a house. There is no reason why the evidence of the witnesses who depose to these instances should be disbelieved.

Instance No. 8 is a case of *Bahal Khatri*s of Khanpur which is only a few miles from Sham Chaurasi. The witnesses to this instance succeeded to the ornaments of their mother to the exclusion of their sisters, and no reason has been shown to discredit them.

Instances Nos. 5, 6 and 7 are deposed to by Wazir-ud-Din, Petitioner-Writer of Hoshiarpur, and relates to events in his own family. He is a *Silli Sheikh* but belongs to the same brotherhood as *Bahals* and *Sahgal*

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Sheikhs. His evidence appears reliable. Instance No. 9 relates to *Sohni Sheikhs*. The estate was small (about Rs. 40) but there is no reason to doubt the correctness of the instance.

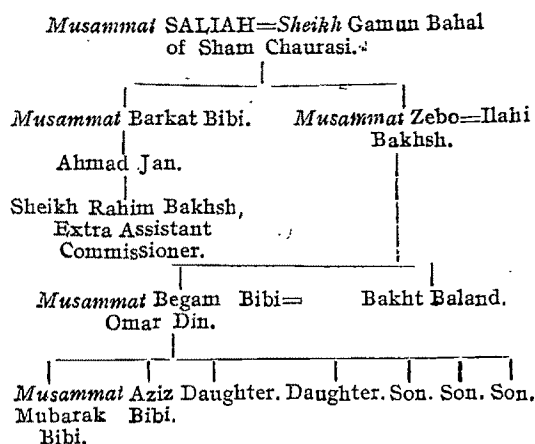
The evidence relating to instances Nos. 10 and 11 is vague and they cannot be considered proved.

Instances Nos. 12 to 18 relate to *Sakgal Sheikhs*. Of these, No. 12 is important being an instance of Najm-ud-Din's own family. It is an instance of the succession to one Miran Bibi who is the plaintiff's maternal grand-mother, and has been proved. No. 13 is an instance deposed to by Sheikh Faiz Bakhsh, a retired Extra Assistant Commissioner, and shows that he succeeded to his brother's property. As, however, his sister predeceased his mother this instance is not in point. No. 14 is an instance where the property left by *Musammat Karam Bibi* alias Karmo was of very considerable value. It all devolved on her son to the exclusion of her daughters. The evidence with regard to this is particularly good. Khan Bahadur Sir Abdul Hamid Khan being one of the witnesses regarding it (page 607). The evidence relating to instances Nos. 15, 16 and 17 is also good. Instance No. 18 must, however, be eliminated as there the daughters predeceased the mother and the question of her succession did not arise. No 19 is an instance among *Ghai Sheikhs*. It has, however, been proved and the witness Hafiz Rahim Bakhsh states that he has relations with *Bahal Sheikhs*.

No. 20 does not assist, as though it is an instance in Aziz Din's family the evidence indicates that the lady in question gifted her property to her son and the question of succession did not properly arise. Instance No. 21 is good and has been satisfactorily proved. No. 23, however, must be eliminated as it does not appear to relate to *Sheikhs* of the same brotherhood as *Bahals* and *Sakgals*. Instance No. 24 relates to the devolution of the property of the widow of Sheikh Nanak Bakhsh, Extra Assistant Commissioner. Khan Bahadur Sir Abdul Hamid Khan was a son of one Sheikh Nanak Bakhsh and states that his mother inherited nothing either from her mother or father.

From the above it will be seen that out of the 24 instances relied on by the defendants

Nos. 10, 11, 13, 18, 20 and 23 cannot be accepted leaving 18 instances that can be regarded as proved. In most cases the facts were well known to the plaintiff, for it has to be borne in mind that he is closely related to Aziz Din's family apart from his having married *Musammat* Hamida Begam and any mis-statements by the witnesses could have been brought out at once. He has produced 4 instances of alleged succession under Muhammadan Law. The evidence as to Nos. 1 and 2 shows that the distribution of the mother's estate was *not* in accordance with Muhammadan Law, while No. 4 is not a case of a daughter's succession. Instance No. 3 needs more detailed consideration and to illustrate it the following pedigree-table has been put forward:—



Aziz Bibi married *Sheikh* Rahim Bakhsh, Extra Assistant Commissioner. It is said that *Musammat* Zebo had two houses one of which she got from her mother, *Musammat* Saliah, and the other from her husband. On her death her son, Bakht Baland, succeeded to the house his mother had obtained from her husband, while the daughter, *Musammat* Begam Bibi, took the other. This, it is alleged, was a division according to Muhammadan Law. This is deposed to by Muhammad Amir (page 574) who states that he and his brotherhood follow *Shara*. At the same time, at page 117 is to be found the copy of a plaint in which it is distinctly alleged that the then plaintiffs of whom this witness is one, followed *Zemin-dari* custom (see paragraph 7). There

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is nothing to show what the values of the two houses were so that it is impossible to say that they devolved according to Muhammadan Law. It is also possible, as urged by Mr. Tek Chand, that *Musammāt* Zebo made a gift of the house to her daughter and that it was not a case of succession at all. In any event, it cannot be said that it has been proved that succession in this instance was in accordance with Muhammadan Law.

The result is that, while on the plaintiff's side there is no proved instance of succession by a daughter to a maternal estate among these *Sheikhs*, the defendants have proved 18 instances of succession to such estates according to the custom set up. Having regard to all the circumstances, therefore, it must be held that the defendants have succeeded in proving that, among the *Sheikhs* to which their family belongs, a custom exists by which sons exclude daughters from succession to their maternal estates.

Under Head III, (exclusion by brothers of sisters from succession to a childless brother's estate) the defendants have put forward 7 instances. Of these the 1st and 2nd relate to *Bahal Sheikhs* of Sham Chaurasi itself, but No. 1 must be eliminated as in this instance there was only one sister who predeceased the brother whose estate was in question. Instance No. 2 is deposed to by one Nur-ud-Din who states that, on the death of his father he (witness) had one brother and one sister. The sister was excluded by the two brothers and when witness's brother died he succeeded to the estate excluding the sister. This witness is the father-in-law of Najm-ud-Din's sister so that it may safely be assumed that this is a true instance. In instance No. 7 one Miran Bakhsh, a *Sahgal Sheikh* died without issue leaving a brother and a sister. The brother succeeded to the exclusion of the sister. The evidence in support of this has in no way been discredited. Instances Nos. 4, 5 and 6 also relate to *Sahgal Sheikhs* and the evidence in support of them is good. Instance No. 3 is the case of *Silli Sheikhs* and Wazir-ud-Din who deposes to it claims that the *Sillis* belong to the brotherhood of *Bahal* and *Sahgal Sheikhs*. There is no reason to disbelieve the testimony of this witness who comes from Hoshiarpur.

On the other side two instances have been put forward. As to the first, P. W. *Sheikh* Mulk Shah states that his paternal uncle died leaving lands, house and cash. A sister of his, *Musammāt* Imam Bibi, succeeded to the cash and house, while the brother took the land. The brother, Nur-ud-Din, however, states that the house had been gifted to her by their father (page 473, line 20). Further comment is needless.

In the second instance the succession was to the estate of *Sheikh* Muhammad Ishaq. As, however, he only left him surviving a daughter and a sister it is obvious that there were no males such as a son or a brother to put forward any rival claims and this is not in any way in point.

Here, again, while the plaintiff has failed to prove a single instance in support of succession according to Muhammadan Law the defendants have proved six instances in which, when it was the case of succession to a childless *Sheikh* of the tribes in question, sisters have been excluded by brothers. It must be held that the defendants have proved that by custom in the tribe to which their family belongs brothers exclude sisters from succession to a childless brother's estate.

Under Head IV, the defendants have produced a number of instances relating to succession by collaterals according to custom and against Muhammadan Law. Mr. Mool Chand's objection to these instances was that they were irrelevant to the points at issue but he did not seriously contest their existence and an examination of the evidence in support of the first 21 leaves no doubt that they have been proved. No. 22 is not an instance but a reference to the evidence of a witness for the plaintiffs, one Muhammad Said, a *Sheikh* of Hoshiarpur, shows that no daughter has ever filed a suit to claim a share.

On the question of relevancy it was contended that instances showing that these particular *Sheikhs* had departed from strict Muhammadan Law in other matters could not be regarded as raising any presumption that Muhammadan Law had been abrogated by custom in matters of succession, and this contention was still further extended so as to urge the exclusion from consideration of instances coming under Head I (Succession to Paternal Estates). It would seem, how-

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ever, that these instances are relevant and of importance, *not to prove the special custom set up*, but to show that, in spite of the fact that the parties are converts to Islam from Hindu *Khatri*s, strict Muhammadan Law has not been invariably followed and thus to weaken the presumption referred to in *Mahomed Sidick v. Haji Ahmed* (2), *Bai Baiji v. Bai Santok* (3) and *Mahomed Ibrahim Rowther v. Ibrahim Rowther* (4).

It is doubtless true, as pointed out in *Bhambul Devi v. Narain Singh* (6), that custom is not always logical and that the Courts should guard against the danger of seeking to extend custom by logical processes, *e.g.*, by analogy. It would, therefore, be erroneous to say that *because* these *Sheikhs* in the Jullundur Doab follow custom in certain matters including succession to paternal estate, therefore, they must also follow custom when the succession is to a mother or a childless brother, but it is a little difficult to deny that when such departures from Muhammadan Law have been established the task of the defendants is not rendered more easy in establishing the custom now sought to be proved.

Custom is not a matter of inference but of proof, and it is the evidence adduced in support of the custom set up that can and must alone be looked to to ascertain whether or not it has been proved to exist. In the present case, therefore, the instances adduced by the defendant under Heads I and IV are of value and relevant only so far as to show that these particular *Sheikhs* in the Jullundur Doab have not always followed strict Muhammadan Law in other matters.

It is, therefore, not necessary to discuss the following authorities cited at the Bar:—*Maula Bakhsh v. Muhammad Bakhsh* (7), *Daya Ram v. Sohail Singh* (8), *Rulia v. Sultani* (9), *Ram Lal v. Gopi* (10),

Rahim Bakhsh v. Budhan (11), *Fatima Bibi v. Shah Nawaz* (12), *Dhannun v. Bhagwani* (13), *Faqir Muhammad v. Miran Bakhsh* (14), *Bakht Bano v. Chiragh Shah* (15), *Mehtab-ul-din v. Abdullah* (16), *Ganesh Devi v. Darshan Singh* (17), *Muhammad Islam v. Hari Lal* (18), *Haji Bakhsh v. Rahim Bakhsh* (19), *Mahan Kaur v. Sundar Das* (20), *Muzaffur Ali v. Zainab* (21), *Rahim Bakhsh v. Umar Din* (22) and *Nur Muhammad v. Khuda Bakhsh* (23). Suffice it to say that, they have been fully considered and the principles enunciated in them have been observed and given full weight.

Next, Mr. Mool Chand laid stress on two matters that he contended told strongly in favour of Muhammadan Law being the rule of succession in this family. The first was that, on the death of Aziz Din, *Musammam Aziz Begam* applied to be made guardian of her three minor children stating that property to the value of Rs. 18,000 belonged to them. A list of the property is, however, not on the record and there is nothing in the application that can be treated as an admission, either that *Musammam Hamida Begam* had a definite share under Muhammadan Law, or that the parties, in matters of succession, followed that Law. Further, it has to be noted that the Will of Aziz Din is repeatedly referred to and in that Will Aziz Din definitely refers to a devolution of his estate according to custom (page 108). The second was that

(6) 29 Ind. Cas. 572; 39 P. R. 1915; 103 P. W. R. 1915; 8 P. L. R. 1916.

(7) 54 P. R. 1906; 74 P. L. R. 1907; 87 P. W. R. 1906.

(8) 110 P. R. 1906; 31 P. L. R. 1907; 59 P. W. R. 1907 (F. B.).

(9) 20 Ind. Cas. 532; 17 P. R. 1914; 193 P. W. R. 1913; 336 P. L. R. 1913.

(10) 25 Ind. Cas. 710; 24 P. R. 1914; 58 P. W. R. 1914; 196 P. L. R. 1914.

(11) 22 Ind. Cas. 712; 74 P. R. 1914; 92 P. L. R. 1914; 141 P. W. R. 1914.

(12) 60 Ind. Cas. 509; 2 L. 98; 3 L. L. J. 152.

(13) 67 Ind. Cas. 555.

(14) 43 P. R. 1908; 90 P. W. R. 1908; 188 P. L. R. 1908.

(15) 45 P. R. 1908; 93 P. W. R. 1908.

(16) 140 P. R. 1908; 68 P. W. R. 1907.

(17) 56 Ind. Cas. 478; 2 L. L. J. 377; 2 U. P. L. R. (L.) 100.

(18) 21 Ind. Cas. 944; 7 P. W. R. 1914; 16 P. L. R. 1914.

(19) 14 Ind. Cas. 752; 113 P. R. 1912; 162 P. W. R. 1912; 238 P. L. R. 1912.

(20) 3 Ind. Cas. 483; 40 P. R. 1909; 54 P. W. R. 1909; 43 P. L. R. 1909.

(21) 7 Ind. Cas. 348; 58 P. R. 1910; 81 P. W. R. 1910; 107 P. L. R. 1910.

(22) 29 Ind. Cas. 382; 49 P. R. 1915; 111 P. W. R. 1915; 243 P. L. R. 1915.

(23) 34 Ind. Cas. 135; 125 P. R. 1916; 93 P. W. R. 1916; 49 P. L. R. 1916.

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Muhammad Hafiz, son of Aziz Din, sued *Musammat* Aziz Begam and the other members of the family for a share in the estate of Aziz Din. This suit was compromised, after the death of *Musammat* Aziz Begam, by Dr. Amir Shah, a stranger to the family who had admitted that he had no personal knowledge of the rule of succession followed by these people. It is also significant that Muhammad Hafiz says that he does not know whether the tribe to which he belongs is governed by Muhammadan Law or custom (page 479). Both these matters, therefore, afford the plaintiff no assistance. Similarly, the application of Ghulam Rasul, a brother of *Musammat* Aziz Begam, to be appointed guardian of the minors, Abdul Hamid and *Musammat* Hamida Begam, on the death of *Musammat* Aziz Begam can carry no weight. Admittedly, it contained a false allegation that *Musammat* Hamida Begam had been married to one *Sheikh* Muhammad and not Najm-ud-Din.

Mr. Mool Chand then urged that the evidence of the plaintiffs' witnesses was of considerable weight as a number of them were from Sham Chaurasi and four of them were members of a 'Committee' that was managing the shrine at that place. The existence of such a Committee has, however, not been proved and, as pointed out by Mr. Tek Chand, not one of these four has been able to quote a single instance of succession under Muhammadan Law.

On the other hand, the witnesses for the defendant are, many of them, men of good position and Mr. Tek Chand pointed out that no fewer than 19 of them were related to the families of *Musammat* Aziz Begam or Aziz Din.

After a careful and anxious examination and consideration of the evidence on the record, and of the elaborate arguments of the learned Advocates, we are of opinion, that the defendant, Abdul Hamid, has discharged the *onus* that was on him and has proved that among the *Sheikh* converts to Islam from Hindu *khatri*s, residing in the Jullundur Doab, that is to say, in the Districts of Jullundur and Hoshiarpur, a custom prevails whereby sons exclude daughters in the succession to their maternal estates, and brothers exclude sisters in the succession to the estate of a childless brother.

We, therefore, dismiss the appeal and partly accepting the cross-objections dismiss the plaintiffs' suit with costs throughout.

Z. K.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 84-B OF 1922.

November 30, 1922.

Present:—Mr. Prideaux, A. J. C.*Musammat* LAXMIBAI—APPLICANT*versus*

DEVI AND ANOTHER—NON-APPLICANTS.

Evidence Act (I of 1872), s. 116—*Landlord and tenant*—*Tenant not let into possession*—*Landlord's title, denial of*—*Lease from co-sharer*—*Lessee when can deny lessor's title*.

The rule that no tenant can deny his landlord's title only applies where the tenant has been let into possession by such landlord and not where the tenant has been in possession previously.

Yerragunilla Seshachartu v. Mukkumalla Chiniah, 25 Ind. Cas. 721, relied on.

The rule that a person who takes a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment is also subject to the abovementioned qualification.

Jamsedji Sorabji v. Lakshmiram Rajaram, 13 B. 323; 7 Ind. Dec. (N. S.) 214, relied on.

LAXMIBAI. V. DEVI.

Revision of an order of the Munsif No. III, Akola, dated the 21st March 1922.

Messrs. M. Gupta and A. V. Khare, for the Applicant.

Mr. G. G. Hatvalne, for Non-Applicant No. 1.

Mr. G. R. Deo, for Non-Applicant No. 2.

ORDER.—This order also disposes of Civil Revision No. 85-B of 1922. The applicant in both cases is the same though the non-applicants are different. But the point to be decided, namely, whether one Baliram who has at the request of the defendant been brought on record as a defendant has been rightly brought on it common to both cases. Both applications for revision were heard together. Both suits are based on leases. In Civil Revision No. 84-B, the lease is dated the 11th January 1921, while in the sister case, No. 85-B the lease is dated the 15th January 1921.

It has been argued here that no tenant can, during the continuance of his tenancy, be permitted to deny that the landlord of such tenant had at the beginning of his tenancy no title to the immovable property. Baliram has been brought on record in each case on written applications stating that before the execution of the rent-notes in favour of the plaintiff defendants used to pay half rent to the plaintiff and half to one Krishnaji. This Krishnaji had mortgaged his half share of the site, namely, half of Survey No. 5, with one Baliram Pandoba and this was foreclosed in Civil Suit No. 78 of 1920 on the file of the Third Sub-Judge, Akola. Baliram taking possession of the half share on or about the 2nd July 1921, and Baliram had given notice of his rights to the defendants but subsequently allowed them to occupy the site. It is, therefore, necessary to make Baliram a party to the suit.

Though, under section 116 of the Evidence Act, no tenant can deny his landlord's title existing at the commencement of the lease, the rule only applies where the tenant has been let into possession by such landlord. It has been held by the Madras High Court in *Yerragunlla Seshachari v. Mukkumalla Chinniah* (1) that section

116 of the Evidence Act applies only to cases where the tenant has been put in possession by the landlord and not to cases where he has been in possession previously. It is not denied that in the present case though the defendants executed the rent-notes in favour of the plaintiff, yet they had been in possession of the sites previously. I am aware of the case of *Jamsedji Sorabji v. Lakshmiram Rajaram* (2) which lays down that, if a person takes a lease from one of several co-sharers he cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment. But this also, I think is bound by the rule of the landlord's giving possession under the tenancy. If through ignorance or mistake a tenant has executed a rent-note and has not been put in possession by the lessor it seems to me he can dispute the lessor's title.

In the present case it seems that there is dispute as to whether these sites belonged to the plaintiff whose husband is said to have got them by gift from one Aochit, the brother of Krishnaji the mortgagor to Baliram, or whether they had passed to Baliram under his foreclosure decree, and it seems to me that to prevent fresh suits the matter can be decided by making Baliram a party to the two suits here. I, therefore, decline to interfere with the lower Court's order and dismiss the two applications with costs. There will be but one set of costs. I fix Pleader's fee at Rs. 15.

N. K.

Applications dismissed.

(2) 13 B. 323; 7 Ind. Dec. (N. S.) 214.

(1) 25 Ind. Cas. 721.

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MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 420 OF 1921.

September 26, 1922.

Present :—Mr. Justice Spencer and

Mr. Justice Venkatasubba Rao.

KACHINAMTHODI PARAMBIL SAHARABI—DEFENDANT NO. 1—APPELLANT

versus

KACHINAMTHODI PUTHIA PURAYI.

SEEMAMUTTI'S SON ALI AND OTHERS—

PLAINTIFFS AND DEFENDANTS NOS. 2 TO 7

RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 11—Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Claim proceedings—Order directing notification of claim, effect of—Title suit—Limitation—Procedure.

Where a claim is preferred to property attached in execution of a decree it is the duty of the Executing Court to investigate the claim, and if it is satisfied that the claimant has made out his case to release the property from attachment, or if it arrives at a decision against the claimant, to disallow the claim. An order merely directing the notification of the claim to intending purchasers without investigating it is an improper order. [p. 859, col. 2.]

Machi Raju Venkataratnam v. Vadrevu Ranganayakamma, 48 Ind. Cas. 270; 41 M. 985; 35 M. L. J. 335; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292 (F. B.), followed.

Every order which is not in favour of a claimant is not necessarily an order against him. [p. 859, col. 1.]

Lakshmi Ammal v. Kadiresan Chettiar, 63 Ind. Cas. 431; 41 M. L. J. 198; 14 L. W. 12; (1921) M. W. N. 495 and *Ayya Pattar v. Athupurath Manakkal*, 52 Ind. Cas. 938; (1919) M. W. N. 805, followed.

The combined effect of O. XXI, r. 63 of the Civil Procedure Code and Art. 11 of Schedule I to the Limitation Act is to cut down the usual period for a title suit, which in many instances is twelve years, to a year when the case falls within the terms of those provisions. The result is that, if a person whose property is attached takes no steps under the summary procedure available to him to get his right established, he has the usual period of limitation, but if he prefers a claim and an order is made against him he is bound to file a regular suit within a year of the order. Therefore, unless an order is clearly against a claimant as contemplated by those provisions, the Court will not be justified in placing a forced construction upon it for the purpose of deciding that it is such an order. [p. 858, col. 2.]

A claim was preferred against the attachment of certain properties in execution of a decree on the ground that the judgment-debtor had only a share in them and that the claimant was entitled to a moiety thereof, and the order of the Court was Whatever right the defendant has will pass by the sale. The claim put forward in the petition will be noted in the sale proclamation.

Held, that the order did not negative the claimant's right to a share and did not amount to an order against him under r. 63 of O. XXI of the Civil Procedure Code and that a suit for the recovery of his moiety against the decree-holder auction-purchaser more than a year after the date of the order was not governed by Art. 11 of Schedule I to the Limitation Act and was not, therefore, barred by limitation. [p. 858, col. 1.]

Lakshmi Ammal v. Kadiresan Chettiar, 63 Ind. Cas. 431; 41 M. L. J. 198; 14 L. W. 12; (1921) M. W. N. 495, *Ayya Pattar v. Athupurath Manakkal* 52 Ind. Cas. 938; (1919) M. W. N. 805, distinguished.

Appeal against an order of the Court of the Subordinate Judge, South Malabar, at Calicut, in Appeal No. 83 of 1921, preferred against the decree of the Court of the Principal District Munsif, Calicut, in Original Suit No. 529 of 1919.

Mr. T. A. Ananta Aiyar, for the Appellant.

Mr. K. Kuttikrishna Menon, for the Respondent.

JUDGMENT.

Spencer, J.—The District Munsif's order of 17th March 1917 on the claim petition was an improper one as it followed the practice condemned in *Machi Raju Venkataratnam v. Vadrevu Ranganayakamma* (1) of notifying claims to intending bidders without investigating them.

But whatever was the order which should have been passed on the claim, I am satisfied that the order that was actually passed was not an order against the claimant within the meaning of r. 63 of O. XXI (of the Code of Civil Procedure), as it did not negative his claim to an undefined share in the property attached. The claimant's petition was not dismissed. The facts of this case are similar to those in *Lakshmi Ammal v. Kadiresan Chettiar* (2) and *Ayya Pattar v. Athupurath Manakkal* (3) and in the course of those decisions it was pointed out that every order which is not in favour of a

(1) 48 Ind. Cas. 270; 41 M. 985; 35 M. L. J. 335; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292 (F. B.).

(2) 63 Ind. Cas. 431; 41 M. L. J. 198; 14 L. W. 12; (1921) M. W. N. 495.

(3) 52 Ind. Cas. 938; (1919) M. W. N. 805.

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claimant is not necessarily an order against him.

In this view, the lower Appellate Court was right in deciding that r. 63 of O. XXI, Civil Procedure Code, does not bar the present suit. As my learned brother agrees with me, the Civil Miscellaneous Second Appeal is dismissed with costs.

Venkatasubba Rao, J.—The question to be decided is: "Is the suit barred by Art. 11 of the Limitation Act?" The suit is for partition. The suit property had been attached in execution of a decree obtained by the first defendant against a certain person and the plaintiff then preferred a claim stating that the judgment-debtor had only a share in the property and that he himself was entitled to a moiety thereof. On the claim petition the Court made the following order: "The petitioner's contention is that the defendant has only a share in the property and that the other shares belong to the petitioner and some others. Whatever right the defendant has will pass by the sale. The petition does not require any further investigation. The claim put forward by the petitioner will be noted in the sale proclamation." The sale was held and the first defendant became the purchaser. The plaintiff seeks in the present suit to recover his half share of the property from the first defendant. It is contended on behalf of the latter that the order referred to amounts to an order against the plaintiff under r. 63 of O. XXI of the Civil Procedure Code; and that the suit having been filed long after the lapse of a year from the date of the order the suit is barred under Art. 11 of the Limitation Act. The Subordinate Judge overruled this contention.

It seems to me that the Subordinate Judge's decision is correct. In the first place it is necessary to observe that in making the order referred to the Court did not act in accordance with the provisions of the Civil Procedure Code. It was the duty of the Court to have investigated the claim, and if it was satisfied that the claimant made out his case, to have released the property from attachment, or if it arrived at a decision against the claimant, to have disallowed the claim. This course was obviously not followed by the District Munsif who made the order in question. At the same time, it

must be noted that an order to sell the property did not necessarily mean that the claim of the plaintiff was found against because in any event the judgment-debtor was entitled to share in the property. The District Munsif, moreover, expressly stated in his order that by the sale only the right of the defendant would pass. No doubt this is a truism. But we are not concerned with the propriety of the course followed by the District Munsif. The question is not, whether the District Munsif's order is legally sustainable, but whether the order that was made was an order against the plaintiff under r. 63 and under Art. 11. It is clear that the District Munsif did not intend to make an order against the plaintiff, and he in effect states that as by the sale, only the right of the defendant will pass and as the petitioner has not claimed the whole of the property, the petition does not require any further investigation. I cannot construe this order as an order against the plaintiff. The Courts have repeatedly condemned the practice followed in this instance by the District Munsif. But I fail to understand why the plaintiff should suffer on account of the erroneous order made on the claim petition. The combined effect of O. XXI, r. 63, Civil Procedure Code and Art. 11 of the Limitation Act is to cut down the usual period of limitation which, in many instances, is 12 years to a year when the case falls within the terms of the said sections. The result is, if a person whose property is attached takes no steps under the summary procedure available to him to get his right established, he has the usual period of limitation. But if he prefers a claim and an order is made against him he is bound to file a regular suit within a year of the order. In this state of things, when it is not clearly an order against the claimant as is contemplated by the provisions referred to above, I do not think the Courts will be justified in placing a forced construction upon the order for the purpose of deciding that it is an order against him though it is not, on the face of it, and though it was not intended to be, such an order.

The appellant strongly relied upon the decision of the Full Bench in *Machi Raju Venkataratnam v. Vedreva Ranganayakamma* (1). It was held in it that an order

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refusing to investigate a claim on the ground that there was delay in filing it is an order passed "against" the claimant. The order to be construed in that case was in the following terms: "The allegations of the *zemindarini* will be notified to the bidders with the remark that the *zemindarini* did not take steps for her claim being enquired into during the last 10 months." Rule 58, O. XXI, Civil Procedure Code, enacts that no investigation shall be made "when the Court considers that the claim or objection was designed by or unnecessarily delayed." But, however, the Full Bench decided that the order made was in effect an order rejecting the claim. Sir John Wallis, C. J., seems, to think that the claimant having been at fault in preferring his claim beyond the time allowed by the law, there was nothing unfair in requiring him to proceed to assert his title by suit within the shorter period of limitation prescribed. He observes at the close of his judgment: "Though the order only was that the allegations of the *Zemindarini* would be notified to bidders, we think it amounted, and was understood to amount, to a rejection of the claim on the ground that it was filed too late." We are bound by the decision of the Full Bench. But I cannot regard it as an authority which bears on this case. In *Lakshmi Ammal v. Kadiresan Chettiar* (2) the following order which was made on a claim, "Sale stopped. The claim cannot be investigated by this Court. The petition dismissed" had to be construed, and it was held that the order did not negative the right set up by the claimant. Mr. Justice Spencer basis his decision on this ground and Mr. Justice Ramesam says: "I agree with my learned brother in holding that Exhibit VII cannot be taken to be an order negating the claimant's right, and that learned Judge clearly says that that is the ground of his decision. In *Ayya Pattar v. Attupurath Manakkal* (3) a Bench of this Court held that where a person objected to the attachment of property and filed a petition asking that his objection should be recorded without asking for an investigation of his claim, and the Court recorded his objection, such recording did not amount to an order

against the objector under r. 63 of O. XXI. Al dul Rahim, J., refers to the decision of the Full Bench and observes: "But it would be going too far to say that the rule applies to a case where a person, while putting in a petition setting out his objections, does not ask the Court to investigate his claim." These two cases support the view which I am inclined to take.

The learned Vakil for the appellant has referred us to the decision in Civil Miscellaneous Appeal No. 423 of 1921 of Mr. Justice Krishnan and myself. In that case a claim petition was filed and an order was passed in these terms: "withdrawn, closed." We decided that the word "closed" was tantamount to "dismissed" and we held that the point was concluded by the authority of the Full Bench ruling. The case was indistinguishable from the decision of the Full Bench and I, therefore, arrived at that decision. I may refer to the following passage in the judgment:—"The question whether an order is against the claimant or not does not depend on whether the Court had investigated the claim or not. It really depends upon the effect of the order, and if in substance and in effect it negatives the claimant's claim and refuses to recognise it, that is an order which falls under Art. 11 of the Limitation Act." I do not think this is a decision which helps the appellant. I am clearly of the opinion that the order in question is not in effect and in substance one negating the plaintiff's claim. I do not think there is any justification for extending the rule laid down in *Machi Raju Venkataratnam v. Vedrevu Ranganayakamma* (1) to cases not really covered by it. For these reasons, I entirely agree with the judgment delivered by my learned brother.

V. N. V.

Z. K.

Appeal dismissed.

GRANT V. SURAJ MAL.

PATNA HIGH COURT.APPEAL FROM ORIGINAL ORDER No. 133
OF 1921.

November 30, 1922.

Present.—Mr. Justice Das and
Mr. Justice Adami.WILLIAM MALING GRANT AND OTHERS
DECREE-HOLDERS—APPELLANTS

versus

SURAJ MAL MARWARI AND OTHERS

JUDGMENT-DEBTORS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 47,
O. XXI, r. 66—Execution of decree—Sale pro-
clamation—Order directing sale free from incum-
brance, nature of—Appeal.*

Certain incumbrances were notified in a sale proclamation under O. XXI, r. 66 of the Civil Procedure Code at the instance of the decree-holder. The judgment-debtor subsequently made an application objecting that the property was not liable to be sold subject to those incumbrances. The Executing Court gave effect to the objection:

Held, that the order of the Executing Court was made under section 47 of the Civil Procedure Code and not under r. 66 of O. XXI of the Code and was appealable.

Appeal from an order of the Subordinate Judge of Bhagalpur, dated the 30th April 1921.

Messrs. Sultan Ahmad, S. M. Mullick and Nirod Ch. Roy and S. Ch. Roy, for the Appellants.

Messrs. C. C. Das and Jagarnath Pd. for the Respondents.

JUDGMENT.

Das, J.—This is an appeal on behalf of the decree-holders against an order of the learned Subordinate Judge of Bhagalpur, dated the 30th April 1921 in a proceeding for execution of a decree.

It appears that the decree-holders wanted certain incumbrances to be notified in the decree. They made their application to that effect to the Court under the provisions of O. XXI, r. 66 of the Code and sale proclamation as finally drawn up by the Court did notify those incumbrances. Thereafter, the respondents who were the petitioners in the Court below made an application which is to be found at page 1 of the paper-book. That petition is as follows:—

"These petitioners have come to know today that the decree-holders have cunningly shown certain incumbrances on the properties entered in the sale proclamation. This is contrary to the real state of things. A

a matter of fact, the decree under execution is on the basis of a bond that was executed before the debts referred to in the sale proclamation were contracted and if the said properties be sold subject to the liabilities mentioned in the sale proclamation, they won't fetch adequate price. This will cause immense loss to the judgment-debtors. The decree-holders have no right to cause the properties to be sold subject to the said liabilities which are contrary to the real state of things, nor is the decree under execution of such nature. The mortgaged properties cannot, according to law, be sold subject to those incumbrances."

This petition was presented by the judgment-debtors under the provisions of section 47 of the Code and they invited the Court to hold in substance that the properties could not be sold subject to the incumbrances as notified in the sale proclamation. The learned Subordinate Judge who dealt with this application thought that as the decree-holders did not produce before him the mortgage-bonds or the *pattas* which according to the decree-holders constituted the incumbrances on the land the properties could not be sold subject to these incumbrances. In the result he allowed the objection of the judgment-debtors.

It was argued by Mr. Das on behalf of the respondents judgment-debtors that the order of the learned Subordinate Judge being an order in a proceeding under O. XXI, r. 66 of the Code is not an appealable order. In my view the contention does not deserve any success; the proceedings under O. XXI, r. 66 were concluded long before the petition, upon which the order of the 30th of April 1921 was passed, was presented. The application of the judgment-debtors did not raise any question as to the terms on which the sale proclamation should be settled, it raised the question whether the Court could sell the properties subject to the incumbrances. In other words, the question raised by the judgment-debtors was a question relating to the execution of the decree. In my opinion the order of the learned Subordinate Judge was an order under section 47 of the Code and is accordingly appealable.

On the merits, there is nothing at all to be said in favour of the view of the learned Subordinate Judge. The sale proclamation

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did notify those incumbrances. There is no dispute between the parties that these incumbrances do exist, in fact the assertion in the petition that the debts referred to in the sale-proclamation were contracted after the date of the decree is undoubtedly incorrect as the facts show. The learned Subordinate Judge could not in those proceedings go behind the sale proclamation which was settled upon notice to the judgment-debtors.

The order of the Subordinate Judge must accordingly be set aside.

The appellants decree-holders are entitled to the costs of this appeal.

Adami, J.—I agree.

Z. K.

Decree set aside.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 871 OF 1921.

September 27, 1922.

Present:—Mr. Justice Spencer and

Mr. Justice Venkatasubba Rao.

SADAGOPA AIYENGAR—PETITIONER

versus

SELLAMMAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 2, 16—Execution of decree—Transfer of decree to one of several judgment-debtors, effect of—Adjustment.

The spirit of the second proviso to r. 16 of O. XXI of the Civil Procedure Code is that one judgment-debtor should not, by acquiring the interest of a decree-holder, be allowed to put himself in a position in which he can force the other judgment-debtors to pay the whole of the decree amount when his proper remedy is a suit for contribution, and for this purpose it does not signify whether the assignee decree-holder is one against whom a personal money-decree was passed or one who has been directed to pay the decree amount out of the proceeds of the property in his hands. [p. 861, col. 2.]

Panachand v. Sundrabai, 31 B. 308; 9 Bom. L. R. 409, dissented from.

A transferee of a decree must first prove his right before he can be allowed to execute the decree and it is then only that any question of adjustment will arise. [p. 862, col. 1.]

Bayyana Ramayya v. Nidamarthi Krishnamurthi, 32 Ind. Cas. 952; 40 M. 296; 3 L. W. 186; 19 M. L. T. 124; (1916) 1 M. W. N. 133 and *Mohamad Rowther v. Pichai Rowther*, 35 Ind. Cas. 624; 4 L. W. 534, followed.

Petition, under sections 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the appellate order of the Court of the Additional Subordinate Judge, Tanjore in Appeal Suit No. 81 of 1920, (Appeal Suit No. 54 of 1920 on the file of the District Court, Tanjore) preferred against the order of the Court of the District Munsif, Mannargudi, in E. P. R. No. 295 of 1919 in Original Suit No. 183 of 1918.

Mr. T. R. Srinivasa Iyengar, for the Petitioner.

Mr. A. V. Viswanatha Sastry, for the Respondents.

JUDGMENT.—The Subordinate Judge has in effect found that the execution petitioner is a *benamidar* for Sowri Iyengar who with the money of 1st defendant purchased the decree.

This finding is sufficient to bring the case within the scope of the 2nd proviso to r. 16 of O. XXI, Civil Procedure Code.

The decree was one for the payment of money against first defendant and three others.

The fact that first defendant was directed by the decree to pay the amount out of his family properties does not make the decree any the less a decree for payment of the money against him.

The observation of Chandavarkar, J. in *Panachand v. Sundrabai* (1), that "A decree for money against several persons" means a personal decree for the payment of money by two or more defendants jointly, in our opinion, puts an unduly narrow interpretation on this provision. The spirit of the rule is that one judgment-debtor should not by acquiring the interest of a decree-holder be allowed to put himself into a position in which he can force the other judgment-debtors to pay the whole of the decree amount; when his proper remedy is a suit for contribution; and for this purpose it does not seem to signify whether the assignee decree-holder is one against whom a personal money-decree was passed or one who has been directed to pay the decree amount out of the proceeds of the property in his hands.

(1) 31 B. 308; 9 Bom. L. R. 409.

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It is next argued that the Subordinate Judge was by reason of O. XXI, r. 2 not entitled to find that the decree was satisfied by Sowri Iyengar's purchase. This argument is met in the decisions in *Bayyana Ramayya v. Nidamarthi Krishnamurthi* (2) and *Mohamad Rowther v. Pichai Rowther* (3), where it was pointed out that the transferee must first prove his right before he can be allowed to execute the decree, and it is then only that any question of adjustment will arise.

The lower Courts had jurisdiction to decide as they have done and the civil revision petition is dismissed.

V. N. V.

Petition dismissed.

Z. K.

(2) 32 Ind. Cas. 952; 40 M. 296; 3 L. W. 186; 19 M. L. T. 124; (1916) 1 M. W. N. 133.

(3) 35 Ind. Cas. 624; 4 L. W. 534.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 130

OF 1921.

December 1, 1922.

Present.—Mr. Justice Das and Mr. Justice Adami.

DHAROHAR SINGH—APPELLANT

versus

RAM PRASAD NARAYAN SAHI AND

ANOTHER—RESPONDENTS.

Execution of decree, application for—Continuation of previous application—Conditions requisite—Test.

In order to entitle a decree-holder to claim that an application should be regarded as a continuation of a previous application, two conditions must be satisfied, first, that the previous application was dismissed for no fault, or default on his part, and, secondly, that the subsequent application is similar in scope and character to the previous application. To determine this latter a fair test to apply would be to see if the decree-holder could have got the relief in the previous application which he subsequently claims. [p. 863, col. 2; p. 864, col. 1.]

Appeal from a decision of the Subordinate Judge, First Court, Muzafferpore, dated the 12th April 1921.

Mr. S. C. Mitter, for the Appellant.

Mr. Nirsu Narain Sinha, for the Respondents.

JUDGMENT.

Das, J.—This is an appeal on behalf of the decree-holder and is directed against an order of the learned Subordinate Judge of Muzafferpore, dated the 12th April 1921, by which the learned Subordinate Judge dismissed an execution case against the respondents.

The decree-holder obtained a mortgage decree against Babu Harbans Narain Singh and his sons. The decree was made absolute under the old Civil Procedure Code so far back as the 22nd December 1906. We are not concerned in this appeal with the first application for execution. In 1912 the decree-holder for the second time applied for execution of his decree and he expressly wanted to sell the property described as lot No. 4 in the mortgage-decree. The respondent Babu Ram Prasad Narain Sahi and Babu Ram Rekha Prasad Narayan Sahi intervened in the execution proceedings and objected to the sale of lot No. 4 on the ground that they had purchased lot No. 4 at a revenue sale. The objection was disallowed and the respondents thereupon instituted a suit, being suit No. 152 of 1912 in Chapra for a declaration that the property described as lot No. 4 was not liable to be sold in execution of the decree-holder's mortgage-decree. On the 27th of November 1913 a compromise decree was passed in Suit No. 152 of 1912 by which the respondents as purchasers of lot No. 4 agreed to pay to the decree-holder Rs. 2,000 on or before the 30th August 1914.

We are not concerned with the third application for execution which was presented in 1915. The respondents were not parties to that execution as the decree-holder proceeded in that application against properties other than lot No. 4. In 1918 the decree-holder presented his fourth application for execution and it will be necessary to consider the scope and character of that application presently. By that application the decree-holder did want to sell lot No. 4 as well as two other lots of properties described as lots Nos. 5 and 6, he did not bring the respondents on the record as parties to that execution proceeding but the respondents intervened in that execution proceeding and admitted their liability to satisfy the decree to the extent of Rs. 2,000 and, in

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fact, paid a portion of the decretal amount. The entire sum of Rs. 2,000 not having been paid by the respondents, the decree-holder proceeded with the sale of, amongst other properties, the property covered by lot No. 4. The sale took place on the 15th March 1913 and lot No. 4 was purchased by the decree-holder. There was then the inevitable application for setting aside the sale under O. XXI, r. 90 and that application ended in a compromise between the parties on the 7th June 1919. The sale was set aside by consent on the respondents agreeing to pay Rs. 540 within a month. It was agreed that if the sum of Rs. 540 was not paid on or before the 7th July 1919 the decree-holder would be entitled to sell lot No. 4. It is needless to say that the sum of Rs. 540 was not paid by the respondents to the decree-holder. On the 26th July 1920 the present application for execution was presented in Court and it was at once met by the respondents with the plea that it was barred by limitation.

The learned Subordinate Judge has dismissed the execution petition on two grounds, first, on the ground that the respondents not being parties to the suit in which the mortgage-decree was passed cannot be proceeded against in the execution proceeding arising out of that suit, and, secondly, on the ground that the application for execution is barred under the provisions of section 48, Civil Procedure Code.

I will first consider whether the learned Subordinate Judge was right in dismissing the execution petition on the ground that the respondents were not parties to the mortgage suit. It is quite true that they were not parties to the mortgage suit but they have undoubtedly purchased one of the properties which was the subject-matter of the suit. They are accordingly representatives-in-interest of the judgment-debtor unless they can establish that by reason of the fact that they purchased at a revenue sale they are not liable to satisfy the mortgage-decree of the plaintiff. They did make an attempt to establish their case in Suit No. 152 of 1912 which they instituted in the Chapra Court. By a consent decree which was passed in that suit they took upon themselves the liability for Rs. 2,000 out of the entire decretal amount. They intervened in the fourth execution proceed-

ings and they admitted their liability to pay the decretal amount to the extent of Rs. 2,000 and in fact in that execution case they did pay a sum of money to the decree-holder. In my opinion, it is impossible to contend that they were not proper parties to the execution proceedings. In my opinion the learned Subordinate Judge was not right in dismissing the execution proceedings and on the ground that those proceedings were not maintainable against the respondents.

So far as the question of limitation is concerned, it is clear that execution is *prima facie* barred under the provisions of section 48 of the Civil Procedure Code, but Mr. Saroshi Charan Mitter on behalf of the decree-holder urges before us that his present application ought to be regarded as a continuation of the application for execution which he presented in 1918. It is well established that in order to entitle a decree-holder to claim that an application should be regarded as a continuation of the previous application, two conditions must be satisfied, first, that the previous application was dismissed for no fault or default on his part and, secondly, that the present application is similar in scope and character to the previous application. If these two conditions are satisfied there is no reason why the Court should not regard the present application as a continuation of the previous application.

Now, in this case clearly there were no laches on the part of the decree-holder. The respondents entered into a compromise with him, they agreed to pay Rs. 540 to him on or before the 7th July 1919, and on the faith of the representation made to him by the respondents the decree-holder consented to have the sale in his favour set aside. Therefore, the decree-holder has satisfied one of the conditions, namely, that there was no fault or default on his part at all.

The next question is, can the present application for execution be regarded as similar in scope and character to the previous application? I take it that all that is necessary for the decree-holder to establish is that, in substance, though it may not be in form, the present application is similar in scope and character to the previous application.

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Mr. Nirsu Narayan Sinha on behalf of the respondents urges before us that the present application cannot be regarded as similar in scope and character to the previous application; he points out that the previous application was an application which arose out of Suit No. 41 of 1906 and that the respondents were not parties to that application and that the present application is stated by the decree-holder himself to arise both out of Suit No. 41 of 1906 and Suit No. 152 of 1912.

Now, it is quite true that the decree-holder in his petition for execution recited both the suits, that is to say, Suit No. 41 of 1906 and Suit No. 152 of 1912. In this I think he was wrong. The Muzafferpore Court could have no power whatever to execute the consent decree which had been passed by the Chapra Court in Suit No. 152 of 1912, but I do not think that makes any difference in the substance of the application which was presented by the decree-holder. He undoubtedly recited Suit No. 41 of 1906, he recited all the facts which would enable the Court to determine what was the sum of money that was still due and owing by the respondents to the decree-holder.

In regard to the argument that the respondents were not parties to the previous application for execution, all that I need point out is, that they were undoubtedly parties to that execution not indeed when that application was presented but when it was struck off. They intervened in that application and they took upon themselves the responsibility for at least Rs. 2,000 out of the decretal amount claimed by the decree-holder. In my opinion, no argument can be founded upon the fact that the present application recites the fact that there was a suit in Chapra by the decree-holder against the respondents.

It is next urged that the decretal amount shown in the previous application is Rs. 14,564 whether the decretal amount shown in the present application is Rs. 2,000. This is relied upon by Mr. Nirsu Narayan Sinha as showing that the present application for execution has been made not in Suit No. 41 of 1906 but in Suit No. 152 of 1912. As I have said before, the decree-holder was ill-advised in saying anything about Suit No. 152 of 1912 in his petition for execution, but that is merely the form

of the application. Can it be urged that in substance it makes any difference because the decree-holder in his present application for execution instead of mentioning that the decretal amount is Rs. 14,564 has stated that the decretal amount is Rs. 2,000. I think not, for the argument goes not to the substance of the thing but merely to the form of the thing.

Then it is urged that the names of the judgment-debtors are different, that whereas the previous application for execution shows that Harbans Narayan Singh and his sons are the judgment-debtors, the previous application for execution shows the respondents as the judgment-debtors. That undoubtedly is so, but then, as I have said before, the present respondents intervened in the previous application, so that they were undoubtedly parties to the execution proceedings. It is true that the present execution petition is not against Harbans and his sons but that is, because, so far as the claim of the decree-holder against them is concerned it has been satisfied by them.

Lastly it is urged that the properties are not the same. It is necessary to mention that the previous application for execution was in respect of the properties described as lots Nos. 4, 5 and 6, whereas the present application for execution is in respect of lot No. 4. But it appears that, so far as the claim of the decree-holder is concerned, in respect of lots Nos. 5 and 6 the judgment-debtors, namely, Harbans Narain and his sons satisfied the claim of the decree-holder, so that it was impossible in the present application for execution to claim any relief in respect of lots Nos. 5 and 6. In my opinion in order to determine whether an application may be considered as similar in scope and character to a previous application, a fair test to apply would be to see if the decree-holder could have got the relief in the previous application which he now claims supposing his previous application had not been struck off. If this were not the rule it would in many cases be impossible to hold that an application should be regarded as a continuation of the previous application. To take the present case, the claim of the decree-holder in relation to lots Nos. 5 and 6 has been satisfied. It would, therefore, be impossible for the decree-holder in the present application to

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claim any relief in respect of lots Nos. 5 and 6. But if we apply the test which I have mentioned, it is easy to see that the decree-holder in the previous application could have got the relief which he now claims in the present application for, in spite of the fact that the claim of the decree-holder in respect of lots Nos. 5 and 6 was satisfied by Harbans Narayan Singh, it was open to the decree-holder in the previous application to proceed against the respondents in respect of lot No. 4. Applying the test it would appear that the relief claimed in the present execution proceedings is substantially the same as that claimed by the decree-holder in the previous application, that is to say, that in substance the present application is similar in scope and character to the previous application, if that be so, and if the present application be regarded as a continuation of the previous application, no question of limitation arises.

I would allow this appeal, set aside the order of the learned Subordinate Judge and direct that the execution case do proceed.

The appellant is entitled to the costs of this appeal.

Adami, J.—I agree.

W. C. A.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 360 OF 1921.

February 7, 1923.

Present:—Mr. Justice Oldfield and

Mr. Justice Venkatasubba Rao.

YELLAPRAGADDA SRIRAMACHANDRA VENKATANARAYANA—

RESPONDENT No. 2—DEFENDANT No. 4

—APPELLANT

versus

RUVVADA NARASIMHA ROW

PETITIONER—PLAINTIFF'S LEGAL

REPRESENTATIVE—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 19—Gross-claims under same decree—Party, entitled to smaller sum, right of, to execute—Interest of decree-holder split up—"Two parties," meaning of.

Plaintiff obtained a decree in respect of certain properties, which she claimed as the heir of her mother, with a liability to pay a sum of Rs. 2,000 to the fourth defendant. Under the decree the fourth defendant was also liable to pay plaintiff a sum of Rs. 385 for past mesne profits. Plaintiff died after decree, and the lands passed to her brother, first defendant, by right of inheritance but the amount of mesne profits which was the plaintiff's *stridhanam* passed to her husband. On an application for execution of the decree for Rs. 385 by the plaintiff's husband:

Held, that under O. XXI, r. 19 of the Civil Procedure Code the plaintiff's husband was not entitled to take out execution for the smaller sum awarded to the plaintiff under the decree. [p. 867, col. 1.]

O. XXI, r. 19 of the Civil Procedure Code does not exclude the case of a decree-holder on whose death his interest devolves on two different individuals. [p. 867 col. 1.]

The point of time when operation is to be given to the provisions of O. XXI, r. 19 of the Code, is when application is made for execution and the rule does not become inapplicable merely because, before the date of the application, the plaintiff's interest had become split up. [p. 867, col. 1.]

The words "two parties" in O. XXI, r. 19 refer to the parties to the suit and not to the different representatives of the same party. [p. 867, col. 1.]

Appeal against an order of the Subordinate Judge, Rajahmundry, dated the 28th April 1921, in Execution Petition No. 16 of 1921, in Original Suit No. 31 of 1915.

Messrs. G. Lakshmanna and Viyanna, for the Appellant.

Mr. P. Narayanamoorthy, for the Respondent.

JUDGMENT.

Oldfield, J.—I have had the advantage of reading my learned brother's judgment and I am not prepared to dissent from his interpretation of O. XXI, r. 19, Civil Procedure Code. In accepting it, however, I observe that the difficulty arising from the division of the interest of a deceased party to a decree between two legal representatives does not seem to have been contemplated in that rule, since it does not include even a provision similar to r. 18 (3) (a) and that I am, with all respect, unable to apply language used by Batchelor, J., in *Madappa Ganapa Hegde v. Jaki Ghosal Gabri Ghosal* (1) to the present case, since that difficulty was not there under consideration. But the language of r. 19 in my opinion is consistent only with the (1) 30 Ind. Cas. 893; 40 B. 60; 17 Bom. L. R. 689.

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conclusion reached by my learned brother and I accept his conclusion that the agreement set up between first and fourth defendants was subject to a condition which is not shown to have been fulfilled and is, therefore, ineffective. I, therefore, concur in the order proposed.

Venkatasubba Rao, J.—This is an appeal from an order of the Subordinate Judge of Rajahmundry allowing execution against the fourth defendant at the instance of the husband of the plaintiff who claimed to be the plaintiff's legal representative. The fourth defendant was directed by the decree to pay to the plaintiff a sum of Rs. 385-4-0 as mesne profits in respect of some property. The plaintiff's husband applied for execution in respect of this sum of money. The fourth defendant objected to execution on the ground that under the same decree, the plaintiff was directed to pay him Rs. 2,000 with interest at 12 per cent. from a certain date and that the amount due to him being much larger than the sum payable by him, the plaintiff's representative was not entitled to take out execution for the smaller sum. The Subordinate Judge overruled this contention and the fourth defendant is the appellant before us.

The respondent, the plaintiff's husband, has sought to support the judgment of the lower Court on the ground that the decree was obtained by the plaintiff in respect of certain properties which she claimed as the heir of her mother; that the amount payable to the fourth defendant under the decree was payable by the plaintiff as representing the estate of her mother; that the amount which the plaintiff was to get from the fourth defendant was her *stridhanam* property; that the respondent, as her husband, inherited that property, and that he was, therefore, entitled to recover by execution the sum which the plaintiff was to get under the decree without reference to the amount which the plaintiff was directed to pay to the fourth defendant. It was further argued that the first defendant in the suit, who was the brother of the plaintiff, became the plaintiff's representative in respect of her mother's estate and that the first defendant, was, therefore, liable to pay the amount which the plaintiff was decreed to pay to the fourth defendant.

In short, the argument on behalf of the respondent was that the fourth defendant was bound to pay him Rs. 385-4-0 and the fourth defendant's remedy in respect of Rs. 2,000, and interest thereupon lay against the first defendant.

We have to determine which of these two contentions is correct. O. XXI, r. 19, Civil Procedure Code runs as follows:—"Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—(a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree."

The decree under consideration is "a decree under which two parties are entitled to recover sums of money from each other." The plaintiff was entitled to recover Rs. 385-4-0 from the fourth defendant and the latter Rs. 2,000, and interest thereupon from the plaintiff. There can be no doubt that the plaintiff, and the fourth defendant answer the description of "two parties" in the rule. That being so, the provision is clearly applicable, because an application has been made to the Court for the execution of a decree of the nature described by the rule. Clause (b) provides that where application is made to the Court for the execution of such a decree, satisfaction for the smaller sum shall be entered upon the decree. Now such an application has been made; and, under the rule, the Court has no option but to enter up satisfaction for the smaller sum, that is, in this case the sum due to the plaintiff. When the satisfaction has been so entered, there can be no sum payable to the plaintiff and the plaintiff, therefore, will not be able to execute the portion of the decree which awards him the smaller amount, if the plaintiff during her lifetime attempted to execute the decree, O. XXI, r. 19 would be an effective bar against her. The respondent has argued that the provision does not automatically of its own force render the decree for the smaller sum inexecutable; in other words, that

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the effect of r. 19 is not to convert a decree with two distinct provisions into a single decree enforceable only for the difference between the two sums; but, on the contrary, that the point of time when the operation is to be given to the provision under question is when application is made for the execution and that, as in the present case, on the date of the execution application the plaintiff's interest became split up, the rule has no application. It is no doubt true that the provisions of the section come into operation only "where application is made to a Court for the execution of a decree," but that condition has been satisfied in the present case. The application has been made. The section does not exclude the case of a decree-holder on whose death his interest devolves on two different individuals." "Two parties" referred to in r. 19 are the parties to the suit. The words do not refer to two different representatives of the same party. On a strict construction of O. XXI, r. 19, I have no hesitation in coming to the conclusion that the appellant's contention is correct and that the plaintiff's husband is not entitled to take out execution for the smaller sum awarded to the plaintiff under the decree.

Moreover, I am at a loss to understand why the defendant should suffer because on the death of the plaintiff, her interest devolved on two different representatives. I fail to see why, if, as the result of the set-off, the fourth defendant was entitled to recover from the plaintiff, the difference between the two sums, he should immediately upon her death be obliged to pay into the hands of one representative the smaller sum and perhaps be unable to recover the larger sum from the other representative. This seems to me clearly opposed to justice and I find no justification for this view in the terms of the section to which reference has been made.

Four cases were cited by the appellant's learned Vakil as bearing on the question, *Bhagwan Singh v. Ratan* (2), *Sankara Menon v. Gopala Pattar* (3), *Annada Mohan*

Roy v. Atul Chandra Chakrabarti (4) and *Madappa Ganappa Hegde v. Jaki Ghosal Gabri Ghosal* (1). I shall refer only to the last cited decision, because I think it alone has a material bearing upon the case on hand. There the applicant applied to execute a decree for recovering Rs. 445-8-0 which he was entitled to recover from the opponents as mesne profits. Under the same decree, the opponents were entitled to claim the sum of Rs. 855 as costs from the applicant; but they were prevented from recovering it as the right to it was barred by limitation. They, however, claimed to set off the amount against the amount sought to be recovered by the applicant. It was held that the applicant could not be allowed to execute his decree for the smaller sum without reference to the larger sum which the decree awarded to the opponents. Batchelor, J., observed at page 63,* "For, as I read the rule, it contemplates that the decree should be regarded as a single indivisible order of the Court enforceable only for the balance, that is, the difference between the two sums awarded, and that balance becomes awardable by the Court without the intervention of the parties as soon as the amount of the balance is determined."

There remains one point to consider. It is said that the fourth defendant entered into an agreement with the first defendant in respect of the amount payable by the plaintiff to the fourth defendant. The respondent has argued that the fourth defendant has thus precluded himself from setting up that an amount is due to him under the decree. In answer to this argument it is sufficient to say that it is admitted that the agreement relied upon is a conditional agreement and that the condition has not been fulfilled. The amount due to the fourth defendant has not been paid and the respondent cannot, therefore, contend that the portion of the decree relating to payment to the fourth defendant has been satisfied. In this view, it becomes unnecessary to determine the other question, namely, whether the adjustment referred to not having been certified under O. XXI, r. 2, may or may not be recognised by the Court executing the decree.

(2) 16 A. 395; A. W. N. (1894) 133; 8 Ind. Dec. (N. S.) 257.

(3) 23 M. 121; 8 Ind. Dec. (N. S.) 479.

(4) 56 Ind. Cas. 753; 24 C. W. N. 465.

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The appeal should, therefore, in my judgment, be allowed with costs.

V. N. V.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL, SIDE APPEAL No. 126 OF 1921.

November 1, 1922.

Present:—Sir Walter S. Schwabe, Kt., Chief Justice, and Mr. Justice Wallace.

ABDUL SHAKER SAHIB—

APPELLANT

versus

ABDUL RAHIMAN SAHIB AND ANOTHER

—RESPONDENTS.

Specific Relief Act (I of 1877), s. 35—Decree for specific performance, form of—Time fixed for payment, effect of—Failure to pay within time fixed—Procedure—Delay in suing, effect of.

A decree in a suit for specific performance of a contract for sale of land, directing conveyance on payment of an amount by the plaintiff and fixing a time for such payment, is in the nature of a preliminary decree and after the original judgment, the action is not ended but remains under the control of the Court. It is competent both to the Original and the Appellate Courts on suitable application, to extend the time fixed for payment, and the plaintiff's rights under the decree are not lost merely by non-payment within the time fixed.

A decree for specific performance must not make payment of the purchase money by a certain date a condition of the continuance of the rights under the judgment.

Ramaswami Kone v. Sundara Kone, 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26; *Moideen Kuppai v. Ponnuswamy Pillai*, 26 Ind. Cas. 63; 1 L. W. 882; 16 M. L. T. 430, distinguished.

Observations of Srinivasa Iyengar, J., in *Gopala Aiyar v. Sannasi*, 32 Ind. Cas. 401; 3 L. W. 29; 19 M. L. T. 137, dissented from.

Where a purchaser offers to pay the purchase-money without actually tendering it, but the vendor refuses to accept the offer, there is a waiver and actual tender of the amount is dispensed with. [p. 871, col. 1.]

Polglass v. Oliver, (1831) 2 Cr. & J. 15; 1 49 E. R. 7; 2 Tyr. 89; 1 L. J. (N. S.) Ex. 5; 37 R. R. 623 followed.

In a suit for specific performance of a contract, the fact that certain persons entitled to the benefit of the contract refused to join the plaintiff

and were, therefore, joined as defendants, is not a bar to a decree for specific performance. [p. 871, col. 2.]

Persons who desire the assistance of a Court in obtaining an equitable relief must come quickly, but the question whether a Court should grant an equitable relief is one of fact to be decided on the circumstances of each case. [p. 871, col. 2.]

Where a suit for specific performance of a contract of sale is brought some two years after the time fixed for its performance and it appears that the plaintiff was put off by the defendant himself who is not shown to have been prejudiced by the delay in bringing the action, the Court ought not to refuse to exercise its powers of decreeing specific performance.

Per *Wallace, J.*—Where specific performance of a contract of sale has not been effected within the period laid down by the decree, it is open to the purchaser to apply to the Court for an extension of time for payment of the purchase-money, and to the vendor to apply either for a final and peremptory order for specific performance, or for an order rescinding the contract either immediately or to follow automatically on the expiry of the period peremptorily granted. [p. 872, col. 1.]

Appeal from a decree of Mr. Justice Coutts-Trotter, passed in the exercise of the Ordinary Original Civil Jurisdiction of the Court, in Civil Suit No. 80 of 1920.

Mr. K. Rajah Iyer, for the Appellants.

Mr. T. L. Venkataramma Iyer, for the Respondents.

JUDGMENT.

Schwabe, C. J.—The respondents, plaintiffs, obtained a decree for specific performance of a contract for the sale of certain lands and superstructures thereon to them by the first defendant: Coutts Trotter, J., gave judgment in the following words: "I must therefore find for the plaintiffs and give them decree for specific performance on payment of Rs. 4,000. Time for payment two months." In pursuance of the judgment a decree was passed providing (1) that, upon payment by the plaintiffs on or before the 19th December 1921 of a sum of rupees four thousand only, the first defendant do execute and register a proper deed of conveyance of the properties in the schedule, (2) that upon payment the 1st defendant do put the plaintiffs in possession of the properties together with all documents and title-deeds. Before the expiry of the two months, that is, before December 19th, the 1st defendant had given notice of appeal. Before the expiry of the two months but after the notice of appeal,

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the plaintiffs had issued an application before the Judge in charge of the original side for extension of the time for paying the money and this application was heard in January 1922, that is, after the expiration of the two months, and was ordered to stand over until the hearing of this appeal. The appeal coming on, a preliminary point is taken, namely, that the two months having elapsed neither the Original Court nor this Court has any power to extend the time and that, therefore, the plaintiffs have lost irrevocably all their rights under the decree except the costs, and it is therefore, useless to occupy the time of this Court in considering the merits of the case. I do not think that this is strictly a preliminary point, because the question of the costs of the suit would still remain. If the decree was right, the plaintiffs would be entitled to costs from the first defendant and if wrong the plaintiff would be liable for costs. But the point has been fully argued on both sides and raises important points on which we shall express our opinion.

The decree was drawn up, I am told, in the ordinary form of decree in use here in cases of specific performance. It may be that it is a convenient form in certain cases, though I have been unable to discover its history and how it came to be adopted. No form for a decree for specific performance is provided by Statute or rule here, and it has been left to the Courts to devise a suitable and appropriate form. Specific performance is an equitable remedy which has been known and used by the Courts of Chancery in England for centuries, and appropriate forms of judgment have been approved by the learned Equity Judges in England and have now become almost stereotyped and those at present in use will be found set out in Seton on Judgments under the title "Specific Performance." On a perusal of them the first thing to be observed is, that not one of those forms contains in the first instance, a limit of time for payment of the purchase-money and not one attempt to make payment of the purchase-money by a certain date a condition of the continuance of the rights under the judgment. After the original judgment for specific performance it is the definite practice in England that all consequential relief by reason of any party failing to comply with

the terms of the judgment must be sought by application to the Court by which the judgment was passed. Such applications are made by motion in the action showing that in England, after the original judgment the action is by no means ended but remains under the control of the same Court. If the default is made by the purchaser in paying the purchase-money, there are several remedies open to the vendor. (1) He may on motion in the action obtain an order fixing a definite time and place for payments and delivery over of the conveyance and title-deeds and can, after the expiration of that time, levy execution for that amount, if not paid. (2) He may apply by motion in the action for an order rescinding, not the judgment but the contract, and in order to succeed in such a motion he has to satisfy the Court that there has been a positive refusal to complete, which, it may be observed in the present case, the respondent has certainly not proved. A similar right is given by section 35 of the Specific Relief Act of 1899. (3) He can enforce his unpaid vendor's lien for the purchase-money and costs. (4) He can by motion in the action obtain an order for sale by the Court of the property when he will be at liberty to bid. The proceeds of the sale are paid into Court and the vendor gets his contract price, interest and costs and the purchaser the balance, if any. Where the vendor is in default, the remedies are even more varied.

It would seem to be absurd to hold that the mere fact that a date of completion is fixed in the original decree (*sic*) puts an end to the action and that the control of the Original Court expires on the expiration of that date and thus substitutes in effect for all the known remedies stated above the simple expedient of treating the action and the decree as dead for all purposes and leaving the vendor in undisturbed possession of property which is not his and may, as in the present case, be of a greater value than the contract purchase-money, which, perhaps by some accident, the purchaser has failed to pay. It is also worth observing that there is no evidence that the first defendant was ready to execute a conveyance or hand over the title-deeds in exchange for the money and in fact, so far from intending to complete he

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was appealing on the ground that the decree was wrong.

In my judgment it was not intended by this decree that the payment of the Rs. 4,000 by the date named should be a condition, failing to comply with which would deprive the successful plaintiff of all his rights under the decree. In my judgment this decree is in the nature of a preliminary decree the original Court keeping control over the action and having full power to make any just and necessary orders therein, including, in appropriate cases, the extension of the time. If I am wrong in this and the proper interpretation of this decree is as contended for by the appellant, then, in my judgment, this decree is wrong, and I should, if necessary, order that it be set right by eliminating the condition which ought not to have been imposed upon the successful plaintiff except at a much later date and upon definite refusal by him to complete. Even in that case such condition could only be imposed at the request of the defendant who, as I have pointed out, has other various remedies. As long as this form of decree is understood to be of a preliminary nature and the Court still retains full power over the action, I do not see any particular harm in the continuance of its use. Some words such as "further consideration reserved" shall be added. But, personally, I should be prepared to say that the appropriate forms are those set out in Seton.

It is, however, contended that this form having been used we are precluded by authority from holding that the time fixed is not a condition and, as I understand, also from holding that either the original Court or this Court has power to extend the time. I do not so interpret this decree but, as I have said, if that is the correct interpretation of it, in my judgment, it must be varied. Therefore, the question whether we are bound by authorities which so interpret it is not of great importance. The cases relied on are *Ramaswami Kone v. Sundara Kone* (1), *Moiden Kuppai v. Punnuswamy Pillai* (2) and *Gopala Aiyar v. Sannasi* (3).

In *Ramaswami Kone v. Sundara Kone* (1) the decision of the District Munsif was that on plaintiff's paying into Court the balance of consideration within a month the defendant should execute a sale deed. The money was not paid into Court within the month, and, after the expiration of the month, the defendant appealed. On appeal the Subordinate Judge confirmed the District Munsif's order. The plaintiff then applied to execute this decree and the District Munsif held that the original one month granted by his decree having expired and the plaintiff not having complied with its terms, the plaintiff could not have execution. The plaintiff then applied to the Subordinate Judge to modify the appellate decree by introducing into it, a fresh time limit. This having been refused, the plaintiff appealed against the District Munsif's order dismissing his application for execution. That appeal was dismissed by the Subordinate Judge. The case came on appeal before a Bench of this Court which held that, on the proper construction of the first appellate decree of the Subordinate Judge, the time was not extended and that, therefore, execution could not be granted. The Court, however, did lay down that the Subordinate Judge could extend the time for performing conditions precedent granted by the original decree on appeal from that decree. It is, however, to be observed that no application was at any time made to the District Munsif to extend the time allowed by the decree, and this case does not, therefore, touch the point in question here.

In *Moiden Kuppai v. Punnuswamy Pillai* (2) this Court, on second appeal, directed that on payment of Rs. 50 within three months by the plaintiff to the defendant a moiety of the suit property should be delivered to the plaintiffs. Subsequently, the plaintiff applied to the lower Court to extend the time. That was refused by the lower Court, and on appeal it was held by this Court that the lower Court had no power to extend the time fixed by the Appellate Court. The plaintiffs then petitioned this Court to extend the time and this Court held that it had no power to modify its own order except on a proper application for review which that application was not. The Court held that the time

(1) 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26.

(2) 26 Ind. Cas. 63; 1 L. W. 882; 16 M. L. T. 430.

(3) 32 Ind. Cas. 401; 3 L. W. 29; 19 M. L. T. 137.

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fixed by its order in that case was an essential term and that non-compliance with it could result in plaintiff's losing their rights unless they could put the matter right by review. But, in that case, the question was not under consideration whether the original Court, if it directed that specific performance should be performed within a certain time, could extend that time.

In *Gopala Aiyar v. Sannasi* (3) the Court of first instance gave a decree for specific performance, giving the plaintiff one month's time to pay the price, which decree was, on appeal to the Subordinate Judge, confirmed by him. More than one month after the date of the appellate decree the plaintiff applied to the Subordinate Judge to extend the time fixed by the original decree. The application was granted but on a revision petition it was held by Srinivasa Aiyangar, J. that the Appellate Court had no jurisdiction to extend the time fixed by the original Court. This may be right; but the learned Judge said that it had been decided by this Court in *Ramaswami Kone v. Sundara Kone* (1) that the Court which passed the decree had no power to extend the time, much less any Appellate Court. As I have pointed out *Ramaswami Kone v. Sundara Kone* (1) did not say so, and with that part of the judgment of Srinivasa Aiyangar, J., I do not agree.

I, therefore, do not feel in this matter in any way hampered by authority and this preliminary point fails.

Turning to the merits, the main question is a pure question of fact. The learned Trial Judge has, I think, correctly stated different Judges or different Juries might take different views of the facts. But there was ample evidence to support his finding that the contract alleged was made and I see no reason for differing from it.

Further, the contract alleged is to reconvey the property when the Rs. 4,000 is tendered within one year. There is no evidence of an actual tender but there is evidence that the first plaintiff attended upon the first defendant with P.W. No. 6 who had the money with him and on the first plaintiff asking the first defendant to take it, the first defendant said he would not. This, in my judgment, was a waiver of and dispensed with any actual tender, see

Polglass v. Oliver (4) and many subsequent cases.

A further point was taken that, as certain persons entitled to the benefit of the contract refused to join the plaintiffs in the suit, and have been joined by them as defendants, the decree for specific performance could not be granted. I do not agree with this contention and I have nothing to add to the judgment of Courts-Trotter, J., on the point.

Lastly, it was contended, and this is a more difficult point, that as two years had elapsed from the date of the original offer of the money, the plaintiffs were too late in bringing this suit. It is a well-established principle that persons who desire the assistance of the Court in obtaining equitable relief must come quickly. In each case it is a question to be decided on the facts whether the delay on the part of the plaintiff is such that the Court ought not to exercise its powers. In this case on the facts I think that the delay should be excused, for, on the evidence, the plaintiffs were put off for some time by the first defendant himself. The case has, however, been brought very late, but in my judgment not late enough to compel us to refuse relief it not being shown that the defendant has been prejudiced.

The appeal will, therefore, be dismissed with costs. The time or the completion will be extended by this decree for a period of two months. It must be understood that the original Court still has jurisdiction in this matter and has full powers to deal with any point that may arise including, if necessary, an application for further time.

Wallace, J.—I agree. On the first point of law taken, I wish to say this: No special form of drafting a decree for specific performance is supplied by the Civil Procedure Code, as is supplied by it in the case of a decree in a pre-emption suit by O. XX, r. 14, which directs that, if the purchase-money is not paid as stipulated in the decree, the suit shall be dismissed with costs. Hence the analogy of decrees, etc., in pre-emption suits and reported rulings thereon are not of assistance in this case. The form of decree drawn up in the Trial Court is the general form adopted in this Presidency (4) (1831) 2 Cr. & J. 15; 149 E. R. 7; 2 Tyr. 89; 1 L. J. (N. S.) Ex. 51 37 E. R. 623.

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for such decrees. But that it is in the nature of a preliminary and not a final decree is, I think, placed beyond doubt by section 35 of the Specific Relief Act. As I read that section, it lays down that when a decree for specific performance of a contract of sale has been passed and the purchaser makes default in payment of the sum which the Court has ordered him to pay, the vendor may either file a fresh suit for rescission of the contract or may, in the specific performance suit itself, apply to the Court to rescind the contract. It is perfectly clear that the contract is not determinable or determined by the mere failure to comply with the terms of the decree. It is not determined until the Court orders that it is determined. By the decree for specific performance the Court sets out what it finds the real contract between the parties was, and declares that such a contract exists and gives what it considers a reasonable time within which the contract shall be carried out. Regarding the decree, from this point of view, as a contract, it is clear in this case, as in most others of the same kind, that time is not of the essence of the contract, and that, until the contract is rescinded by formal order or decree, such time for performance, not being an essential part of the contract, may be varied by the Court which has declared what the essential terms of the contract are. It is clear, as the learned Chief Justice has shown, that it must be within the powers of the Court to vary the time within which the contract shall be performed as difficulties might arise through no fault whatever of the parties preventing performance within the time specified in the decree, *e. g.*, when a third party has within that period set up a *bona fide* claim of title to the property, it may even be necessary to direct specific performance to stand over for a reasonable but indefinite period, until that claim has been adjudicated.

I take it then that, where specific performance of sale has not been effected within the period laid down by the decree, it is open (a) to the purchaser to apply to the Court for an extension of time for payment of the purchase money, and (b) the vendor to apply either for a final and peremptory order for specific performance or for an order

rescinding the contract either immediately or to follow automatically on the expiry of the period peremptorily granted. The original action is thus open until a final decree or order of such a nature and scope is passed, and the original Court has until then ample power to extend the time for specific performance. The case reported as *Moideen Kuppai v. Ponnuswami Pillai* (2) is not a case in point. It was apparently not a case of a decree for specific performance since no reference was made to section 35 of the Specific Relief Act. In *Gopala Aiyar v. Sannasi* (3) also no reference is made to that section and, in any case, the application to extend the time was made after the time granted by the decree had expired. In *Ramaswami Kone v. Sundara Kone* (1) there was no application for extension of time at all, and the decision turned on the propriety of interpreting the appellate decree in terms of the original decree. In the present case an application to extend the time was put in by plaintiffs to the Court which passed the decree and no final order has yet been passed on that. I am, therefore, quite clear that the original Court has in this case full power to extend, on proper application made to it, the time fixed by its decree for specific performance, and equally so has the Appellate Court in an appeal which is of the nature of an appeal from a preliminary decree. The argument that plaintiffs should not be allowed to get a fresh extension of time because defendant has appealed against the decree has not impressed me. His appeal was tantamount to a declaration that he would not receive the money and carry out his part of the contract, and thus made it useless for plaintiffs to attempt to carry out their part of it. On the other points of the case, I have nothing to add to the judgment of the learned Chief Justice.

V. N. V.

Appeal dismissed.

LUDDAR v. BANSI.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2537 OF 1921.

August 3, 1922.

Present:—Mr. Justice Campbell

LUDDAR AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

Musammat BANSI AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Custom—Alienation by widow—Reversioners, right of, to contest, in presence of daughter.

The existence of a daughter does not preclude even a distant reversioner from contesting a widow's alienation, especially where the *Riwaj-i-am* declares the reversioners to be preferential heirs to the daughters. [p. 874, col. 1.]

Muhammad Umar v. Abdul Karim, 103 P. R. 1907; 159 P. W. R. 1907, *Kapurja v. Mangal*, 149 P. R. 1908; 192 P. W. R. 1908, *Ram Ditta v. Kishan Singh*, 4 P. R. 1890, *Lachho Bai v. Asa Nand*, 144 P. R. 1882, relied upon.

Second appeal from a decree of the District Judge, Hoshiarpur and Kangra Districts, dated the 9th August 1921, reversing that of the Munsif, First Class, Kangra District, Kangra, dated the 22nd December 1920.

Bakhshi Tek Chand and Lala Fakir Chand, for the Appellants.

Lala Jagan Nath, for the Respondents.

JUDGMENT.—This second appeal has resulted from a declaratory suit regarding land of which the last male proprietor was Lachhi Ram. Lachhi Ram died leaving a mother, Musammat Bansi, and a daughter, Musammat Bholi, the latter of whom is now stated to be eleven years of age and married. The parties are Brahmans of the Palampur Tahsil of the Kangra District. On the death of Lachhi Ram his mother succeeded and she has gifted a portion of the estate to her son-in-law Ram Ditta, the husband of Lachhi Ram's deceased sister. The plaintiffs who are collaterals of Lachhi Ram in the seventh degree have sued for a declaration that the gift shall not affect their reversionary rights.

The Courts below have concurred in holding that the land alienated is ancestral *qua* the plaintiffs and that the parties are governed by custom. The Trial Court decreed the declaration. The District Judge accepted the alienee's appeal and dismissed the suit on the ground that the onus of proof lay upon the plaintiffs to show that they had a right to contest the alienation in the presence of Lachhi Ram's daughter

and that they had failed to discharge it. This daughter, it may be remarked, was not a party to the suit.

The plaintiffs have come to this Court on second appeal armed with a certificate under section 41 (3), Punjab Courts Act; that the following question regarding the validity of a custom is of the necessary importance, and doubtfulness:—"Can a remote collateral in the seventh degree contest an alienation of ancestral property by the widow of a childless proprietor in presence of the daughter among Brahmans of the Palampur Tahsil, Kangra District? Does a remote collateral of seventh degree exclude daughters from succession to ancestral property among Brahmans of the Palampur Tahsil?"

There is no doubt to my mind that the lower Appellate Court dismissed the suit for wrong reasons. If it be assumed that the daughter of Lachhi Ram is a nearer heir than the plaintiffs, the latter, in my opinion, is competent to maintain the suit. The alienor is a widow with a life-interest. The daughter is a minor, hitherto childless, and, being a female, probably no more than a life-tenant if she succeeds and has no issue. She is not a party to the suit. A declaratory decree will enure for her benefit if she is a preferential heir.

It would be unprofitable to discuss the question of whether Musammat Bholi is in fact an heir preferential to the plaintiffs, since she is not a party and a decision on the point would not bind her. But it is also in favour of the plaintiffs' right to maintain the suit that the *Riwaj-i-am* of the District would support a claim by them to succeed before Musammat Bholi [Middleton's Customary Law of the Kangra District page 95, Question 49 and page 1101, Question 51 (V)]. It may be that what is said there is not supported, so far as their case would be concerned, by specific instances but, whatever view might be taken of the effect of judgments of this Court subsequent to that of the Privy Council in *Beg v. Allah Ditta* (1), the latter ruling makes it clear that the *Riwaj-i-am* entries would have to be regarded seriously as an

(1) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

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important piece of evidence in their favour in the event of their preferring hereafter a claim to inherit before *Musammatt Bholi*.

The learned Counsel for the respondents has conceded that the test is, whether the plaintiffs have a substantial chance of succession and that every case of the present nature must be decided upon its own facts. I cannot follow him in his contention that, in the circumstances, the plaintiffs have a very remote chance of succeeding if *Musammatt Bholi* is the preferential heir. The situation, in my opinion, is just the opposite. *Musammatt Bholi* is a child still and it cannot be presumed to be inevitable that she will live to have children. In *Muhammad Umar v. Abdul Karim* (2) it was ruled that the existence of a daughter does not preclude a near reversioner from contesting a widow's alienation. The same was laid down in favour of a distant reversioner in *Kapuriah v. Mangal* (3) (a Hindu Law case). In *Ram Ditta v. Kishan Singh* (4) collaterals in the 10th degree were held entitled to contest a similar alienation in the presence of daughter's sons where the *Riwaj-i-am* and *Wajib-ul-arz* declared them to be preferential heirs. *Lacho Bai v. Asa Nand* (5) is also in the plaintiff's favour.

For these reasons, I hold that the plaintiffs-appellants were entitled to maintain a declaratory suit.

The question remains whether the gift by *Musammatt Bansi* was valid. This has not been decided by the learned District Judge. The Trial Court placed the point directly in issue and found in the negative. I observe that there is no evidence on the record that a gift to a son-in-law by any widow (whether the wife or mother of the last male-holder) is sanctioned by custom. A single witness for the defendants, Mit Ram, stated that his maternal uncle's paternal uncle's wife had gifted land to her son-in-law, but in cross-examination admitted that he had only heard this and that he did not know when the gift had been made.

I, therefore, accept the appeal with costs, set aside the order of the lower Appellate Court dismissing the suit and restore the decree of the First Court.

Z. K.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 103, 104

105 OF 1922.

November 14, 1922.

Present.—Mr. Justice Krishnan.

RUKMANI AMMAL—PETITIONER

versus

RAMACHANDRA THONDAMAN SAHIB

BY AGENT POTHAN AND ANOTHER—

RESPONDENTS.

Execution of decree—Beneficial owner of decree, whether entitled to join in pending execution proceedings.

Parties should be allowed to join the record when their rights are in danger. [p. 875, col. 1.]

A person beneficially entitled to the fruits of a decree is entitled to be made a party in pending execution proceedings instituted by the *benamidar* decree-holder. [p. 875, col. 1.]

Manikkam v. Tatayya, 21 M. 388; 8 M. L. J. 48; 7 Ind. Dec. (N. S.) 631, distinguished.

Dwar Bakhsh Sirkar v. Fatih Jali, 26 C. 250; 3 C. W. N. 222; 1 Ind. Dec. (N. S.) 765 and *Muthiah Chettiar v. Lodd Govinda Doss Krishna Doss*, 69 Ind. Cas. 337; 44 M. 919; 41 M. L. J. 316; 14 L. W. 287; (1921) M. W. N. 649, relied on.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise an order dated the 8th February 1922 of the Court of the Additional Subordinate Judge, Trichinopoly, in I. A. Nos. 1, 2 and 3 of 1922 respectively in Appeal Suits Nos. 154, 155 and 156 of 1921 respectively.

Messrs. T. Narasimha Aiyangar and N. S. Ramaswami Aiyangar, for the Petitioner.

JUDGMENT.—This was an application by the petitioner, as the person beneficially entitled to the fruits of the decree in Original Suit No. 293 of 1899 on the file of the Court of the District Munsif of Trichinopoly which had been obtained by one Krishnaswamy Aiyangar, to be made a party to the appeal against the order of the District Munsif removing the obstruction of the respondent Rama-

[F] (2) 103 P. R. 1907; 159 P. W. R. 1907.

[F] (3) 149 P. R. 1908; 192 P. W. R. 1908.

(4) 4 P. R. 1890.

(5) 144 P. R. 1882.

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chandra Thondaman by agent Pothan, against possession of the property, purchased in execution being taken. The learned Subordinate Judge has dismissed the application holding that petitioner should file a fresh execution application and cannot claim to join in the present proceedings, relying on *Manikkam v. Talayya* (1). In that case such a point was not discussed or decided. That case really decided that the beneficial owner can come in and execute a decree obtained by a *benamidar* and if there was any dispute about the decree being *benami* the Executing Court should decide it.

Dwar Bakhsh Sirkar v. Fatik Jali (2) shows that a beneficial owner can ask to be added to a pending execution application and it has been held in *Muthiah Chettiar v. Lodd Govinda Doss Krishna Doss* (3) that a part transferee of a decree can apply to execute it even though there was an agreement to the contrary. The principle is clearly that parties should be allowed to join the record when their rights are in danger. In this case, therefore, petitioner should have been added as party respondent.

There is no meaning in telling petitioner to bring a fresh application for execution as the execution has been almost completed by sale of the property and the only thing now remaining being to give possession to the auction-purchaser.

I would, therefore, set aside the order of the lower Appellate Court and direct the Subordinate Judge to add petitioner as party respondent and dispose of the appeal according to law. There will be no order as to costs, here. This order will govern all the three petitioners before me.

V. N. V. *Petitions allowed.*

(1) 21 M. 388; 8 M. L. J. 48; 7 Ind. Dec. (N. S.) 631.

(2) 26 C. 250; 3 C. W. N. 222; 13 Ind. Dec. (N. S.) 765.

(3) 69 Ind. Cas. 337; 44 M. 919; 41 M. L. J. 316; 14 L. W. 287; (1921) M. W. N. 649.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 149 OF 1922.

December 18, 1922.

Present:—Sir Dawson Miller, Kt., Chief Justice, Justice Sir B. K. Mullick, Kt., and Mr. Justice Kulwant Sahay.

In the matter of Babu MADAHVA SINGH, VAKIL.

Letters Patent (Pat.), cl. 8—Criminal Law Amendment Act (XIV of 1908), s. 17 (2)—Legal practitioner, position and responsibilities of—Defiance of law and authority—Disciplinary jurisdiction of the High Court, exercise of.

Advocates and Pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice, but also for giving professional advice for which they are entitled to be paid, to those members of the public who require their services. Their position, training and practice give them immense influence with the public and their example must necessarily have a much greater effect whether for good or for evil than the example of those who do not occupy this privileged position. [p. 877, col. 1.]

It is not necessary for the High Court to be able to exercise its disciplinary jurisdiction that a legal practitioner should have committed an offence or should have done something subjecting him to anything like general infamy or imputation of bad character. [p. 877, cols. 1 & 2.]

A legal practitioner who takes the law into his own hands and sets up his own opinion in defiance of the opinion of constituted authority renders himself liable to the exercise of the disciplinary jurisdiction of the High Court. [p. 877, col. 1.]

Mr. P. N. Sinha, for the Vakil.

The Government Advocate, for the Crown.

JUDGMENT.

Miller, C. J.—In this case Babu Madhava Singh, a Vakil of this Court, ordinarily practising in the District Courts of Saran, having been enrolled in the Calcutta High Court in the year 1913, has been called upon to show cause why he should not be dealt with and either removed or suspended from practice under the powers conferred on the Court by clause 8 of the Letters Patent. It appears that in January last Babu Madhava Singh was tried and convicted of an offence under section 17, clause (2), of the Criminal Law Amendment Act, 1908, and was sentenced to one year's simple imprisonment. The sentence was afterwards reduced by the

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Local Government to six months. Section 17, clause (2), of the Criminal Law Amendment Act provides :—

“Whoever manages or assists in the management of an unlawful association, or promotes or assists in promoting a meeting of any such association, or of any members thereof as such members, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.”

It appears from the decision of the Magistrate before whom Babu Madhava Singh was tried and convicted that there were certain persons known as the *Sewak Dal* volunteers, and by a Notification in December last these volunteers were declared by the Local Government to be an unlawful association within the meaning of Part II of Act XIV of 1908, the Criminal Law Amendment Act. Notwithstanding this Notification, a meeting was held at which a large number of persons were present and I have no doubt many of them, if not most of them, belonged to the *Sewak Dal* volunteers. At that meeting speeches were made in direct defiance of the Notification and the persons present were invited to enrol themselves as volunteers. Two other persons were tried and convicted along with Babu Madhava Singh. The learned Magistrate said that he appeared to be the most educated of the accused and, although the speech he made on that occasion was not the principal speech, still he was convicted and given the same sentence as the other two. After he had served his sentence he applied for renewal of his clerk's license and the matter was brought to the notice of the Court by the District and Sessions Judge of Saran. The Court thereupon issued notice to him asking him to offer any explanation which he might be in a position to make both of his past conduct and his future attitude towards offences of the nature of which he had been convicted. In reply to that notice he stated that the action for which he was convicted was done in perfect good faith for he sincerely believed that it was necessary in those days to enlist volunteers for the preservation of the peace in the district; that the restriction of the enrolment of volunteers was unnecessary in the District of Saran, a fact of which he held a sincere conviction, and he adds that

the lack of the necessity for restricting their enrolment was proved by the fact that the restriction was withdrawn a few days after his arrest. He then concludes by saying that his conviction was on a matter of opinion which does not come under the purview of the Legal Practitioners Act. Then, as regards his future attitude he says that he does not intend to commit any offence against any law.

Reading that answer, I cannot help thinking that the attitude of the Vakil is that the orders of the Local Government declaring the volunteers to be an unlawful association are altogether unnecessary and unwarranted and that he himself knew much better than the Local Government whether such an order ought to have been issued, and knowing that such orders were unnecessary and unwarranted he felt perfectly justified in defying them and in taking part in a meeting with the object of enrolling further volunteers in an association which had been declared to be an unlawful association and that the whole matter was merely one of opinion in which he was entitled to put forward his opinion even against the orders of constituted authority. There is not a word in his reply which indicates that he feels any sense of regret for having done acts which undoubtedly amounted to defiance of the law, or that he intends in future to refrain from any such offence. It is quite obvious that whether for political considerations or for any other reasons, if we take the law into our own hands and say what we shall do and what we shall not do notwithstanding that there may be a prohibition under the law against doing certain acts, all good Government in the country would come to an end and a state of anarchy and chaos would exist, and I cannot help regretting that this young man who was enrolled as a Vakil in 1913 does not even now realise the exact nature of the offence which he has undoubtedly committed. On his behalf to-day Rai Bahadur Purnendu Narayan Singh has appeared and even now no expression of regret is put forward on his behalf, but it has been contended that, upon the facts disclosed in the Magistrate's judgment, there really was no offence committed under section 17, clause (2), of the Criminal Law Amendment Act and that it has not

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been proved that the meeting in which he took part was really a meeting of the association which had been proscribed and declared an unlawful association by the Local Government. Whether such a case could be made out, or not, must depend upon the evidence in the case. On further consideration, the learned Rai Bahadur did not pursue the matter or take us through the evidence before the Magistrate because it was pointed out to him that whether or not the Vakil was guilty of an offence under that section it is perfectly clear that he has deliberately taken the law into his own hands and defied the orders of constituted authority. In these circumstances, it seems to me that it would be impossible for us to take the course which I certainly had in mind to take at one time had the Vakil appeared and expressed regret for his past conduct and given some assurance as to his conduct in the future. In such a case we might have been content to let him off with a warning and to accept his assurances as to his future conduct, but having regard to the attitude which he has taken throughout, I do not think that we should be justified in acting in such a manner. With regard to the actions of persons in the position of a Vakil, who is an officer of the Court and who holds a responsible position and who certainly ought to uphold the preservation of law and order, I do not think I can do better than refer to the words of the learned Chief Justice of the High Court at Bombay in a recent case which was heard in October 1919. The learned Chief Justice in a very similar case to the present said:—

"Advocates and Pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice, but also for giving professional advice, for which they are entitled to be paid, to those members of the public who require their services. Their position, training and practice give them immense influence with the public and their example must necessarily have a much greater effect whether for good or for evil than the example of those who do not occupy this privileged position. It is not necessary in order for us to be able to exercise our jurisdiction that any offence should have been committed, nor is it

necessary that what the respondents have done should have subjected them to anything like general infamy or imputation of bad character."

I entirely agree with the remarks of the learned Chief Justice in that case and desire to impress them upon the respondent in this case. In these circumstances, although I have already stated I should have been willing had the respondent shown a different attitude to let him off with a warning, I think that the least we can do is to suspend him from practice for a period of six months from this date.

Mullick, J.—I agree.

Kulwant Sahay, J.—I agree.

Z. K.

Suspension order passed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 116 OF 1922.
November 8, 1922.

Present:—Mr. Kanhaiya Lal, J. C.

RAM SINGH AND OTHERS—

DEFENDANTS—APPELLANT

versus

Musammat RAGHUBANSA—

PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Mortgage by father in lieu of antecedent debts—Pious obligation of sons to pay—Oudh Civil Digest, para. 267—Legal Practitioner—Money-lending business—Professional etiquette—Contract, validity of.

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Where a mortgage is executed by the father of a joint Hindu family, in lieu of antecedent debts, the sons are under a pious obligation to pay the mortgage debt unless it is shown to have been tainted with immorality.

The disability which attaches to a legal practitioner under paragraph 267 of the Oudh Civil Digest in regard to doing money-lending business does not have the effect of rendering any contract, by which he lends money to a person belonging to the district in which he is practising, void and unenforceable. The question in such cases is really one of professional etiquette rather than of public policy and the contract cannot be regarded as invalid.

Appeal from a decree of the District Judge, Gonda, dated the 13th December 1921.

Mr. Zahur Ahmad, for the Appellant.

Mr. Aditya Prasad, for the Respondent.

JUDGMENT.—Janardan Prasad was a Pleader practising in Bahraich. He advanced certain money to Nanku Singh the father of the defendants Nos. 2 and 3 and the grandfather of the defendant No. 4, on two simple bonds one of which was executed on the 2nd June 1903 (Exhibit 1) and the other on the 1st October 1907 (Exhibit 2). In lieu of the moneys due on those bonds he subsequently took a mortgage from Nanku Singh in favour of his wife, Musammat Raghubansa, on the 23rd May 1910. That mortgage is now in suit. The defendants Nos. 2, 3 and 4 contested the validity of that mortgage partly on the ground that it was not made for family necessity or for the benefit of the family, and partly on the strength of paragraph 267 of the Oudh Civil Digest which forbade a legal practitioner from embarking on money-lending business without the express permission of the Court. The Trial Court found against them and decreed the claim. That decree was upheld in appeal.

It is urged on behalf of the defendants-appellants that the lower Appellate Court ought to have gone into the question raised regarding the absence of legal necessity or valid consideration and the reasonableness of the covenants as to interest entered in the bonds. These points were evidently not pressed in the lower Appellate Court. The mortgage was executed in lieu

of antecedent debts which the defendants-appellants were under an obligation to pay, unless they were shown to have been tainted with immorality. Nanku Singh died during the progress of the suit in the Court of first instance and the pious obligations of his sons and grandson to pay his debts came into existence on his death. The covenant as to the payment of the interest was not unreasonable. It is also said that the defendants-appellants had asked for an adjournment on the 6th April which was disallowed by the Trial Court, but that point, too, does not appear to have been pressed in the lower Appellate Court.

It is next argued that the plaintiff had no right to sue unless there was an assignment of the earlier bonds which formed the consideration of the mortgage in suit in her favour or they were cancelled by endorsements or otherwise. No assignment can, however, be made in favour of a *benamidar* such as the plaintiff was. The effect of the novation of the contract was practically to render the earlier bonds unenforceable. The consideration of the mortgage in suit was, therefore, a good consideration binding on the defendants-appellants who were charged with the responsibility of paying the debts due by Nanku Singh under the Hindu Law.

It is also urged that the disability which attached to Janardan Prasad in regard to doing money-lending business had the effect of rendering any mortgage taken by him from a person, belonging to the district in which he was practising void and unenforceable, but, as pointed out by this Court in *Sughar Kumwar v. Sitapat Ram* (1) and *Babu Lachman Das v. Hira Lal* (first Civil Appeal No. 51 of 1917, dated 9th July 1918), there is a wide distinction between a contract which it may be improper for a Pleader to enter into without the sanction of this Court and a contract the toleration of which is so injurious to the public welfare that even as between the parties who have voluntarily entered into it the Courts will refuse to enforce it. The question in such cases is really one of professional etiquette rather

(1) 39 Ind. Cas. 135; 20 O. C. 67; 4 O. L. J. 92.

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than of public policy and the contract cannot be regarded as invalid. The appeal fails and is dismissed with costs.

N. H.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 67 OF 1922.

October 5, 1922.

Present :—Mr. Daniels, J. C.DORI LAL—DECREE-HOLDER—APPLICANT
*versus*Musammât JAMAGA AND OTHERS—
JUDGMENT-DEBTORS—OPPOSITE PARTY.*Jurisdiction*—Decree conditional on payment within fixed time—Court, power of, to extend time.

Where a decree is passed conditionally on the decree-holder's making a certain payment within a fixed time, the Court has no power to extend the time so fixed. [p. 880, col. 1.]

Revision against an order of the Munsif, Bahraich, dated the 8th April 1922.

Mr. S. N. Roy, for the Applicant.

Mr. H. M. Ghosh, for Mr. B.N. Chakbast,
for the Opposite Party.

ORDER.—This is an application under section 115, Civil Procedure Code, for revision of an order purporting to have been passed under section 144, Civil Procedure Code. The facts are of an unusual nature. The plaintiff-applicant obtained a decree for specific performance against two sets of parties, against *Musammât* Jamaga and her husband Haji Rahim Bakhsh, who had contracted to sell certain property to the plaintiff and against one Barati to whom they have subsequently sold it in violation of the contract previously made with the plaintiff. The decree passed in the plaintiff's favour was, however, a conditional decree. It was conditional on the plaintiff depositing in Court the sum of Rs. 275 within 15 days. The plaintiff did not comply with this condition. He deposited the money four days after the period allowed by the decree had expired. In the meantime, he applied for the correction of the decree by inserting certain directions as to what was to happen in the event of his making the deposit. The Court allowed the amendment, although in the same order it states its view that the plaintiffs had failed to comply with the decree and was not entitled to any extension of time. This order was passed on the 20th March 1922. Two months earlier, the plaintiff had applied in the execution department to be put in possession of the property on the basis of deposit made by him and had been put in possession. Notice of this application was not given and was not required to be given, to the defendants and the fact that a deposit had not been made in time does not appear at that time to have been brought to the notice of the Court. In the course of the proceedings which culminated in the order of the 20th March *Musammât* Jamaga had applied to be restored to possession and her application was granted by the order of 8th April 1922 which is now attacked before me.

The order is attacked both on the ground that the Munsif had no jurisdiction to pass it. On the merits it is, in my opinion, a perfectly correct order. The decree had not been complied with and the view both of this

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Court and of the Allahabad High Court as laid down in the authorities referred to by the learned Munsif and other cases, is that where a definite time fixed is by the decree itself, the Court has no power to extend it. In any case, no order extending the time was passed in this case and the excuses put forward by the plaintiff and considered by the Court below in no way affect the fact that he failed to comply with the decree.

On the question of jurisdiction it is urged, and rightly, that the case does not come within the terms of section 144, Civil Procedure Code. That section refers to the case of a decree being varied or reversed. Here the original decree holds good, but what was reversed was an order granting the plaintiff execution under the erroneous impression that he had fulfilled the terms of the decree. I cannot, however, concur with the applicant in his further suggestion that the order was passed without jurisdiction. If there is any point at all to which the inherent powers of the Court referred to in section 151, Civil Procedure Code, extend, it is to the remedying of just such an injustice as was done in this case; the plaintiff not having complied with the decree and the Court having under a misapprehension granted him relief to which he was not entitled, it was fully within its power to put right the wrong which had been done. In this view it is not necessary to decide the counter-plea raised by the respondents that the order complained of was appealable to this Court and, therefore, that the application for revision is incompetent. I am not prepared to accept the suggestion of the respondents that a conditional decree must necessarily be treated as a preliminary decree and that the order restoring possession was of the nature of a final decree; I am, however, inclined to think that it was an order passed in the execution department from which an appeal could have been preferred under the provision of section 47, Civil Procedure Code. It would certainly be very anomalous to hold that an order of this kind, which alters the entire effect of the suit, was a mere incidental order from which no appeal

lay. A difficulty is certainly created by the fact that in the order complained of the Munsif directed the parties to bear their own costs of the suit, which he had no power to do in the execution department. As, however, the original decree made no provision for costs in the event of the plaintiff failing to make the deposit, the result is exactly the same as it would have been, if this part of the order had been omitted.

One other objection taken by the applicant may be noted. He urges that the only person who was entitled to apply for restitution was Barat. This, however, was a matter between the defendants themselves and it does not appear to me that it is open to the plaintiff to take this objection. The suit was brought against both sets of defendants and if the plaintiff was wrongly given possession contrary to the decree it was open to either of them to apply for restitution.

In the result, the present application fails and it is hereby dismissed with costs.

Application dismissed.

N. H.

RAMAMMA v. GURUNATHAM.

MADRAS HIGH COURT.CRIMINAL REVISION CASE No. 333 OF 1922.
(CRIMINAL REVISION PETITION No. 290
OF 1922.)

March 13, 1923.

Present:—Justice Sir William Ayling, Kt.,
and Mr. Justice Odgers.N. RAMAMMA—COMPLAINANT
—PETITIONER

versus

M. GURUNATHAM—ACCUSED—
RESPONDENT.*Workman's Breach of Contract Act (XIII of 1854), s. 1, enquiry under—Criminal Procedure Code (Act V of 1898), s. 247, applicability of—Order of acquittal purported to be passed under s. 247—Order of dismissal of complaint—Review.*

The proceedings of a Magistrate under the Workman's Breach of Contract Act up to the stage of the passage of an order by the Magistrate for re-payment or performance under section 2 are not criminal proceedings at all. [p 881, col 2]

Hussaina Beari v. Emperor, 59 Ind. Cas. 45; 43 M. 443; 22 Cr. L. J. 13 and *Emperor v. Dhondu*, 1 Ind. Cas. 378; 33 B. 22; 6 Bom. L. R. 255; 1 Cr. L. J. 263, followed.

Therefore, an inquiry under section 1 of the Workman's Breach of Contract Act cannot be held to be governed by Chapter XX of the Criminal Procedure Code and an order of acquittal of an accused person on account of the non-appearance of the complainant on the day of hearing even though purported to be made under section 247 of the Code, cannot be considered to have been passed under that section. Such an order is merely one of dismissal of the complaint which the Magistrate can review if he sees cause to do so. [p. 182, col. 1.]

Aveam Das Mochi v. Abdul Rahim, 27 C. 131; 4 C. W. N. 201; 14 Ind. Dec. (N. S.) 86, followed.*Girish Chandra Das v. Bhusan Das*, 51 Ind. Cas. 476; 46 C. 867; 29 C. L. J. 387; 20 Cr. L. J. 492; 23 C. W. N. 959, not followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate of Kovvur dated the 29th October 1921, in C. C. No. 329 of 1921.

Mr. S. Ranganatha Ayyar, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The petitioner in this case has filed a complaint under section 1 of the Workman's Breach of Contract Act against the respondent before the Stationary Sub-Magistrate, Kovvur, and that officer proceeded to hear and determine the case as

provided in the Act. On one of the dates of hearing, the petitioner was absent and the Magistrate thereupon, passed an order purporting to acquit the respondent under section 247 of the Criminal Procedure Code. The petitioner subsequently applied to the Magistrate to review the order of acquittal and to proceed with the trial from the stage at which the case was thrown out. The Magistrate held that he had no power under the Criminal Procedure Code to review an order of acquittal under section 247, and accordingly dismissed the petition. Against that dismissal the present revision is preferred.

In our opinion, the Magistrate's view was wrong. It has been held by this Court in *Hussaina Beari v. Emperor* (1) that the Magistrate's proceeding under the Workman's Breach of Contract Act up to the stage of the passage of an order by the Magistrate for re-payment or performance under section (2) are not Criminal proceedings at all and this is also the view taken in *Emperor v. Dhondu* (2). If the proceedings are not criminal proceedings, it is difficult to see how the procedure can be regulated by Chapter XX of the Criminal Procedure Code or how section 247 of the Code can apply. Mr. Ethiraj who argued the case for the Public Prosecutor, suggested that the definition of "Summons Case" in the Code as "a case relating to an offence and not being a Warrant Case" would cover proceedings leading up to an offence (*i. e.*, disobedience to a Magistrate's order), which has been committed at the time when the proceedings were initiated; but it seems to us that that would be an unwarrantable stretch of the definition. The ruling in *Hussaina Beari v. Emperor* (1) is to the effect that as offence is committed until the workman disobeys the Magistrate's order. In the second place, Mr. Ethiraj asks under what provision of the law the enquiry contemplated by the Act can be conducted at all, if not under the Criminal Procedure Code? We think the answer to it is contained in the closing words of section 1 of the Act, which empowers the Magistrate to "hear and determine the case." This view

(1) 59 Ind. Cas. 45; 43 M. 443; 22 Cr. L. J. 13.

(2) 1 Ind. Cas. 378; 33 B. 22; 6 Bom. L. R. 255, 1 Cr. L. J. 263.

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is in accordance with the judgment of the Calcutta High Court in *Averam Das Mochi v. Abdul Rahim* (3) in which the learned Judges have in fact held that the Criminal Procedure Code does not apply to the enquiry contemplated by section 1 of the Workman's Breach of Contract Act. They say: "the learned Pleader, who appears for the petitioner, urges (1) that the evidence has not been properly recorded; and (2) that the Magistrate has written no judgment. He, however, has not been able to show us any section of Act XIII of 1859, or of the Criminal Procedure Code, prescribing how evidence in a case of this nature should be recorded or requiring a judgment to be written." These words imply that Chapter XX of the Criminal Procedure Code does not govern the case. We have been referred to a Calcutta case, *Girish Chandra Das v. Bhusan Das* (4), similar to the present case, in which the learned Judges apparently presumed that section 247 would apply, but the question of the applicability does not appear to have been raised in that case at all nor was their attention drawn to the difficulty.

In our opinion, the enquiry directed by section 1 of the Workman's Breach of Contract Act cannot be held to be one under Chapter XX, Criminal Procedure Code, and the Magistrate's order of acquittal was in effect not passed under that Chapter of the Code but was merely a dismissal of the complaint. Viewed in this light, there is nothing to prevent him from reviewing that order if he sees cause to do so. We must, therefore, set aside his dismissal of the petitioner's review petition dated 23rd February 1922, and direct him to restore the petition to file and dispose of it according to law.

V. N. V.

N. H.

Order set aside.

(3) 27 C. 131; 4 C. W. N. 291; 14 Ind. Dec. (N. S.) 86.

(4) 51 Ind. Cas. 476; 46 C. 867; 29 C. L. J. 387; 20 Cr. L. J. 492; 23 C. W. N. 959.

LAHORE HIGH COURT.

CRIMINAL PETITION No. 32 OF 1923.

April 20, 1923.

Present:—Mr. Justice Moti Sagar.

GHULAM NABI—PETITIONER

versus

JAMALA—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—District Magistrate, whether must be moved—Procedure.

Ordinarily, the High Court will not transfer a case pending before a Magistrate unless the party applying for transfer has moved the District Magistrate before coming to the High Court.

In re Fonseca, 6 Bom. L. R. 480; 1 Cr. L. J. 589, relied upon.

Petition, under section 526 of the Criminal Procedure Code, for transfer of the case *Jamala v. Ghulam Nabi*, from the Court of the Magistrate, First Class, Ferozepore, to some other competent Court.

Mr. *Jai Gopal Sethi*, for the Petitioner.

Mr. *Shamair Chand*, for the Respondent.

ORDER.—This is an application for the transfer of a case under section 526 of the Code of Criminal Procedure from the Court of Mr. Stephens, Magistrate First Class, at Ferozepore, to the Court of some other Magistrate in the same District. A preliminary objection is raised that the petitioner ought to have moved the District Magistrate for a transfer before coming up to the High Court. I think this objection is well founded and must prevail. It has been held in *In re Fonseca* (1) that, ordinarily, a High Court does not transfer a case pending before a Magistrate unless the party applying for transfer has moved the District Magistrate before coming to the High Court. I am in full agreement with the rule laid down in this authority and reject the application. The petitioner would be fully competent to apply to the District Magistrate for a transfer, if so advised.

Z. K.

Order accordingly.

(1) 6 Bom. L. R. 480; 1 Cr. L. J. 589.

KESHO SINGH V. EMPEROR.

ODH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 95 OF 1922.

October 10, 1922.

Present :—Mr. Ashworth, A. J. C.KESHO SINGH AND OTHERS—
APPLICANTS*versus*

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 430—Mischief—Absence of finding that property does not belong to accused, effect of.

A conviction under section 430 of the Penal Code, in the absence of a finding based upon evidence that the property belonged to any one other than the accused himself, is bad in law, and cannot be sustained, because no person can commit mischief in respect of property which belongs exclusively to himself.

Criminal revision against an order, dated the 25th May 1922, of the Sessions Judge, Hardoi.

Mr. Ali Uddin Ahmad, holding brief of Mr. S. M. Zahur Ali, for the Applicants.

The Government Pleader, for the Opposite Party.

JUDGMENT.—This is an application in revision against a conviction by a First Class Magistrate of Hardoi of the five applicants. An application in revision to the Sessions Judge was rejected. The Magistrate found that the accused had blocked up a certain channel by which water from one tank went into another tank. The feeding tank belonged to the accused and the fed tank to the applicants. He also found that stopping of the channel caused injury to the fields of the complainants by preventing their (fields) being irrigated. The Magistrate now here came to a finding that the channel belonged to the complainant. Indeed, it is clear from the judgment generally, and it is also in accordance with the probability, that the accused had blocked up the channel at a spot within their own land. Section 430, Indian Penal Code, under which the applicants have been convicted is a case of aggravated mischief. Before convicting under that section it is necessary to prove mischief. No person can commit mischief in respect of property which belongs exclusively to himself. This is perfectly clear from explanation (2) to section 425 which provides that mischief may be com-

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mitted where the act affects property belonging to the offender and another jointly. In the present case the conviction was bad because there is no finding, and indeed it appears to be contrary to the evidence that the property, that is, channel to which change was caused, was at the point where it was blocked up, the property of any one other than the accused themselves. This application in revision is, therefore, allowed. Fines, if paid, will be refunded.

W. C. A.

*Revision allowed.***PATNA HIGH COURT.**

CRIMINAL REVISION No. 69 OF 1923.

March 13, 1923.

Present :—Mr. Justice Adami.KEDAR NATH CHAUBEY AND OTHERS—
PETITIONERS*versus*

JALESWAR RAM TEWARI AND

OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Possession delivered under decree of Civil Court, value of—Procedure.

Proceedings may be taken with jurisdiction under section 145 of the Criminal Procedure Code before the Magistrate comes to know that one party has a decision of the Civil Court in his favour and the proceedings will not be without jurisdiction. But when in the course of the proceedings he finds that there is such an order of the Civil Court, it is his duty to maintain that order and possession granted under that order, if such possession has been given within a reasonable time from the initiation of the proceedings under section 145. It will then be proper for him not to stay the proceedings, but to pass an order under section 145 declaring the party which has the Civil Court decree in its favour, or which has been put in possession by the Civil Court to be in possession and to forbid the other party to interfere with the possession of that party. [p. 884, col. 2.]

This is not, however, an invariable rule and the evidentiary value to be attached to the fact that the Civil Court has given possession to one party must depend upon the particular circumstances of each case. [p. 885, cols. 1 & 2.]

Kulada Kinkar Roy v. Danesh Mir, 33 C. 33 at p. 47; 10 C. W. N. 1057; 2 C. L. J. 271; 2 Cr. L. J. 670, followed.

Application against an order passed by the Sub-Divisional Officer, Bettiah.

Messrs. G. C. Pal and S. S. Bose, for the Petitioners.

Messrs. L. N. Singh and S. Saran, for the Opposite Party.

JUDGMENT.—This application is directed against an order passed by the Sub-Divisional Magistrate of Bettiah in proceedings

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under section 145 of the Code of Criminal Procedure. The dispute related to 23 *bighas* of land in village Baudhbarwa. It appears that Mr. Coffin, the *thicadar*, after his lease had expired, sued the recorded tenants of the holdings for rent and obtained an *ex parte* decree. At the sale held in execution of that decree he purchased the holdings and obtained delivery of possession on the 13th March 1921. At the end of the year, i.e., 8th December 1921, Mr. Coffin sold the holdings to the first party to the proceedings. It appears, too, that in 1912 second party purchased 23 *bighas* from the recorded tenants and thereafter redeemed certain usufructuary mortgages which the tenants had previously executed in favour of other persons and then obtained *khas* possession of the holdings. The dispute, therefore, between the parties was whether the first party were in possession under their purchase in December 1921 or the second party had remained in possession since their purchase in 1912 on their redemption of the usufructuary mortgages.

The learned Sub-Divisional Magistrate went to the locality and examined certain witnesses produced by the first party, but the second party had no chance of cross-examining them. On return to the head-quarters the learned Sub-Divisional Magistrate perused the documents put forward by the first party and thereupon, without hearing either the witnesses of the second party or looking into such documentary evidence as the second party wished to produce, passed the order against which this application was made. Shortly stated, the order is to the effect that after perusing the documents put forward by the first party, the learned Magistrate found that the first party had been put in possession by the Civil Court under O. XXI, r. 95 in 1921 and that being so, he was bound to uphold and maintain the possession of the first party. His order runs as follows: "All that remains for this Court is to uphold first party in possession. Following the ruling of *Gobind Chander Moitra v. Abdul Sayad* (1), I hold that I have no jurisdiction to pass an order under section 145, Criminal Procedure Code. Proceedings are accordingly stayed under section 145 (5), Criminal Procedure Code. The

Police to release the crop from attachment⁸ and make over to the first party. No order for costs."

Now, in the first place, in my opinion, the order passed was wrong. The learned Sub-Divisional Magistrate holds that after proceedings have been taken under section 145 and it is found that the Civil Court found title of, and delivered possession to, one party, the Magistrate has no jurisdiction to pass an order under section 145. I do not consider that this is right. Proceedings may be taken with jurisdiction under section 145 before the Magistrate comes to know that one party has a decision of the Civil Court in his favour and the proceedings will not be without jurisdiction. But when in the course of proceedings he finds that there is such an order of the Civil Court it is his bounden duty to maintain that order and possession granted under that order. It will then be proper for him not to stay the proceedings, but to pass an order under section 145 declaring the party which has the Civil Court decree in his favour, or which has been put in possession by the Civil Court, to be in possession and to forbid the other party to interfere with the possession of that party. The present order does not contain any provision against the second party forbidding them to enter upon the land until a decision has been come to by a competent Civil Court.

Apart from this, the procedure followed by the learned Magistrate appears to me to be wrong. The petitioners complained that they had no opportunity of either showing their documents or of proving their possession through their witnesses. It appears from the order of the Magistrate that the decree in execution of which the land was sold to Mr. Coffin was a money-decree and there can be no doubt, I think, that the decree was of that nature. Under that decree only the right, title and interest of the judgment-debtors in the decree would pass. But it appears that the decree-holder made an application to the Munsif for the annulling of all incumbrances, but his application was refused on the ground, I suppose, that the decree was merely a money-decree. Thus, it is practically admitted that there were incumbrances and those incumbrances were the prior usufructuary mortgage which, the present petitioners have in

(1) 3 C. L. R. 217.

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part redeemed. That being so, the Court could only give possession to the decree-holder or the auction-purchaser to the extent of the judgment-debtor's interest and the judgment-debtors had by that time lost their interest. The mere fact that possession was delivered to the auction-purchaser under O. XXI, r. 95 would not affect the persons who were not subject to the decree. It is to be remembered that the suit is a rent suit; it was not a suit for declaration of title and recovery of possession and there had been no decision of the Civil Court on the question of title and possession. It further appears that one of the judgment-debtors who was represented as a major was in fact a minor and that the Munsif, in proceedings under O. XXI, r. 90, came to the conclusion that this minor was not bound by the decree or the sale. It might well be that delivery of possession was given to the auction-purchaser, but it is to be remembered that about nine months afterwards this auction-purchaser transferred the land by sale to the first party. There is nothing to show whether that first party actually got possession of the land under their sale. The difficulty is that the documents which the second party wished to produce before the Magistrate were not considered and this Court can only have regard to the allegations made on behalf of the petitioners as to what those documents contained. It may have been that since the delivery of possession to the predecessor of the first party, the second party had obtained possession of the land or had never been ousted from the possession they held under their purchase or after redemption of the mortgage and I think the Magistrate should have considered both the documents and the oral evidence of their witnesses as to possession before passing the order he has done.

It is quite true that a Magistrate in proceedings under section 145 is bound to maintain the decisions as to title passed, and possession delivered, by a Civil Court in execution of its decree if such possession has been given within a reasonable time from the initiation of the proceedings under section 145. As has been shown in *Kulada Kinkar Roy v. Danesh Mir* (2), this is not

an invariable rule and the evidentiary value to be attached to the fact that the Civil Court has given possession to one party must depend upon the particular circumstances of the particular case. As the Magistrate has not considered the documentary and other evidence produced by the second party and such evidence is not before this Court, it is impossible to say whether the circumstances were such that the Magistrate was bound to uphold the possession given by the Civil Court in this present case.

The order must be set aside and the case must be sent back to the learned Sub-Divisional Magistrate with directions that the second party should be given an opportunity of cross-examining the witnesses of the first party and of producing evidence and documentary on their own behalf.

Z. K.

*Order set aside.
Case sent back.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 204 OF 1922.

CRIMINAL REVISION PETITION No. 179
OF 1922.

November 15, 1922.

Present—Mr. Justice Wallace.VENKATARAMA AIYAR—COMPLAINANT
—PETITIONER*versus*

SUNDARAM PILLAI AND OTHERS

—ACCUSED Nos. 1 TO 3—RESPONDENTS.

*Criminal Procedure Code (Act V of 1898), s. 247**—Warrant-case—Procedure adopted in summons-case—Absence of complainant—Procedure.*

Section 247 of the Criminal Procedure Code is intended to lay down a general principle that a person charged with a summons-case offence is entitled in law to an acquittal if the complainant is absent; and this right cannot be denied him simply because the Magistrate adopts a warrant-case procedure for the trial of a summons-case offence. [p. 836, col. 2.]

The right of the accused to benefit under section 247 of the Criminal Procedure Code does not depend on the procedure which the Magistrate chose to adopt and was constrained to adopt by the complaint as laid, but on the nature and the class of the offence for which he is being tried at the time of the complainant's failure to appear in Court. [p. 887, col. 1.]

(2) 33 C. 33 at p. 47; 10 C. W. N. 1037; 2 C. L. J. 272; 2 Cr. L. J. 670.

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When running through the trial of a warrant-case a Magistrate is satisfied that only a summons-case charge will stand, the rest of the trial though technically a continuation of the warrant-case trial is really a summons trial. [p. 886, col. 2.]

Queen-Empress v. Papadu, 7 M. 454; 2 Weir 551; 2 Ind. Dec. (N. S.) 900, relied upon.

Rajnarain Koonwar v. Lala Tamoli Raut, 11 C. 91; 5 Ind. Dec. (N. S.) 819, *Ganga Saran v. Emperor*, 59 Ind. Cas. 850; 19 A. L. J. 6; 22 Cr. L. J. 146, distinguished.

When any conflict arises between technicalities and the legal rights of an accused person, the latter must prevail. [7. 886, col. 2.]

Petition, under sections 435 and 439 of the Code of the Criminal Procedure, 1898, praying the High Court to revise an order, dated the 16th January 1922, of the Court of the Sub-Divisional First Class Magistrate, Ramnad, in C. C. No. 169 of 1920.

Dr. S. Swaminathan, for the Petitioner.
Mr. A. S. Natarajan, Public Prosecutor,
for the Government.

Mr. V. L. Ethiraj, for Respondent,
Accused No. 1.

ORDER.—The first point for decision in this case is whether the lower Court had any jurisdiction to acquit the accused under section 247 of the Code of Criminal Procedure. Perusal of the lower Courts proceedings shows clearly that the accused was charged under section 430, Indian Penal Code, a warrant-case offence, that the lower Court tried the accused under the procedure laid down for the trial of warrant-cases, but eventually framed a charge under section 426, Indian Penal Code, a summons-case offence, but still proceeded with the trial under warrant-case procedure, recalling the prosecution witnesses for examination, for further cross-examination, and then eventually acquitted accused under section 247 of the Code of Criminal Procedure on the ground that the complainant (petitioner) was absent on the adjourned date of hearing. Petitioner's case is that the lower Court having elected to try the case by warrant-case procedure, had no power to act under section 247 of the Code of Criminal Procedure which applies only to case tried under summons-case procedure.

No doubt, section 247 appears in the chapter headed "Of the trial of summons-cases" and not in the Chapter headed "Of the trial of warrant-cases," but, in my opinion, that does not settle the point

at issue. Section 247 seems to me intended to lay down a general principle that a person charged with summons-case offence is entitled in law to an acquittal if the complainant is absent; and I cannot see why this right should be denied to him simply because the Magistrate has adopted a particular procedure in the trial of the case. *Ex hypothesi* in such contingency, the complainant has so exaggerated his case that the Magistrate had to try it as a warrant-case, whereas, if the complainant has not exaggerated it, and the Magistrate had tried it as a summons-case *ab initio*, the acquittal on the ground of complainant's absence could have been perfectly legal. I cannot see any justification either in law or in reason why accused should lose this right to demand an acquittal merely because the complainant exaggerated the case against him. To hold otherwise would be to allow a pure technicality to negative a substantial legal right. If any conflict arises between technicalities and the legal rights of an accused person, undoubtedly the latter must prevail.

I find no reported cases directly in point. That reported as *Rajnarain Koonwar v. Lala Tamoli Raut* (1) was a case in which the Magistrate purported to pass an order under section 247 of the Code of Criminal Procedure in respect of a warrant-case offence, which was clearly illegal. The case reported as *Queen-Empress v. Papadu* (2) lays down that when a Magistrate finds that a warrant-case charge fails, he is not prevented from then and there trying the accused for a summons-case offence, which he finds to have been made out, under the procedure for trying summons-cases. I take it that this means that, when running through the trial of a warrant case, the Magistrate is satisfied that only a summons-case charge will stand, the rest of the trial though technically a continuation of the warrant-case trial is really a summons case trial. In the case reported in *Ganga Saran v. Emperor* (3) the question decided was that a case begun under a warrant-case procedure

(1) 11 C. 91; 5 Ind. Dec. (N. S.) 819.

(2) 7 M. 454; 2 Weir 551; 2 Ind. Dec. (N. S.) 900.

(3) 59 Ind. Cas. 850; 19 A. L. J. 6; 22 Cr. L. J. 146.

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should be continued under that procedure and that the applicability of section 247 of the Code of Criminal Procedure to cases so tried was not considered.

The general principle must be that the right of the accused to benefit under section 247 of the Code of Criminal Procedure does not depend on the procedure which the Magistrate chose to adopt and was constrained to adopt by the complaint as laid, but on the nature and class of the offence for which he is being tried at the time of the complainant's failure to appear in Court. I find, therefore, nothing illegal in the lower Court's procedure.

The next point taken is that the petitioner had good reasons for not appearing at the hearing of 16th January 1922. Petitioner was well aware that the hearing was going on on that day at Abhiramam since he was served with summons for that day and place. His plea that he could not find the Magistrate at Abhiramam is disingenuous, since the Magistrate was holding his Court at the usual place where he used to hold it when camping at Abhiramam. The plea that 16th January 1922 was a holiday was not a sound excuse for petitioner not appearing to prosecute his case, and a legal reason for the Magistrate refusing to act under the peremptory provisions of section 247 of the Code of Criminal Procedure.

I am not prepared to interfere in this case and dismiss the petition.

V. N. V.

Petition dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 625 OF 1922.

November 14, 1922.

Present:—Justice Sir John Bucknill, Kt.

RAMGOBIND RAM—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 193—Perjury
Essentials necessary for conviction—Intention.

The intention to commit perjury must be clearly present before a person charged with that offence can properly be convicted of it, and a statement capable of being construed in any reasonable way in such committing, that it does not show a clear intention of committing perjury, or a deliberate attempt to make a false statement does not *per se* contain the elements of the offence. [p. 889, col. 2; p. 890, col. 1.]

Messrs. S. P. Varma and Hareshwar Prasad Sinha, for the Petitioner.

Mr. S. N. Bose, for the Opposite party.

JUDGMENT.—This is an application in criminal revisional jurisdiction made by one Ramgobind Ram who asks that an order of the Deputy Magistrate of Motihari, dated 24th August 1922, under which he was convicted of an offence against the provisions of section 193 of the Indian Penal Code and sentenced to six months' rigorous imprisonment may be set aside. An appeal against this decision was lodged before the Sessions Judge of Muzafferpore who, however, dismissed the appeal on the 9th October of this year. The whole matter is an extremely simple one and the circumstances under which this application arises appear to be very clear.

There was a case brought by a Factory known as the Motihari Concern against certain persons in connection with rent. One Mosadi Lal had applied to be made a co-defendant and he was so made a party; the 17th of June had been fixed for hearing of the matter. Now on that date an application had been filed asking on behalf of Mosadi Lal, for adjournment on the ground that one of his sons was going to be married at a place called Kesaria and that it was necessary that he (Mosadi) should attend that function. Now there was no reason to suppose that this application for adjournment made by this man was in any way untrue or fictitious, and, as a matter of fact, the application was granted; presumably partially also because the applicant (Mosadi) one of the co-defendants had not upto that time applied for any adjournment of any kind or for delay in the hearing of the case. Had nothing else occurred I presume that the matter would have passed off without any comment. However, it would seem that early in the morning, between 7 and 8 A. M., (and it must here be noticed that at that time of year the Court sits from

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about 6 or 6-30 A. M. until about 11-30 A. M.) an individual named Mehdi Hussain who is the *Mukhtar-am* of the Motihari Factory and who is the complainant in the matter now under review observed Mosadi Lal somewhere near or coming to the Court compound. No doubt this man (Mehdi Hussain) naturally knew of the application which had been made by Mosadi Lal for an adjournment of the case and the ground on which it had been made and as was pointedly indicated by the Sessions Judge, the Motihari Factory had brought their witnesses to Court and were spending considerable sums in instructing their Lawyers, the presence of Mosadi Lal after his application must have appeared to Mehdi Hussain to have needed considerable explanation. More than this, however, Mehdi Hussain states that he saw a man called Baldeo Sahai (who is said to be a clerk to a Vakil and who was also said to be looking after Mosadi Lal's case) signalling to Mosadi Lal to go away or keep away from the Court-house. At any rate, as a result of what he saw, Mehdi Hussain, not unnaturally, went into the Court-room and told the Munsif and his Lawyer that, although this application for adjournment had been made, yet Mosadi Lal in fact was then in the Court compound; the Munsif's *chaprasi* was taken out and Mosadi Lal pointed out to him. The position appeared to be so equivocal that Mehdi Hussain promptly filed an affidavit to the effect of what he had seen outside the Court-house and asking that no adjournment should, under such circumstances, be granted.

Now the present applicant here Ramgobind Ram is the son of this co-defendant Mosadi Lal and as soon as Mehdi Hussain had filed his affidavit it is said that this Baldeo Sahai then wrote out an affidavit in the nature of a refutation of what had been stated in that lodged by Mehdi Hussain, and no doubt couched in language intended to support the application which had previously been made for the adjournment on the ground of the necessary absence of Mosadi Lal at his son's wedding; this was sworn to by the applicant.

Now, it is stated by Counsel for the applicant that Ramgobind Ram is able to read

and to write and, therefore, it must be taken that he was acquainted with the language used in the affidavit to which he put his signature and which he duly executed. As this is the document in connection with which Ramgobind Ram was prosecuted for perjury and convicted it is very important that its contents should be quite clearly seen. It reads that "My father has not come to Munsif's Court to-day owing to the marriage of a son, but has sent me to Court for taking time." Now, as I have already stated, the adjournment was granted; but, after this affidavit had been filed, Mehdi Hussain, no doubt chagrined, applied for sanction to prosecute Ramgobind Ram for having made a false affidavit; and, after the Munsif had made an enquiry, he (the Munsif) granted the sanction; Mehdi Hussain then filed a formal complaint before the Sub-Divisional Magistrate, Ramgobind Ram was tried, convicted, sentenced and unsuccessfully appealed in the manner details of which I have given at the commencement of these remarks.

Now the Deputy Magistrate who tried the case, and the Sessions Judge also, have been, it would seem, very much impressed by what I think it is only right that I should call the probabilities of the correctness of inferences which may be drawn from the whole of the circumstances which surrounded this somewhat curious affair and I think it is desirable to state the principal facts and then to try and see whether there is really any ground for considering that there was no reasonable doubt but that the applicant was deliberately and intentionally committing the offence of perjury in making this affidavit in the language in which he did. Now, I do not think it is seriously contended as I have said before that Mosadi Lal's son was not married on that day and there is no doubt that Kesaria the place where the wedding was to be celebrated is situated at some considerable distance from Motihari where the case in which Mosadi Lal was interested was being heard. It is alleged and not seriously traversed that if one desires to go to Kesaria from Motihari one can go by road by *ekka* which is at a distance of some 20 miles or more and that this journey would take several hours. Again if one desires to go by train

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one can only do so by travelling from Motihari a certain distance towards the journey's end to a place called Pipra which is under an hour's journey and, on arrival at that last mentioned place, there still lies before one some twelve miles of road. It is also stated, and again not contradicted, that there is a train about 10 o'clock in the morning and that the marriage would in the ordinary course of events take place in the evening. It must, however, be borne in mind I think in a consideration of the general petition that no doubt it would be necessary and desirable that the father of the bridegroom should arrive at the place where the marriage was to be celebrated sometime before the actual commencement of the important part of the proceedings as he would have not only friends to greet and see but also some arrangements which would require his presence and his adjustment. It is said, and this view has been taken by the Munsif and by the Sessions Judge, that, as there was evidence to show that Mosadi Lal was not only in the neighbourhood of the Court-house between 7 and 8 that morning but that he had also been seen in company with Baldeo Sahai to purchase a revenue stamp on that date in Motihari, the conclusion should safely be come to that Mosadi Lal, Baldeo Sahai and Ramgobind Ram were together in the Court compound for most of the morning. The learned Sessions Judge adds that he thinks it is most improbable that Ramgobind Ram could have stayed at the Court all the morning without seeing his father who is proved to have been there at the time when he purchased the stamp and when Baldeo Sahai made the signal (after the petition for time had been filed) to him to indicate that he should not approach the Court-house itself. The Sessions Judge points out that it had been argued before him that the affidavit was roughly true and that it ought to be taken to mean only that Mosadi Lal was not actually present in the Court-room at the time when the affidavit was filed; but the Sessions Judge no doubt correctly points out that the affidavit does not actually say this. It was a counter-affidavit intended to refute what had been stated by the affidavit filed by Mehdi Hussain indicating to the Munsif

what he had seen outside the Court-house and that on that ground Mosadi Lal's application for an adjournment ought not properly to be granted. I must confess that, if one takes a broad view of this set of facts as to the actual occurrence of the wedding and the physical or rather geographical positions of the place where the case was being heard and the place where the wedding was to be celebrated, it does not seem to me that it is altogether impossible to read into this affidavit a meaning which, although it may be taken not to be strictly accurate, is not altogether inconsistent with elementary truth; and that although its language may convey a meaning which is capable of being easily interpreted as indicative of falsity, it also may be construed in such a way as to comprise elements which may take it outside those upon which could properly be founded a definite charge of actual perjury. The basic proposition which was in the mind of those concerned was that Mosadi Lal was going to attend a wedding that day whether he started at half past six in the morning or at eight in the morning or even later. The principal part of his application to the Court was that as it was the day of the wedding of a son of his he was not available for the purpose of attending properly to his case. The affidavit which is made by his son (the applicant) says in language which I have already given in detail that his father had not come to the Munsif's Court that day on account of this wedding. It may be quite true that Mosadi Lal was with Baldeo Sahai purchasing a stamp in the morning for the purposes of the furtherment of his application in the case and it may well be that some time early in the morning he was actually in Motihari and near the Court, but that to my mind is quite a different proposition to a statement that he was on account of those movements necessarily in a position to attend properly to and to take part in the conduct of his case in Court. It must be remembered that primarily there is no ground for considering that Mosadi's application for adjournment was based upon other than a natural, true and a reasonable cause.

Now the intention to commit perjury must be clearly present before a person

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charged with that offence can properly be convicted of it and a statement capable of being construed in any reasonable way in such committing that it does not show a clear intention of committing perjury or a deliberate attempt to make a false statement does not *per se* contain the elements of the offence. In this case I am of opinion that although it may be that the probabilities of the case indicate that Ramgobind Ram may have been aware of his father's presence in the neighbourhood of the Court-house it does not follow that even if he was so aware of his presence the language of his affidavit is incapable of a construction other than that of a perjury character. Indeed, the learned Sessions Judge has carefully pointed out that there was in fact no evidence to show that Mosadi Lal and Ramgobind Ram had at any time that day been seen in company together.

I, therefore, have come to the conclusion that this was a case in which there was sufficient doubt as to whether there was an intention to commit perjury or not to justify an acquittal and I have no hesitation, under the circumstances which are disclosed in this matter and which have been most ably placed before me by the learned Counsel for the applicant, in setting aside the conviction.

W. C. A. *Conviction set aside.*

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 541 OF 1922.

June 19, 1922.

Present.—Mr. Justice Broadway.

DOST MUHAMMAD AND OTHERS—

ACCUSED—PETITIONERS

versus

ASA RAM—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 437, scope of—Discharge, order of, based on complete evidence—Further enquiry, whether justified—Order directing further enquiry, contents of.

Where the judgment of a Trying Magistrate is neither perverse nor foolish and is based on evidence which is obviously complete, further enquiry should not be ordered. Further enquiry in

such a case means a re-hearing of the same evidence by some other Magistrate, that other Magistrate being practically constituted a Court of Appeal and this is not contemplated by section 437 of the Criminal Procedure Code. [p. 891, col. 1.]

An order of a Sessions Judge under section 437 of the Criminal Procedure Code directing a further inquiry, without stating proper grounds for directing such further inquiry, does not comply with the provisions of the law and is liable to be set aside. [p. 891, col. 1.]

Criminal revision from an order of the Sessions Judge, Multan, dated 17th March 1922.

Kunwar Dalip Singh, for the Petitioners.
Mr. L. Saunders, for the Respondents.

JUDGMENT.—One Asa Ram, an Arora of Karampur in the Multan District, brought a complaint against Dost Muhammad and seven other persons under sections 148, 323 and 506, Indian Penal Code. The case was tried by Khan Bahadur Sheikh Riaz Hussain, C. I. E., Honorary Magistrate, First Class, and the accused persons were discharged on the 22nd December 1921.

The complaint was filed on the 2nd November 1920. Dissatisfied with this result Asa Ram filed an application under section 437, Criminal Procedure Code, in the Court of the Sessions Judge, Multan. It is to be noted that in the grounds set out by him Asa Ram never suggested that the enquiry had been incomplete or that he had further evidence to produce.

The grounds really amounted to grounds of appeal. The learned Sessions Judge, Mr. Ganga Ram, then proceeded to pass the following order:—

"After going through the record I am of opinion that further enquiry in the case is necessary in the interests of justice. I, therefore, set aside the order dismissing the complaint and send the case to the Court of Sardar Ujagar Singh, Magistrate First Class, for fresh inquiry and decision."

Dost Muhammad and his companions have now come up to this Court under section 439, Criminal Procedure Code, through Mr. Dalip Singh, complaining against the order of the learned Sessions Judge and I have heard Mr. Saunders for Asa Ram.

The first point taken up by Mr. Dalip Singh is that the order of the learned Sessions Judge does not comply with the provisions of law, and my attention has been drawn to

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Nagendra Nath Sen v. Korb (1). I have no hesitation in agreeing with that authority and there can be no doubt that the order passed by the Sessions Judge is entirely inadequate.

Next, it was urged that the judgment of the Trying Magistrate not being perverse or foolish and being based on evidence which is obviously complete, further enquiry should not have been ordered. My attention on this point has been drawn to *Jai Ram v. Makhan Lal* (2), *Dulla v. Empress* (3), *Hira v. Emperor* (4) and *Nabi Bakhsh v. Emperor* (5).

The attitude taken up by this Court in regard to orders of this kind has been consistent for a very long period and it is a little surprising to find the Sessions Judge losing all sight of what has been repeatedly laid down by this Court. I have read the judgment of the Magistrate and the learned Counsel on both sides have each criticised the said judgment according to their respective views. In my opinion, the judgment cannot be described either as perverse or foolish. The Magistrate has discussed the evidence and has come to the conclusion that it was insufficient to establish the case against the accused persons. No suggestion has been made that further evidence was forthcoming. The further enquiry, therefore, in this case really means a re-hearing of the same evidence by some other Magistrate, that other Magistrate being practically constituted a Court of Appeal. This is not contemplated by section 437, Criminal Procedure Code. The judgment of the learned Sessions Judge is wrong and I, therefore, set it aside and restore the order of the Trial Court.

N. H.

Order set aside.

W. C. A.

(1) 8 C. W. N. 456; 1 Cr. L. J. 355.

(2) 8 P. R. 1900 Cr.

(3) 2 P. R. 1901 Cr.; 32 P. L. R. 1901.

(4) 3 Ind. Cas. 580; 8 P. R. 1909 Cr.; 38 P. L. R. 1910; 17 P. W. R. 1909 Cr.; 10 Cr. L. J. 314.

(5) 56 Ind. Cas. 777; 1 L. 216; 21 Cr. L. J. 521; 109 P. L. R. 1920; 8 P. W. R. 1920 Cr.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 70 OF 1922.

March 16, 1922.

Present.—Justice Sir John Bucknill, Kt.

BALDEO DUBEY AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 342, 421—Examination of accused after close of prosecution, necessity of—Appeal, dismissal of—Appellate Court, duty of.

An accused person was examined under section 342 of the Criminal Procedure Code before the prosecution witnesses had been cross-examined. After the examination of the latter, he applied for an adjournment to enable him to properly prepare the cross-examination of these witnesses and this was granted. He was not then examined at the close of the prosecution case.

Held, that, technically, the fact of the adjournment being given at the instance of the accused did not relieve the Magistrate from the necessity of examining the accused under section 342 of the Criminal Procedure Code after the close of the prosecution case.

A Criminal Appellate Court ought not to dismiss an appeal because nobody appears for the appellant, it is the duty of that Court to examine the matter and to come to some sort of decision on the merits.

Criminal revision.

Mr. Nawal Kishore Prasad—II, for the Petitioners.

JUDGMENT.—This is an application in Criminal Revisional Jurisdiction. The facts are very simple but two points are raised which, as they stand, are somewhat peculiar. Three men were convicted of criminal trespass under section 447 of the Indian Penal Code and sentence to pay a fine of Rs. 10 each. The affair was evidently a very trivial one.

Now, in the first place, it would appear that the accused were examined under section 342, Criminal Procedure Code, on the 9th November 1921 and before the prosecution witnesses who were summoned had been cross-examined. It is quite true that it would seem that on the 9th of November the accused asked that there should be an adjournment in order to enable them to prepare properly the cross-examination of the prosecution witnesses, and this was granted. The learned Vakil for the applicants, however, points out that although this adjournment was given at the instance of the defence it does not take away from the

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Magistrate the necessity for examining the accused under section 342, Criminal Procedure Code, after the close of the prosecution case. I am afraid that he is probably technically correct although it seems to be carrying the operation of this section to a very extreme aspect.

The second point which is here raised is to the following effect. The applicants appealed to the District Magistrate from the decision of the Sub-Deputy Magistrate of Aurangabad by whom they had been convicted on the 30th November 1921. It is said at the Bar that on the day when the matter came before the District Magistrate, that is to say, on the 20th December 1921, some of the legal practitioners who were accustomed to practise before the District Magistrate owing to political reasons decided to absent themselves from the Court for some few days. In consequence of this, when the case was called on nobody appeared for the appellants and the District Magistrate thereupon dismissed the appeal for what he calls default. It is urged by the learned Vakil for the applicants that this is not the proper attitude for the Court to have adopted and that, even though no one may appear in a criminal appeal, it is the duty of the Court at any rate to examine the matter and to come to some sort of decision on the merits. I am inclined again to think that the learned Vakil is here right.

For these reasons, I think that in this case it is my duty to interfere and to send the matter back to the Trial Court for a rehearing from the date at which the irregularity under section 342, Criminal Procedure Code, took place.

The conviction is set aside and the fines, if paid, will be refunded.

W. C. A. & N. H. *Case remanded.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 311 OF 1921.
(CRIMINAL REVISION PETITION NO. 245
OF 1921.)

April 20, 1922.

Present :—Mr. Justice Devadoss.

MARUTHAYEE AND OTHERS—PETITIONERS
versus

APPAVU PILLAI—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 522

—Breaking open lock and taking possession of house during owner's absence—Order of restoration of possession to owner, whether proper.

Accused taking advantage of the temporary absence of the complainant from his house, broke open the outer lock of the house and entered into unlawful possession and the complainant when he returned was driven out by force:

Held, that, under the circumstances, an order of restoration of possession to the complainant passed under section 522 of the Criminal Procedure Code on conviction of the accused for trespass was a proper order.

Petition, under section 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Remanded in Criminal Appeal No. 6 of 1921, preferred against the judgment of the Court of the Second Class Magistrate, Aruppukottai in C. C. No. 166 of 1920.

Mr. K. S. Ramabhadra Ayyar, for the Petitioner.

Mr. F. S. Vaz, for the Respondent.

CRIER—In this case the petitioners seek to revise the order of the Second Class Magistrate of Aruppukottai who convicted them under section 448 and passed an order under section 522 of the Criminal Procedure Code. On appeal the conviction was upheld and the order under section 522 was left undisturbed. This revision petition has been admitted only as regards the order under section 522, Criminal Procedure Code.

Mr. Ramabhadra Ayyar for the petitioners has adduced a very elaborate argument as regards the question whether an order under section 522 could be passed when dispossession was not caused by the use of criminal force to any person in possession of the property, and he contended that in this case the complainant was not dispossessed of the property by the use of criminal force and, therefore, the Magistrate acted without jurisdiction in passing an order under section 522, Criminal Procedure Code. Without expressing any opinion on the question of law raised, it is sufficient for the disposal of this case to see what the finding is. In paragraph 6 of the appellate judgment there is a clear finding that the owner was dispossessed by the commission of criminal trespass and the use of criminal force. It is not proper that in revision ordinarily, the Court should go behind the finding of

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the lower Courts which in this case is a concurrent one. Even if the contention raised by Mr. Ramabhadra Ayyar is right as regards the question of law, I am not prepared to interfere with the order of the Magistrate as I consider it to be eminently a just order.

The first petitioner who was the wife of the complainant deserted him, according to the evidence, years ago and was leading an immoral life. Taking advantage of his temporary absence from the house, she along with some others broke open the outer lock of the house and entered into unlawful possession of the house, and when the husband returned he was driven out by force. In these circumstances, I consider the order under section 522, Criminal Procedure Code is a very proper order to pass; and further this order was passed so far back as the 28th January 1921, and it would not be right to upset an order more than a year after on the mere technical grounds, even if that be a good one, that the Magistrate should not have passed an order because there was no use of criminal force.

I dismiss the petition.

V. N. V.

Petition dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 305 of 1922.

June 6, 1922.

Present:—Justice Sir John Bucknill, Kt.

PADARATH KURMI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 421—Summary dismissal of appeal—Powers to be exercised with caution—General principles.

The powers which are capable of being exercised under section 421 of the Criminal Procedure Code should be exercised with considerable caution, and where there has been a dispute as to facts and where the credibility of witnesses for the prosecution has been, even though it may be not very successfully, impugned, it is proper for the Appellate Court to call for the records and look at the evidence. It is also desirable that in dismissing an appeal summarily, although it is not necessary for the

Appellate Tribunal, which is thus acting, to compile any elaborate judgment, some indications should be recorded which may be a guide to any Court which may be asked to act in revisional jurisdiction.

Criminal Revision.

Ananda Prasad and G. C. Pal, for the Petitioner.

JUDGMENT.—This is an application in Criminal Revision Jurisdiction made on behalf of one Padarath Kurmi under the following circumstances.

The applicant was charged with having assaulted an old woman who is said to be his mother-in-law. There is no doubt that there had been some dispute between the complainant and the accused. The accused was tried before the Deputy Magistrate of Arrah and was convicted of an offence against the provisions of section 352, Indian Penal Code, he was sentenced to one week's rigorous imprisonment and to a fine of Rs. 15. There is no doubt that the evidence for the prosecution as to the assault was believed by the Deputy Magistrate but, at the same time, there was also a certain amount of evidence which was adduced by witnesses for the defence to which, however, the Deputy Magistrate did not attach very much importance. The accused appealed from this conviction to the District Magistrate of Shahabad who, however, summarily dismissed the appeal purporting to act presumably under the provisions of section 421 of the Criminal Procedure Code. I think that it is not unimportant to observe that, apparently, the District Magistrate did not call for the records of the case; he heard the *Mukhtear* for the appellant and after simply stating that there was no point of law and that the lower Court had discussed the facts of the case in reasonable detail he dismissed the appeal summarily. I am not altogether satisfied that, in acting in this way, the District Magistrate was right. There is no doubt that the powers which are capable of being exercised under section 421 of the Criminal Procedure Code should be exercised with considerable caution and where there has been a dispute as to facts and where the credibility of witnesses for the prosecution has been, even though it may be not very successfully, impugned, it is proper for the Appellate Court to call for the records and look at the evidence. It is also desir-

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able, as has been pointed out by the High Courts in this country, that in dismissing an appeal summarily, although it is not necessary for the Appellate Tribunal which is thus acting to compile any elaborate judgment, some indications should be recorded which may be a guide to any Court which may be asked to act in revisional jurisdiction. One assumes from what is written by the District Magistrate here that he thought that the matter was of so trifling a character that it was not necessary to send for the records, and one may infer that on reading the decision of the Deputy Magistrate, he thought that the facts of the case had been set out sufficiently to justify the conclusion to which the Deputy Magistrate had come. I think that, on the whole, it would be more satisfactory in this case if appeal is referred back for re-hearing. The records should be sent for by the District Magistrate who should himself consider the incidents of the evidence and come to whatever decision he may think fit when he has addressed his mind thereto.

N. K.

PATNA HIGH COURT.

CRIMINAL REVISION No. 636 OF 1922.
November 20, 1922.

Present:—Justice Sir John Bucknill, Kt.

RAHIM AND OTHERS—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Jurisdiction—Municipal bye-law, violation of—Sanction for prosecution for one offence—Conviction for another, legality of.

When a Municipal bye-law contains disjunctive and alternative offences, it is incompetent for a Magistrate to convict a person of one of such offences; when sanction has been given by the Municipality to prosecute him in connection with another. [p. 896, col. 2.]

A Municipality sanctioned the prosecution of a person for "singing with a high sounding instrument" in violation of a bye-law forbidding persons to "beat a drum or tom-tom or blow any high sounding instrument." The accused was convicted for "beating a drum." On revision:

Held, that under no circumstances could the "beating of the drum" be regarded as "singing with a high sounding instrument," and as sanction had been given by the Municipality to the latter offence, the conviction of the accused for the former could not stand. [p. 896, col. 2.]

Criminal revision from an order of the First Class Magistrate, Monghyr, dated the 28th July 1922.

Mr. Murari Prasad, for the Petitioners;
The Assistant Government Advocate, for the Crown.

JUDGMENT.—This was an application made by three persons asking that an order dated the 28th July of this year passed by a Magistrate of the First Class at Monghyr convicting the accused in manner which will be referred to more particularly later and sentencing them to pay certain fines in connection with an alleged offence against the provisions of one of the Municipal bye-laws of that town might be set aside. It will be desirable at once to state that this bye-law which is No. 80 reads as follows:—

"Nocturnal noises. No person shall, except with the general or special permission of the Commissioners, beat a drum or tom-tom or blow any high sounding instrument after 10 P. M. or before 6 A. M."

The Magistrate found one of the petitioners, whose name is Rahim, guilty of beating a drum and sentenced him to pay a fine of Rs. 5 or in default of payment to 5 days' simple imprisonment; he also found the two other accused named Kishori and Tajamul guilty under section 80 of the Municipal bye-law read with section 114, Indian Penal Code and sentenced them to pay each of fine of Rs. 3 or in default of payment to 3 days' simple imprisonment. The Magistrate's decision was brought by motion before the Sessions Judge of Monghyr who, however, merely stated that he saw no ground for interfering; the case has now been brought to this Court asking for the exercise of its revisional jurisdiction.

Now, the arguments which have been put forward very ably by the learned Vakil who appears for the applicants raise numerous matters of very considerable general importance; for example, it is said that the bye-law itself is *ultra vires* and does not fall within the provisions of section 350 of the Bengal Municipal Act. It is also suggested that there is not evidence that what took place was or had been complained of as being a nuisance. It is, I think, unnecessary here that I should enter into consideration of these points because there are other and perhaps more simple points put forward on behalf of the applicants upon which this case can be decided. These points put shortly are, firstly, that there

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was no proper sanction given by the Municipality to the prosecution, and, secondly, that, even supposing the sanction which appears to have been accorded was legal, the offence for which sanction to prosecute was accorded was not the offence with and for which the applicants were charged and tried and in respect of which they were convicted.

Another matter which was also raised was as to whether the instrument upon which it was found that the accused Rahim had been playing was in fact a drum within the meaning of section 80 of the Municipal bye-law. I think it is at the outset desirable to point out what was, apparently, the course of events which led up to the proceedings before the Magistrate. So far as can be gathered from the record, the Police appears to have made some enquiries presumably upon some kind of information which had been given to them. It does not appear exactly what this information was, but, at any rate, on the 21st May a Police Officer seems to have forwarded to the Sub-Divisional Officer a printed form which is headed "complaint of an offence under Act III of 1884 and Bye-laws." This form is evidently one which is used in cases where it is necessary for the sanction of the Municipal authority to be obtained before a prosecution is commenced, because on it at the bottom is a printed memo., reading, "prosecution sanctioned, submitted to the Magistrate.—Chairman M. C." This Police Officer made, in forwarding this complaint to the Sub-Divisional Officer, the following observations. "This sort of nuisance is too common in the town." Now, this form contains on it certain columns, one giving the date and place of occurrence, another the names of the persons who are alleged to have committed the offence and a third the nature of the offence with the sections under which it is proposed that they should be prosecuted. I find here that there were five persons whom it was suggested should be prosecuted. In the last column the offence alleged is "singing with a high-sounded instrument at a late hour of the night against section 80 of the Municipal Bye-law." The Sub-Divisional Officer forwarded this paper to the Chairman of the Municipality of Monghyr for necessary sanction on the 23rd May

and the printed memo., to which I have referred above, is signed by some one on what appears to be the 10th of June who signs as "V.-Chairman M. C." which it is agreed means Vice-Chairman of the Municipal Council.

Now, I may say at once that there is nothing whatever to indicate that before the Magistrate or before the Sessions Judge any question was raised that the sanction of the Vice-Chairman was illegal; and I, therefore, think that it is as well to leave the consideration of that, perhaps somewhat difficult question, aside until one has looked at what took place before the Magistrate. The Magistrate seems to have had before him certain facts; but apparently the three applicants were not actually dealt with by him for or charged before him with the offence for which sanction (such as it was) had been granted (*i. e.*, for having sung with a high-sounding instrument at a late hour of the night) but with having beaten a drum or tom-tom on May 10, 1922 at 11-30 P. M. in the town of Monghyr. It was apparently proved to his satisfaction and not indeed contested that the witnesses for the prosecution who were Police constables on duty saw that the accused Kishori was singing while the accused Rahim was playing on what is known as a *tabla*. The accused Tajammal was playing on an instrument known as *jori*. The other two accused we are not concerned with as it seems they did not appear.

The whole argument which took place before the Magistrate (and which he says was dealt with by the Pleader for the defence at very great length) was that the *tabla* was not a drum at all still less a tom-tom and much instructive information has been placed before me as to what is the nature of this instrument. It would certainly seem that although it is probably one which falls within the strict definition of the word "drum" it could hardly be included in the same category as those familiar instruments in a western band such as the brass drum, kettle-drum, or side-drum all of which are struck with drum sticks and which produce or can produce a very loud noise. It is said that the *tabla* (and pictures which have been produced before me show that that is the case) is a little instrument

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which is played on by the fingers primarily for the purpose of keeping musical time and that it does not produce any strident or loud noise and cannot be heard from any considerable distance. As for the *jori* this is said to be a musical instrument something in the nature of small "bells."

Now the Magistrate undoubtedly felt very considerable diffidence in coming to the conclusion that the playing on a *tabla* constituted the mischief against which this bye-law 80 was directed, for he says in his decision "so far as the law stands, the accused Rahim was committing an offence and Kishori and Tajammul were abetting it. The learned Pleader for the accused argued that the Municipality did not mean to penalize singing or dancing which according to him cannot go on without a *tabla*. Although there is force in this argument and as a matter of fact such singing and dancing with *tabla*-music goes on in big towns through most part of the night, I am not aware whether in those Municipalities there is such a law or not or whether singers or musicians there have to take previous permission of the Municipal Commissioners or not. As the law in this town stands, I must find the accused guilty. If the members of the public think that such music is not objectionable, it is for them to approach the Municipal authorities to delete this section of the bye-law or to take other measures to enforce their will," and he seems with reluctance to find the accused guilty in favour of the general broad principles which the Magistrate has mentioned and which the learned Vakil for the applicants here has brought to my attention.

But, be that as it may, apparently these persons were carrying on some form of concert late in the evening, and apparently again the carrying on of this concert seems to have been thought objectionable or to have been regarded by some as creating an undesirable noise in the town late at night. If this had not been so, it is difficult to see or to imagine why this prosecution was ever instituted or, let us assume, sanctioned. At the same time, one cannot help feeling that it may well be that considerable care should be exercised in putting into operations against the persons the provisions of a bye-law such as this which ca

so obviously be utilized in unduly repressive and unnecessarily restrictive manner. The real point, however, upon which I have come to the conclusion that I must set aside this conviction is one which it is admitted is a matter of considerable substance. It will be observed that the sanction (whether that was itself valid or not) given by the Vice-Chairman of the Municipality was granted in respect of an offence alleged to have been committed by way of "singing with a high-sounding instrument at a late hour of the night." Now, whatever may be the exact definition in English of the word *tabla*, or whatever may be the proper construction of the bye-law itself there can be no doubt that, under no circumstances, could the playing of the *tabla* be regarded as "singing with a high-sounding instrument." The accused were not convicted or even charged apparently with "singing with a high-sounding instrument" which was the only offence in connection with which sanction for whatever it was worth had been granted by the Vice-Chairman of the Municipality. I find it difficult to contemplate that even where a valid sanction has been given by a Municipality to prosecute persons for an assumed violation of one of their bye-laws that a Magistrate should be by virtue of that sanction capable of convicting them for an offence against another, and, carrying that principle down into a single bye-law itself which contains disjunctive and alternative offences; I think it is equally incompetent for a Magistrate to convict persons of an offence of one of such mentioned in such bye-law, when sanction has, as a matter of fact, been only given by the Municipal authorities to prosecute in connection with another. In this case sanction had been given to prosecute for the offence of "singing with a high sounding instrument." The principal accused, however, has been convicted of "playing on a drum" and the other two with having abetting him. Under these circumstances, the conviction, to my mind, is obviously bad and must be set aside.

N. H.

Conviction set aside.

RUKAN DIN v. HASASN DIN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1106 OF 1919.

August 2, 1922.

Present.—Mr. Justice Martineau and Mr. Justice Brasher.

RUKAN DIN—PLAINTIFF—APPELLANT
VERSUSHASSAN DIN AND OTHERS—DEFENDANTS
—RESPONDENTS.*Construction of document—Sale of portion of joint land—Agreement to pay compensation if land sold not allotted to vendor on partition—Vendor allotted lesser land than area sold—Compensation, suit for—Cause of action.*

Where a person sells his share in a certain land to another and agrees to pay compensation to the latter if the land sold does not come to his share at the time of partition, the agreement must be interpreted as meaning that the compensation would be payable, if by an order in the partition proceedings subject to any modification on appeal, the vendor is not allotted, or is allotted a lesser area than that sold by him. Limitation for a suit claiming compensation is to be reckoned from the date of such an order and not from the date when the different co-sharers take possession of the shares allotted to them.

Second appeal from the decree of District Judge, Lahore, dated 21st February 1919.

Messrs. P. S. Narain and B. P. Khosla, for the Appellant.

Mr. Nand Lal, for the Respondents.

JUDGMENT.—The only question in this and the two connected Appeals (Nos. 1104 and 1105 of 1919) is whether the suits out of which the appeals arise are barred by limitation. The suits were instituted by the same plaintiff against three sets of defendants. The cause of action in each case was, that the defendants had sold their shares in certain land to the plaintiff and had agreed that if the land sold should not fall to their share in the partition proceedings which were then pending they would pay compensation. In each case the vendors were allotted at partition a less area than the area sold to the plaintiff and compensation was claimed accordingly.

The Courts below have applied Art. 65 of the Limitation Act, taken with Article 116, and have held that the period of limitation was six years to be reckoned from the date of the order passed under section 118 of the Punjab Land Revenue Act, i.e., May 25th 1909.

For the appellant the main contention is that, assuming these Articles to be applicable, limitation did not run until the other co-sharers took possession of the shares allotted to them, and if this contention be correct each of the suits would be within time. It is argued that the partition proceedings were not completed until possession was actually delivered to the parties concerned, and that, if possession had not been taken by the other co-sharers, they might have lost their rights in the land allotted to them. The agreement between the parties was that the vendors would be liable to pay compensation if the land sold did not come to their share at the time of partition. We think this must be interpreted as meaning that the compensation would be payable if by the order of the Revenue Officer, subject to any modification on appeal, the vendors were allotted a less area than that sold by them. When the order became final the other co-sharers had a right to recover possession of the land allotted to them and though they might subsequently forfeit their right by their inaction, their position was the same as that of a decree-holder. We do not think that the agreement can reasonably be construed to mean that the land falling to the share of the vendors would include land to which they might ultimately become entitled owing to the laches of these co-sharers. We accordingly agree with the Courts below that limitation is to be reckoned from May 25th 1909 when the order of the Revenue Officer was passed.

The appellant's Counsel has further contended that Art. 132 of the Limitation Act would be applicable, since, by the terms of the agreement, the compensation payable was made a charge upon the property of all kinds of the vendors. There is ample authority, however, to show that Art. 132 is restricted to cases in which payment is sought to be enforced out of the property on which it is charged, and in the present case the plaintiff is only seeking a personal remedy.

We accordingly see no reason to interfere and dismiss each of these appeals with costs.

N. U.

Appeals dismissed.

SECRETARY OF STATE FOR INDIA *v.* LAXMI BAI.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

December 8, 1922.

Present:—Lord Phillimore, Sir John Edge,
Sir Lawrence Jenkins and
Lord Salvesen.

THE SECRETARY OF STATE FOR
INDIA IN COUNCIL—APPELLANT.*versus*

LAXMI BAI AND ANOTHER—RESPONDENTS.

Grant—Saranjam grant—Presumption—Grant for political services—Revenue, payment of, to grantees—Grant, nature of—Saranjam grant, presumption of, suit against—Civil Courts, jurisdiction of—Pleadings, construction of—Privy Council, practice of.

A grant of *saranjam* may be either of the soil and the whole revenue derived from it or a grant of the royal share of the revenue only. Although it may well be that it is ordinarily a grant of the royal revenue only, there is no such presumption and in each case it must be determined upon the facts what was the quality of the original grant. [p. 899, col. 1.]

A *saranjam* grant was made by the British Government in respect of political services. The documents connected therewith contained no suggestion anywhere that what was conveyed was merely the royal share of the land revenue; on the contrary, they assumed that the revenue of the lands was conveyed to the grantees and the amount of the *nazrana* levied from time to time was based on the yearly revenue of the estate; there being no suggestion that the revenue derived by the occupant, as distinct from *saranjamdar*, was not liable to *nazrana*.

Held, that the original grant was a grant of the soil.

The right of the Government to resume *saranjam* grants cannot be questioned in a Civil Court [p. 900, col. 1.]

It has not been a practice of their Lordships of the Privy Council to construe the pleadings too strictly or to exclude a plea, which is not embodied in the plaint, from being made an issue in the case. [p. 899, col. 2.]

Appeal from the judgment and decree of the Bombay High Court, dated 22nd December 1916, reversing a decree of the District Judge, Dharwar dated 6th January 1913.

Sir George Lowndes, K. C., and Mr. Kenneth Brown, for the Appellant.

Me-srs. D. Gruyther K. C., and Parikh, for the Respondent.

JUDGMENT.

Lord Salvesen.—This is an appeal against a decree of the High Court of Judicature at Bombay, dated 22nd December 1916, which reversed a decree of the District Judge of Dharwar, dated the 6th January 1913. The suit relates to a part of the Hebli estate, from which the plaintiff was

evicted by the Government on the death of his grandfather, Pandurangrao. Their object in doing so was to prevent partition of what they regarded as an impartible estate held under a grant of *saranjam*.

It is not necessary to recapitulate the facts which have been very fully stated in the judgment of the District Judge of Dharwar or to consider the majority of the points which were disposed of by him and on appeal by the High Court at Bombay. The sole issue which remains for determination is, whether the *saranjam* grant made by the British Government in favour of an ancestor of the plaintiff was a grant of the royal revenue only, or was a grant of the land itself, or of the whole revenue of the land coupled with a right to hold it. The learned District Judge held that the original grant by the British Government was a grant of the whole revenue of the land, and that this carried with it the right to make the best possible use of unoccupied land. The High Court at Bombay, in reversing his decision, held that the grant was one of the royal share of the revenue only and not of the soil. In reaching this conclusion it is impossible to resist the view that the Judge, of the High Court were much influenced by their view that there is a presumption that a grant of *saranjam* is a grant of royal revenue only, and accordingly that the burden of proving that, in any particular case of *saranjam*, it is a grant of the soil, lies upon the party alleging it. They relied upon various cases cited and which at that time seemed to establish this proposition. They had not, however, the benefit of two recent decisions of this Board, *viz.*, *Suryanarayana v. Patanna* (1) and *Chidambira Sripaksha Pandara Sannidhigul v. Veerama Reidi* (2), in both of which it was held that there is no such presumption.

In conformity with these decisions their Lordships are of opinion that a grant of

(1) 48 Ind. Cas. 689; 45 I. A. 209; 41 M. 1012; 25 M. L. T. 30; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 493 (P. C.).

(2) 63 Ind. Cas. 538; 40 I. A. 286; 45 M. 585; 31 M. L. T. 51; 16 L. W. 102; (1922) M. W. N. 740; 13 M. L. J. 640; (1922) A. I. R. (P. C.) 292; 37 C. L. J. 199; 27 C. W. N. 245 (P. C.).

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saranjam may be either of the soil and the whole revenue derived from it, or a grant of the royal share of the revenue only. It must be determined in each case upon the facts what was the quality of the original grant although it may well be that it is ordinarily a grant of the royal revenue only. It may be that as the plaintiff was dispossessed by the British Government in 1901 there is a certain onus upon the appellant to justify his dispossession, but this becomes of little materiality when evidence is adduced from which a conclusion in fact may be legitimately drawn. In the present case the oral evidence is of no value as supporting the plaintiff's case, and an inference must be drawn one way or the other from the documents that have been produced in the case. These have been examined in detail by the District Judge on pages 35 and 36 of the record, and their Lordships concur generally in the result of his analysis. It is plain that the original grant was made in respect of political services and while it is no doubt possible that the grantees were at that time the owners of the estate, and that all that the grant was intended to give them was a release from payment of the royal share of the revenue, there is nothing in any of the documents produced which suggests such a limitation. On the contrary, in one of the early documents founded on the grant mention was made expressly of the Kasba Hebli with its hamlets and Watnhal, with the Mahal Jukath and Mokassa "with the whole of the dues and cesses and hidden treasures, exclusive, however, of the dues of *huckdars* and *inamdars*," and the language of the other documents is in similar terms. It is significant also that in the deed of partition executed by Pandurangrao in 1879, the property partitioned is described as the *Jahagir* villages of Kasba Hebli and Majre Watnhal and the Mouza of Talvai and Kurdapur "obtained from the British Government." Throughout the documents there is no suggestion that what was conveyed was merely the royal share of the land revenue. They assume throughout that the whole revenue of the lands was conveyed to the grantees and the amount of the *nazarana* which has been levied from time to time appears to have been based on

the yearly revenue of the estate, "there being no suggestion (as the learned District Judge says) that revenue derived by the holder as occupant, as distinct from *saranjamdar* was not liable to *nazarana*." All these considerations are sufficient, in their Lordship's opinion, to justify the inference that the original grant was a grant of the soil.

It is significant as bearing on the result at which their Lordships have arrived, that the plaintiff in his original plaint nowhere maintained the view upon which the learned Judges of the High Court proceeded. His main claim was that he was a full owner of the property in dispute, and that the estate in question was granted as *sarva inam* hereditarily in recognition of the services which his ancestors had rendered in assisting the British in settling the country conquered from the Peshawas. This claim was rejected by the District Judge and has now been admitted by the plaintiff to be untenable. As an alternative to this claim, based on the grant by the British Government, the plaintiff proceeds as follows:—

"*Saranjam* grant is a grant of the revenue only, and the Government cannot resume that *raitava* rights which the plaintiff and his ancestors have been enjoying from ancient times. And even if the *saranjam* grant be of the soil, Government has no right to resume it. And the estate in suit is partible."

It is not clear what is meant by "*raitava* rights" but the statement sufficiently discloses that they are rights of occupancy only and not of ownership, and a claim of this kind was strenuously maintained in the lower Court with regard to the occupation of lands which were unoccupied at the date of the original grant. This latter claim has now been abandoned. In no part of the plaint is it possible to find a claim that the *saranjam* grant was a grant of the royal share of the revenue only. It appears, however, that this point was argued, and it has not been the practice of their Lordships to construe the pleadings too strictly, or to exclude a plea, which was not embodied in the plaint, from being made an issue in the case. The fact, however, that it did not occur to the plaintiff's advisers to propound this contention on the

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evidence which he adduced has a bearing on the question as to the proper inference to be drawn in fact from that evidence.

As the case was framed, the jurisdiction of the Civil Courts in India was apparently not ousted. But in the view, which their Lordships now take, the right of the Government to resume these lands could not be questioned in the Civil Courts.

In the result, their Lordships will humbly advise His Majesty that the decree of the High Court at Bombay should be set aside and the suit dismissed with costs here and in the Courts below.

N. K.

Suit dismissed.

KHUDA BAKHS V. GHULAM QADIR.

the security required by section 17 of the Provincial Small Cause Courts Act. The provision is mandatory, as held in *Assan Mahomed Sahib v. Rahiman Sahib* (1). No doubt there is nothing in the section to prevent personal security being accepted if the Court is satisfied of its sufficiency but it would not ordinarily do so. In any case, the mere word of the defendant, against whom the decree is asked for in the suit, is no security at all. The order of the Munsif is set aside and he is directed to take the case on to his file and pass fresh orders according to law. Costs to abide and follow.

V. N. V.

Order set aside.

(1) 55 Ind. cas 977; 43 M. 579; 11 L. W. 543; 38 M. L. J. 539; 28 M. L. T. 17; (1920) M. W. N. 375; 27 M. L. T. 273.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 337 OF 1922.

December 5, 1922.

Present:—Mr. Justice Krishnan.

ARCHAKAM VENKATAPATHI DEEKSHATHULU—PETITIONER—COUNTER-PETITIONER

versus

KATHIRAMANGALAM CHENGA REDDI
AND ANOTHER—RESPONDENTS—
PETITIONERS.

Provincial Small Cause Courts Act (IX of 1887), s. 17, whether mandatory—Security, personal, whether can be accepted.

Section 17 of the Provincial Small Cause Courts Act is mandatory and the Court has no power to dispense with the security required by that section.

Assan Mahomed Sahib v. Rahiman Sahib, 55 Ind. Cas. 977; 43 M. 579; 11 L. W. 543; 38 M. L. J. 539; 88 M. L. T. 17; (1920) M. W. N. 375; 27 M. L. T. 273, followed.

The section does not prevent personal security being accepted if the Court is satisfied of its sufficiency but it will not ordinarily do so.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order dated the 11th February 1922 of the Court of the District Munsif, Chittoor, in C. M. P. No. 225 of 1921 in Small Cause Suit No. 926 of 1921.

Mr. T. K. Srinivasa Thathochariar, for the Petitioner.

Mr. S. Jagadesa Iyer, for the Respondent.

JUDGMENT.—The Munsif was wrong in thinking that he could dispense with

LAHORE HIGH COURT.

FIRST CIVIL APPEAL NO. 486 OF 1922.

CIVIL MISCELLANEOUS CASE NO. 167 OF 1922.

June 12, 1922.

Present:—Mr. Justice Abdul Raof.
FIRM Seth KHUDA BAKHS AND SONS
—DEFENDANTS—APPELLANTS

versus.

FIRM Sheikh GHULAM QADIR AND SONS,
THROUGH Khan Sahib Sheikh PIR
MUHAMMAD—PLAINTIFFS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, rr. 8, 13—Suit fixed for arguments on question of jurisdiction—Ex parte decree, whether justified.

Where a case was fixed for arguments on the question of jurisdiction and on the defendant failing to appear the Court proceeded to hear the plaintiff's evidence and passed an *ex parte* decree:

Held, that the Court had no jurisdiction to pass an *ex parte* decree inasmuch as the case was not fixed for decision on the date on which the defendant absented himself but only for hearing arguments on the question of jurisdiction.

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Sialkot, dated the 19th January 1922, rejecting an application for setting aside the *ex parte* decree passed on 10th December 1921.

KHUDA BAKHSH v. GHULAM QADIR:

Mr. G. H. Carden Noad, for the Appellants.

Dr. G. C. Narang, for the Respondents.

JUDGMENT.—This is an appeal from an order refusing to set aside an *ex parte* decree and arises under the following circumstances:—

Ghulam Qadir and Sons sued the firm Seth Khuda Bakhsh and Sons for the recovery of Rs. 5,234-5-0 being the price of goods which had been supplied by the defendants to the plaintiffs and were found to be defective in certain respects. The suit was instituted on the 13th July 1921. On the 17th August 1921 written pleas were filed by the defendants and one of the questions raised was that the Court at Sialkot had no jurisdiction to hear the suit. The Court thereupon framed the following issue relating to the question of jurisdiction:—

"Has this Court no jurisdiction to try the suit?"

The Court described this issue to be a preliminary issue. After having framed the issue the Court fixed the 4th November 1921 for evidence. Clearly, the Court fixed this date for evidence on this particular issue. On this date the defendants did not appear and the hearing was adjourned to the 24th November 1921 and the defendants were ordered to pay Rs. 40 as damages to the opposite side. On the 24th November 1921, the adjourned date, both parties gave evidence on the preliminary issue.

The 10th of December 1921 was fixed for arguments. The defendants, however, did not appear on this date. The decision on the preliminary issue, therefore, might have been given *ex parte* against the defendants. But, curiously enough, the learned Judge allowed the plaintiff to go into the witness-box and give evidence in his favour supporting the claim put forward in the plaint. After recording the evidence the Court forthwith proceeded to decide the suit without framing any further issues and without giving parties an opportunity to produce evidence. It, however, decided the question of jurisdiction in favour of the plaintiffs and held that the suit was cognizable by a Court at Sialkot. On the merits the Court held in favour of the plaintiff and granted him a decree. The defend-

ants applied, on the 4th December 1921, under O. IX, r. 13, Civil Procedure Code, for the setting aside of this decree on the ground that Muhammad Sharif, the managing member of the firm, was ill and could not attend on the date of hearing. This application for the setting aside of the *ex parte* decree has been rejected by the Court below by an order dated the 19th January 1922, and it is against this order that the present appeal has been preferred. Without going into the merits of the allegation as to whether the defendant Muhammad Sharif had actually fallen ill or not, I must hold that the *ex parte* decree ought not to have been passed under the circumstances disclosed by the record. The 10th of December 1921 was not fixed for the decision of the case and, therefore, no *ex parte* decree could have been passed in favour of the plaintiffs against the defendants on the merits. Dr. Narang has argued that I should not interfere with the order of the Court below in this particular case, because the appellant, after filing this miscellaneous appeal, has filed a regular appeal against the *ex parte* decree also. The learned Counsel, however, has not shown me any authority on this point and I do not see how the fact of an appeal from a decree being filed can affect the present appeal. The appellant was entitled to apply for the setting aside of the decree and he had a right to appeal against the order rejecting his application.

A second point is urged by Dr. Narang that at least the decision on the question of jurisdiction must be considered to be final and that I should direct the Court below to treat this question as decided. But the question that I have to decide in the present appeal is whether this *ex parte* decree should be set aside or not, and I am concerned with this question alone. I have already held that, under the circumstances of this case, the Court was not justified in passing the *ex parte* decree.

I, therefore, accept the appeal and, reversing the order of the Court below, pass an order setting aside the *ex parte* decree. I make no order as to costs, because the mistake was committed by the Court itself. The case will now go back to the Court below for decision on the merits.

Z. K.

Appeal accepted.

AHMAD THAMBI MARICAIR V. BAVASA MARACAYAR.

MADRAS HIGH COURT:

CIVIL REVISION PETITION NO. 395 OF 1922.

October 10, 1922.

Present:—Mr. Justice Wallace.

A. K. G. AHMAD THAMBI MARICAIR

—PETITIONER—RESPONDENT

versus

V. S. BAVASA MARACAYAR—RESPONDENT—PETITIONER.

Madras District Municipalities Act (V of 1920), ss. 18, 28—"Chairman" in s. 28, whether includes Chairman delegate—Rules for Election of Chairman, r. 4—"Taking part in ballot," whether includes presiding at election meeting and acting as returning officer—Rules for decision of election disputes, r. 11—Election, when can be set aside—Sub-Judge, whether acts as Court—Revision—Civil Procedure Code (Act V of 1908), s. 115.

By virtue of rule 4 of the Rules for Election of Chairmen of Municipalities under the Madras District Municipalities Act, a candidate whose name has been proposed and seconded for Chairmanship cannot himself preside at the meeting for election of Chairman or act as returning officer therein. [p. 904, col. 2.]

This rule has been framed to carry out the principle that no man shall be a Judge in his own cause. [p. 904, col. 2.]

The expression in the rule "to take part in the ballot" is not restricted to actual voting, but includes presiding at the meeting for election or acting as returning officer. [p. 904, col. 2.]

The word "Chairman" in section 28 of the Madras District Municipalities Act has been used so as to include a Chairman delegate who may be appointed by the Chairman under section 18 of the Act, when he is himself incapacitated from acting as Chairman. [p. 905, col. 1.]

Under rule 11 of the rules framed for the decision of election Municipal disputes, before an election can be set aside, it is necessary to find not only a non-compliance with rules but also that such non-compliance has materially affected the result of the election. [p. 905, col. 2.]

A Subordinate Judge in dealing with an election enquiry under the Madras Municipal Election Rules sits as a Court subordinate to the High Court and an order made by him is subject to revision under section 115 of Civil Procedure Code. [p. 906, col. 1.]

Where a Subordinate Judge in deciding an election petition set aside an election merely on the finding that there had been a breach of the election rules by the successful candidate and omitted to decide whether the breach of the rules established had materially affected the result of the election:

Held, that the Subordinate Judge had exercised his jurisdiction with material irregularity and his order was, therefore, liable to be set aside in revision. [p. 906, col. 2.]

The general principle which governs interference with an order under section 115 of the Civil Procedure Code, is, that when a Court has taken up a point of fact or law for decision and has

decided that point wrongly, it has acted with full jurisdiction regularly and legally and no revision lies against its order, unless that order itself affects the Court's own jurisdiction. But when, having jurisdiction, the Court has failed or refused to take up a point for decision, it has exercised its jurisdiction irregularly, and the more the failure or refusal affects the exercise of its jurisdiction, the greater the irregularity will be. [p. 906, col. 2.]

Amritav Krishna Deshpande v. Balkrishna Ganesh, 11 B. 488; 6 Ind. Dec. (N. S.) 321, *Kuppuswami Iyengar v. Narayana Iyengar*, 32 Ind. Csa. 3; 3 L.W. 36; 19 M. L. T. 24, *Jhotu Lal Ghose v. Ganouri Sahu*, 46 Ind. Cas. 176, 3 P. L. J. 376, *Venkataramanjulu v. Ramaswami*, 30 Ind. Cas. 353; 29 M. L. J. 353; 2 L. W. 709; 18 M. L. T. 164; (1915) M. W. N. 728, *Vuppuluri Atachayya v. Sri Kanchamarti Venkata Sektarama Chandra Rao*, 18 Ind. Cas. 555; 39 M. 195 at p. 201; 13 M. L. T. 60; 24 M. L. J. 112, *Hindley v. Joynarain*, 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288, *Amir Hassan Khan v. Sheo Bahsh Singh*, 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.), *Shew Prosad v. Ram Chundrr*, 23 Ind. Cas. 977; 41 C. 323 and *Balakrishna Udayar v. Vasudeva Aiyar*, 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.), considered.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge. Negapatam, dated 5th May 1922, in O. P. No. 71 of 1921.

Dr. Swaminadan. for the Petitioner.—The petitioner stood as a candidate for the Chairmanship of the Negapatam Municipality and was elected by a majority of 21 to 7 votes obtained by the rival candidate. The only ground on which the election has been set aside is, that the petitioner himself, who was the outgoing Chairman, presided at the meeting. Section 28 of the District Municipalities Act casts this duty on him. Rule 4 of the Rules for Election of Chairmen prohibits only "taking part in the ballot" which means actual voting. Presiding at the meeting is not taking part in ballot.

Mr. T. M. Krishnaswami Aiyar (with him V. N. Venkatavaradachari), was called on to support the judgment.

Rule 4 which prohibits a candidate whose name has been proposed and seconded from taking part in a ballot is in consonance with the well-known principle that no man shall be a judge in his own cause,

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The English Law on the point is perfectly clear and lays down that the principle should be given effect unless there is anything in the Act or the rules against it. There is nothing in the Act or the rules against such a principle.

Reg. v. Owens (1), *Reg. v. Blizard* (2), *Reg. v. White* (3), *Reg. v. Tewkesbury Corporation* (4) and *Reg. v. Morton* (5) 12, Halsbury Page 653, Volume 3 Rogers on Elections, page 115.

The present election rules recognise this. "Taking part in the ballot" is used in contradiction to 'voting.' Ballot under the rules begins as soon as there is a contest for the place and the whole procedure is signified by that word. The petitioner is, therefore, prevented not only from voting but also from presiding, reading ballot slips, pronouncing on the validity or invalidity of votes and returning himself. A returning officer's duties are clearly judicial. *Woodward v. Sarsons* (6).

The rule has been clearly broken in the present case. Section 28 does not stand in my way. In case of incapacity, the Chairman can appoint a delegate under section 18. There is no duty on the Chairman to preside even when he is incapacitated. Chairman in section 28 includes a Vice-Chairman and Chairman delegate as well (see the rules and section 28) see the exactly analogous provisions of English Law. Sections 15, 6, 1, and rule 9, Schedule 2, of English Municipal Corporation Act of 182. In any case the error, if any, is in the interpretation of rules and there is no ground for interference in revision.

[WALLACE J.—The other id will rely on the merits. Question of jurisdiction can then be gone into.]

Dr. Swaminadan. The rules of English Law should not be imported into Ind.a. See

Ramanujulu Naidu v. Parthasarathy Aiyengar (7). The prohibition against importing is not express and should not be implied in the face of section 28. New ideas should not be imported into the language of the rules.

[WALLACE, J.—Under what rule is the election set aside?]

Under rule 11 of the rules for deciding election disputes.

[WALLACE, J.—Where is the finding in the case that the result of the election has been materially affected by non-compliance with rules?]

There is no such finding. The Judge merely found a violation of the rules and set aside the election.

Mr. T. M. Krishnaswami Aiyar was called on to reply on the point and on the jurisdiction question.

The learned Judge below must be deemed to have found that the result has been materially affected by non-compliance. *Shyam Chand v. Chairman of the Dacca Municipality* (8) is referred to in the judgment. See also *Woodward v. Sarsons* (6). The onus of proving non-affecting is on the person seeking to sustain the election in spite of the non-compliance. The other side has not discharged it. The election is rightly set aside. In no case, there is no ground for interference under section 115, Civil Procedure Code in jurisdiction. Error of law is no ground. (On the question of limitation see *Kuppuwami Aiyangar v. Narayana Iyengar* (9), *Moim Chandrar Pal v. Mirza Amir Khan* (10), *Jhotu Lal Ghore v. G. Norri Sahu* (on res judicata see *Amrit v. Kishna Deshpande v. Balakrishna Gahlot* (12), *Ami Hassan Khan v. Sheo Bakhsh Singh* (13).

The Privy Council decisions recognise only jurisdictional errors as ground for

(1) (1859) 2 El. & El. 86; 121 E. R. 34; 28 L. J. Q. B. 316; 5 Jur. (N. S.) 764; 7 W. R. 566.
(2) (1867) 2 Q. B. 55 at p. 58; 7 B. & S. 922; 36 L. J. Q. B. 18; 15 L. T. 212; 15 W. R. 105.
(3) (1867) 2 Q. B. 558; 8 B. & S. 587; 36 L. J. Q. B. 267; 16 L. T. 828; 15 W. R. 983.
(4) (1868) 3 Q. B. 629 at p. 633; 37 L. J. Q. B. 288.
(5) (1892) 1 Q. B. 39; 61 L. J. Q. B. 39; 65 L. T. 611; 40 W. R. 101; 56 J. P. 105.
(6) (1875) 10 C. P. 733 at p. 746; 44 L. J. C. P. 293; 34 L. T. 867.

(7) 28 Ind. Cas. 612; (1915) M. W. N. 290; 17 M. L. T. 331; 1 L. W. 343.
(8) 53 Ind. Cas. 741; 47 C. 524; 30 C. L. J. 270; 24 C. W. N. 189.
(9) 32 Ind. Cas. 3; 3 L. W. 36; 19 M. L. T. 24.
(10) 33 Ind. Cas. 346; 22 C. L. J. 564.
(11) 46 Ind. Cas. 176; 3 P. L. J. 376.
(12) 11 B. 488; 6 Ind. Dec. (N. S.) 321.
(13) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Ruffique and Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.).

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interference [see *Minakshi Naidu v. Subramanya Sastri* (14); *Birj Mohun Thakur v. Rai Uma Nath Chowdhury* (15), *Balakrishna Udayar v. Vasudeva Aiyar* (16).]

Shew Prosad v. Ram Chunder (17) lays down the same rule; also *Venkataramanjulu v. Ramaswami* (18) and *Haridayanath Roy v. Ram Chandra Barua Sarma* (19). The Judicial Committee in a very recent case also pointed out in *Rex v. Nat Bell Liquors Limited* (20) the exact scope of interference in issuing writs of certiorari corresponding to our Revisional Jurisdiction.

This finding is no more necessary than any other point essential to a decision on the merits or as a condition precedent to exercise of jurisdiction. See *Venkataramanjulu v. Ramaswami* (18). There is no warrant for interference.

Dr. *Swaminadan*. There is no finding here on a point essential to the jurisdiction of the Election Court. But for the finding there is no jurisdiction to set aside the election.

See *Hindley v. Joynarain* (21) and *Balakrishna Udayar v. Vasudeva Aiyar* (16).

Reference also was made to *Sundaram v. Mamsa Mavuthar* (22), *Ross Alston v. Pitambar Das* (23), *Sew Bux Bogla v. Shib Chunder Sen* (24), *Venkubai v. Lakshman* (25), *Vuppuluri Atchayya v. Sri Kanchamarti*

(14) 11 M. 26; 14 I. A. 160; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18 (P. C.).

(15) 20 C. 8; 19 I. A. 154; 6 Sar. P. C. J. 245; 10 Ind. Dec. (N. S.) 6 (P. C.).

(16) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

(17) 23 Ind. Cas. 977; 41 C. 323.

(18) 30 Ind. Cas. 353; 29 M. L. J. 353; 2 L. W. 709; 18 M. L. T. 164; (1915) M. W. N. 728.

(19) 58 Ind. Cas. 806; 48 C. 138 at p. 147; 31 C. L. J. 482; 24 C. W. N. 723.

(20) (1922) 2 A. C. 128; 91 L. J. P. C. 146; 127 L. T. 437; 38 T. L. R. 541.

(21) 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288.

(22) 63 Ind. Cas. 937; 44 M. 554; 40 M. L. J. 497; 13 L. W. 498; 29 M. L. T. 269; (1921) M. W. N. 272.

(23) 25 A. 509 at p. 523; A. W. N. (1903) 104.

(24) 13 C. 225; 6 Ind. Dec. (N. S.) 649.

(25) 12 B. 617; 13 Ind. Jur. 270; 6 Ind. Dec. (N. S.) 895.

Venkat Seelarama Chandra Rao (26) and the unreported case in C. R. P. Nos. 341, 342 of 1922.* This is a clear case of material irregularity in the exercise of jurisdiction.

JUDGMENT.—Three main points have been argued on this petition: (1) whether the statutory rules for the election of the Chairman were broken, (2) whether having found that they were broken, the lower Court was not bound to find further that that breach had materially affected the result of the election before it could set aside the election, (3) whether if the Court has neglected so to find, this Court can, and, if it can will interfere in revision, and in what manner it should so interfere.

2. As to point (1) whether the election rules have been broken, the lower Court's finding appears to me to be a finding of fact which, in revision, this Court will not ordinarily disturb. It is pleaded for petitioner that the lower Court's finding is vitiated by a fundamental misreading of the rules which are statutory rules, *i. e.*, that it is based on an error of law. Rule IV lays down that "no candidate whose name has been proposed and seconded shall take part in a ballot." It is admitted that petitioner, whose name had been duly proposed and seconded, himself presided at the meeting and conducted the ballot, opened the ballot-box, counted the votes and acted as returning officer. I am in full agreement with the lower Court that this is "taking part in a ballot," and that that phrase is not restricted, as petitioner argues to the mere act of voting. The rule has clearly been framed to carry out the salutary principle that no man shall be a judge in his own cause, and that it should not be in the power of one vitally interested in the result, to decide on such questions intimately affecting the result, *e.g.*, the validity of a particular vote, as the officer presiding at the ballot has to decide. The English Law on this subject is quite plain, see *Reg v. Owens* (1) *Reg v. White* (3) and other cases cited on page 115 of Volume III of Rogers (26) 18 Ind. Cas. 555; 39 M. 195 at p. 201; 13 M. L. T. 60; 24 M. L. J. 112.

*Since reported as *Ramaswami Gounder v. Muthu Velappa Gounder*, 71 Ind. Cas. 1009; 16 L. W. 848; 44 M. L. J. 1; (1923) A. I. R. (M.) 192. [Ed.]

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on Elections, 18th Edition, *viz.*, that a candidate is precluded from acting as Chairman at an election and is incapable of acting as a returning officer, and that if he so acts, and is elected, his election is voidable on petition *ad hoc* Rule 4, I have no doubt, was designed to carry out the English Law principle.

3. I have no doubt then that in this case rule 4 was broken, and that the lower Court did not misinterpret the rules or the law relating to elections when it held so. It has been urged before me that this rule 4 seems to be in direct contravention of section 28 of the Madras District Municipalities Act V of 1920, which implies that at every meeting of the Council at which the Chairman is present, he shall preside. The difficulty is met in my opinion by counter-petitioner's suggestion of interpreting "absence" as including "incapacity." These two words are in fact used in section 18 separately and as not implying each other and if the incapacity of the Chairman to preside had been contemplated in section 28 similar language to that used in section 18 could have been employed. Section 13 (4) has been obviously misread by the lower Court and has no application to the present point. The difficulty, however, is resolved by holding that the word "Chairman" in section 28 includes "Chairman delegate" in cases where there is no vice-Chairman, and in fact it is clear that one must hold so, otherwise the "Chairman delegate" could not preside at meetings at all, a *reductio ad absurdum*. The proper procedure then in cases like the present, is that the Chairman being incapacitated from fulfilling his duty of presiding at the election meeting should under section 18 appoint a Chairman delegate, who, under section 28, would preside at the meeting. Whether the salutary principle that a man should not be a judge in his own cause is preserved by a procedure which allows him to appoint his own judge in his cause may well be doubted, but that is, so far as I can see, the result of the present procedure as laid down in the Act and the statutory rules.

4. Be that as it may, the difficulty does not alter the fact that petitioner committed a breach of the election rules in presiding at the meeting and taking part in the ballot for the election at which he was a candidate.

It does not, however, at all follow that the lower Court's order setting aside the election was correct. Here I come to point (2) argued before me. Under the statutory rules for the decision of election disputes published in the *Fort St. George Gazette*, dated 30th November 1920, page 607, non-compliance with the provisions of the Act or rules made thereunder can invalidate an election only if "the result of the election has been materially affected thereby." To that question the lower Court has in my opinion, nowhere given its attention. Counter-petitioner argues that since the lower Court holds that the rule broken was a mandatory provision, it must be deemed to have held that the result of the election was materially affected, and relies on the ruling in *Shyam Chand v. Chairman of the Dacca Municipality* (8). What the election rules in Calcutta are has not been stated before me. If they follow rule 13 of the English Ballot Act of 1872, as quoted at page 532 of that ruling, they are wider in principle than the rules in Madras, for under rule 13 an election conducted "not in accordance with the principles laid down in the body of the Act." may be declared "invalid." Under the Madras rules no breach of the rules, whether mandatory or directory, shall invalidate an election unless the result of the election has been materially affected by such breach. It is not an axiom then in this Presidency that a breach of a mandatory rule will so affect an election. It is a question of fact to be decided and found by the Judge who hears the election petition.

5. It was the more necessary for the lower Court to have decided this question in this case, as it was never even alleged much less attempted to be proved by counter-petitioner, that the result of the election would have been different had the rules not been broken, and there is no suggestion that while the ballot was going on, the petitioner had to give, and did give, a decision on any point which could have affected the result of the ballot, and the majority of votes in his favour was overwhelming. Counter-petitioner argues that the onus of showing that the breach did not affect the election lay on petitioner who had violated the rules. Granting so, it is still clear that the lower Court never put that issue before petitioner or called on him to prove it, while, obviously,

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it was unnecessary for petitioner to go out of his way to set out any rebuttal to a case never stated by counter-petitioner in his objection petition to the lower Court.

6. The lower Court has thus neglected to put to itself and to the parties the question it had to decide before, under the rules, it had any legal power to set aside the election. I therefore, come to the third point argued, *viz.* whether this Court can, and if it can, will interfere in revision. That in a matter of this kind this Court has power to interfere under section 115 of the Code of Civil Procedure has been lately decided by a Bench of this Court in a ruling as yet unreported in C. R. P. Nos. 341, 342 of 1922*. I need not recapitulate the *ratio decidendi* of the decisions of their Lordships Krishnan and Venkatasubba Rao, JJ., on this point, with which I respectfully agree; they hold that when dealing with an election enquiry of this kind, the Judge is sitting as a Court subordinate to this Court and, therefore, section 115 applies.

7. Is the present case one then in which this Court should interfere on revision? The phrase in section 115 which can be called in aid by petitioner is "if such subordinate Court appears to have acted in the exercise of its jurisdiction illegally or with material irregularity." A good deal of discussion has centered round this point and many cases have been cited to me for the purpose of showing in what sort or class of cases High Courts in India and in England have acted in revision. I need not deal with these cases in detail, since they all lead to the same conclusion, that what is a "material irregularity" is a matter in itself undefinable and must be decided on the facts in each case. So far as it may be negatively defined, it is not a mere mistake of fact or law [see *Amritav Krishna Dshpande v. Balkrishna Ganesh* (12); *Kruppswami Iyengar v. Narayana Iyengar* (9), *Jhotu Lal Ghose v. Ganour Sahu* (11) and *Venkataramanjulu v. Ramaswami* (18)] unless that mistake has occasioned a wrong assumption or refusal of jurisdiction [*Vuppuluri Atchayya v. Sri Kanchamari Venkata Seetarama Chandra Rao* (26); and *Hindley v. Joyuarain* (21)] since a Court which has jurisdic-

tion to decide a case on a point of fact or law has a jurisdiction to give a wrong as well as a right decision on either point. Thus, where there is jurisdiction and that jurisdiction has been exercised merely wrongly so as to eventuate in a wrong decision on act or law, section 115 cannot be called in aid. [See Privy Council ruling in *Amir Hassan Khan v. Shew Bakhsh Singh* (13) and the ruling in *Sheo Prosad v. Ram Chunder* (17)]. But when there is jurisdiction and that jurisdiction has not been exercised or has been illegally or irregularly exercised, section 115 will apply [see Privy Council ruling in *Balkrishna Udayar v. Vasudeva Aiyar* (16)].

8. I take the general principle to be this, that when a Court has taken up a point of fact or law for decision and has decided that point wrongly, it has acted with full jurisdiction regularly and legally and no revision lies unless that decision itself affects the Court's own jurisdiction. But that when, having jurisdiction, the Court has failed or refused to take up the point for decision it has exercised its jurisdiction irregularly, and the more the failure or refusal affects the exercise of its jurisdiction, the greater the irregularity will be.

9. Applying that principle to the present case, and recalling my conclusion that the lower Court has omitted to decide whether the result of the election was materially affected by the breach of the rules, *i. e.*, to decide the one point in this case which gave it jurisdiction to set aside the election, I cannot come to any other conclusion than that the Subordinate Judge exercised his jurisdiction with material irregularity. Clearly, he exercised it irregularly since he had no legal basis on which to set aside the election, and overlooked the one factor which alone gave him jurisdiction to set it aside; and clearly the irregularity was material because it may well be that if he had decided that question his decision might have been in petitioner's favour, and then he would not have set aside the election.

10. I, therefore, under section 115 (c) set aside the lower Court's order and direct it to re-hear and decide afresh the petition before it according to law. In doing so, the Subordinate Judge will consider, if he decides that the election should be annulled.

* Since reported as *Ramaswami Goundan v. Muthu Velappa Goundan*, 71 Ind. Cas. 1039.—[Ed.]

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whether, having regard to the amendments introduced by Madras Act I of 1922 into Madras Act V of 1920, a fresh election is necessary. It is a point I have not heard at length in this Court.

II. Costs in this petition and up to date in the lower Court will abide the result.

V. N. V.

Petition allowed.

Z. K.

Case remanded.

PATNA HIGH COURT.

CIVIL REVISION NO. 304 OF 1922.

March 21, 1923.

Present:—Mr. Justice Das and

Mr. Justice Macpherson.

SHAM SUNDAR SINGH AND OTHERS—
PETITIONERS

versus

Munshi MUSAHEB LAL AND ANOTHER
—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 90—Application to set aside execution sale—Compromise—Sale to be set aside on deposit of amount by certain date—Conditional deposit—Condition withdrawn before decree holder's application for payment—Deposit, validity of.

During the pendency of an application to set aside an execution sale the parties entered into a compromise whereby it was agreed that if the judgment-debtor paid a certain sum of money to the decree-holder before a certain date the sale would be set aside. The judgment-debtor deposited the sum in Court within the time fixed but made an application to the Court that the money should not be paid to the decree-holder till the decision of a suit which the judgment-debtor was about to file. On the decree-holder's objection that the sale should not be set aside as the terms of the compromise had not been complied with within the time fixed, the judgment-debtor withdrew his objection and intimated that the decree-holder should be allowed to withdraw the money:

Held, that as the judgment-debtor withdrew the condition as soon as objection was taken by the decree-holder so that money became available for payment to the decree-holder before he had made any attempt to withdraw the amount from the Court, the deposit was a valid deposit under the law.

Lal Mohan Koer v Bansidhar Singh, 10 Ind Cas 880, relied on

Appeal from an order of the District Judge, Monghyr, dated the 6th July 1922, setting aside the decision of the Subordinate Judge, First Court, Monghyr, dated the 9th November 1921.

Mr. A. Mukherji, for the Petitioners.

Messrs. Ram Prasad, D. C. Verma and Janak Kishore, for the Opposite Party.

JUDGMENT.

Das, J.—I am unable to agree with the view taken by the learned District Judge. On the 22nd December 1920 a sale of a certain property took place in execution of a certain decree obtained by the opposite party as against the petitioners. On the 21st January 1921 the petitioners applied for setting aside the sale under the provision of O. XXI, r. 90, Civil Procedure Code. On the 23rd January 1921 the parties entered into a compromise, the terms of the compromise being that if the judgment-debtors paid the sum of Rs. 2,695 to the decree-holders on or before the 23rd September 1921 the sale would be set aside, but that if the sum of Rs. 2,695 was not paid to the decree-holders within the time allowed, the application for setting aside the sale would stand dismissed and the sale would be confirmed. That was the position on the 23rd January 1921. On the 19th September 1921 the petitioners deposited the sum of Rs. 2,695 in Court and invited the Court to set aside the sale. The petitioners also applied to the Court that the money should not be paid to the decree-holders until the decision of a regular suit which the judgment-debtors were about to institute against the decree-holders. It appears that such a suit was in fact instituted on the 24th September 1921. On the 23rd September 1921 the decree-holders filed a petition praying that the sale should not be set aside as the deposit made by the judgment-debtors was a conditional deposit which had in effect prevented them from withdrawing the money from Court. The learned Subordinate Judge came to the conclusion that the payment of the money to the decree-holders could not be withheld, and on the 9th November the learned Subordinate Judge set aside the sale. It appears that, while the matter was being argued before the learned Subordinate Judge, the judgment-debtors, through their Pleader, intimated to the Court that they had no objection to the money being withdrawn by the decree-holders. The question which the Court below had to consider was, whether the deposit made by the judgment-

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debtors on the 19th September 1921 was an unconditional deposit or a conditional deposit. The learned Subordinate Judge came to the conclusion that the deposit was an unconditional one, whereas the learned District Judge in appeal has taken the contrary view.

I am not, as at present advised, prepared to assent to the proposition that the deposit was a conditional one. It is, in my opinion, one thing to make the deposit subject to a particular condition; it is another thing to make the deposit and to apply to the Court that the party entitled to withdraw the money from Court should not withdraw it until a particular decision is reached in a particular case. I will, however, assume that the deposit on the 19th September 1921 was a conditional deposit. The question still remains whether there was anything which happened afterwards which prevented the Court from giving the appropriate relief to the judgment-debtors. The judgment-debtors through their Pleader intimated to the Court that they would not object to the money being withdrawn by the decree-holders, and, as a matter of fact, they took up that position before the decree-holders made any application for withdrawal of the money from Court. The case, in my opinion, is governed by the decision of the Calcutta High Court in *Dulhin Mothura Koer v. Bansidhar Singh*. (1) In that case the judgment-debtor made the deposit under O. XXI, r. 89, Civil Procedure Code, on the last day for making a deposit, and the petition by which he made the deposit prayed that the money was not to be paid out to the decree-holder, auction-purchaser, till the disposal of a suit which had been commenced by the petitioner in another Court but it appeared that when objection was taken by the decree-holder that the deposit was not an unconditional deposit the judgment-debtor withdrew the objection. Mr. Justice Mookerjee, in delivering the judgment of the Court, said as follows: "Now, it is perfectly true that a deposit under r. 89 of O. XXI, in order that it may be a valid deposit, must be unconditional, because the deposit is to be made for pay-

ment to the purchaser and the decree-holder. When, therefore, a deposit is made with a condition that the sum may not be drawn out at once but may be retained in Court until a certain event has happened, it is not a good deposit within the meaning of the rule. It appears, however, that the deposit was accepted by the Court without any question and as soon as objection was taken by the decree-holder, the petitioner withdrew the condition, so that the money became available for payment to the decree-holder before he had made any attempt to withdraw the money from Court. Under such circumstances, we are not prepared to hold that the deposit was invalid and not sufficient for reversal of the sale. The position might have been different if, upon objection taken by the decree-holder, the petitioner had persisted in her effort to annex a condition to the deposit. The decree-holder was not prejudiced in any manner by the insertion of the prayer in the application of the petitioner that the money should be retained in Court, and he was substantially in the same position in the end as if such prayer had never been made. We must consequently hold that there was substantially a valid deposit within the time limited by law, sufficient for reversal of the sale."

In my opinion in the circumstances which have happened, we must regard the deposit made by the judgment-debtors on the 19th September 1921 as a valid deposit. That being so, the order of the learned District Judge must be set aside and the order of the Court of first instance must be restored. There will be no order for costs.

Macpherson, J.—I agree.

Z. K.

Ord r set aside

BASDEO SINGH v. BHAGWAT PRASAD.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL, APPEAL No. 187 OF 1922.

September 13, 1922.

Present.—Mr. Simpson, A. J. C.

BASDEO SINGH AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

BHAGWAT PRASAD—PLAINTIFF—

RESPONDENT.

Easements Act (V of 1882), s. 15 (5)—Easement—Statutory prescriptive title, acquisition of.

Section 15 (5) of the Easements Act seems to render it impossible to acquire statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit brought within two years of a continuous enjoyment of the easement for twenty years.

Sultan Ahmad v. Walliullah, 17 Ind. Cas. 22; 10 A. L. J. 227, relied on.

Second appeal from an order of the District Judge, Rai Bareli, dated the 10th April 1920.

Mr. Rada Krishan, for the Appellants.

Mr. D. K. Seth, for the Respondent.

JUDGMENT.—This is a second appeal by the defendants. The suit was based on an easement acquired by prescription. The plaintiff is a tenant holding cultivating possession of certain plots of arable land. The defendants are also tenants and they have a *pakka* well in another plot. The easement claimed is a right to irrigate plaintiff's three plots from the defendants' well. The relief sought was the usual one of a declaration of the right and an injunction.

This being a second appeal, I am not concerned with questions of fact. The Court of Trial found that the necessary enjoyment for 20 years had not been proved and dismissed the suit.

The learned District Judge reversed this decree on a finding that there was a continuous user for more than twenty years. The defendants come here in second appeal. The most important point for decision relates to the fifth paragraph of section 15 of the Easement Act (V of 1882) which runs as follows :—

"Each of the said periods of 20 years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

The lower Appellate Court said *khasras* after 1325 F. show that the fields were irri-

gated from *talab* water. This suit was instituted on 5th July 1921. The date of institution falls within the year 1328 F. which ended on 13th September 1921 but for the purposes of the village papers the Fasli year 1329 began on 1st July 1921. Now, on the plaint itself the cause of action is said to have accrued on 1st January 1920 and the *khasras* of 1325 and 1326 carry us back well beyond two years before the date of institution. It would appear, therefore, that there is a finding of fact by the Court below that the easement was not enjoyed up to a period within two years next before the institution of the suit. The learned Judge did not apply his mind to clause 5 of section 15, probably he had section 47 in his mind. He said: "Once the right of easement had been created by continuous user for more than 20 years it can only be destroyed by disuse for 20 continuous years." The meaning of this clause 5 of section 15 was discussed in *Sultan Ahmad v. Walliullah* (1). It was said that the fifth paragraph of section 15 of the Easements Act seems to render it impossible to acquire statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit. A reference was made to the dictum of Lord Macnaghten in the well known case of *Colls v. Home and Colonial Stores* (2) relating to ancient light, and also to *Hyman v. Van den Bergh* (3) in which that dictum was adopted and made the ground of a decision. It would appear, therefore, that the decree under appeal is based upon an error of law. The plaintiff came into Court setting up a prescriptive title. The law applicable is section 15 and under that section he had to show a period of 20 years continuing up to some point within two years before the institution of the suit. He failed to do so and his suit ought to be dismissed.

For these reasons, I allow the appeal, set aside the judgment and the decree of the lower Court, and restore the decree of the Court of first instance which dismissed the plaintiff's suit. The defendants will get their costs in all three Courts.

N. K.

Appeal allowed.

(1) 17 Ind. Cas. 22; 10 A. L. J. 227.

(2) (1904) A. C. 179 at p. 189; 73 L. J. Ch. 484; 90 L. T. 687; 53 W. R. 39; 20 T. L. R. 475.

(3) (1908) 1 Ch. 167; 77 L. J. Ch. 154; 98 L. T. 478.

NAJMUNNISA V. JAGMOHAN LALL.

PATNA HIGH COURT.

CIVIL MISCELLANEOUS APPEAL NO. 56 OF 1921.

December 18, 1922.

Present:—Justice Sir Jwala Prasad Kt., and Mr. Justice Ross.

Musammal NAJMUNNISA—APPLICANT
—APPELLANT

versus

JAGMOHAN LALL AND OTHERS—

OBJECTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. V, r. 17—Service of summons on *parda nashin* lady, mode of.

Where a *parda nashin* lady is not able to accept service personally and has no agent empowered to accept service on her behalf, and has also no adult male member in her family on whom service may be effected or who is willing to accept service, valid service may be effected on her under the provisions of r. 17 of O. V of the Civil Procedure Code by the serving officer affixing a copy of the summons on an outer door or some other conspicuous part of the house in which the lady ordinarily resides.

Khiroda Sundari Dasi v. Nabin Chandra Saha, 30 Ind. Cas. 64; 21 C. L. J. 653; 19 C. W. N. 1231, relied on.

Appeal against the decision of the Sub-Judge, Gaya dated the 1st February 1922.

Messrs. S. M. Talir and Muhammad Hassan Jan, for the Appellant.

Messrs. S. M. Mullick, S. Nishwar Dayal and Brij Kishore Prasad, for the Respondents.

JUDGMENT.

Ross, J.—There is an appeal against an order of the Subordinate Judge of Gaya dismissing an application to set aside an *ex parte* decree passed in a suit on a mortgage. The appellant is one Bibi Najmun-nissa and the mortgage-bond in suit was executed by her in the pen of her husband and general attorney, Mazharul Huq. In her present application she alleges that she has been residing in *Mauza Narhat* for the last four or five years and no summons was served upon her in the suit. She further alleges that the opposite party No. 10, that is, her husband, Mazharul Huq, has been acting in collusion and concert with the opposite-party Nos. 1 to 9, the plaintiffs in the suit. The opposite party allege in reply that summons was duly served and deny the allegation of collusion with the petitioner's husband. The learned Subordinate Judge held that

Mazharul Huq was the *Am Mukhtar* of the petitioner and that service through him was good. He further held that the residence of the petitioner was at Kazichak.

The evidence of service of summons given on behalf of the opposite party consists of the statements of Raghu Nath Singh, the peon, and Shankar Singh, the identifier. The peon says that he met the defendant's husband Mazharul Huq in her house at Makh-dumpur Kazichak and he refused to accept his summons as well as the summons on Bibi Najmun-nissa. Then the peon affixed the summons and copies of plaint on the house facing east. This evidence is corroborated by the identifier. It is objected to the evidence that this is no proper service under O. V, r. 17. It is contended, in the first place, that service could only be made by affixing the summons to the house when, after using all due care and diligence, the peon had been unable to find the defendant; and, in the second place, that the summons was not affixed to the house where the defendant ordinarily resided. With regard to the first objection, it is suggested on behalf of the respondents that the husband was an agent empowered to accept service and that the service on him was, therefore, good under r. 12. The petitioner says that she had withdrawn the power-of-attorney from her husband. I shall deal with this point later. But the power of attorney itself has not been produced. An abstract from the register has been proved and it does not show that Mazharul Huq had authority to accept service of summons. He must, therefore, in this matter be regarded merely as a male member of the family of the defendant. As to the first objection, that it is not shown that the petitioner could not be found, it is sufficient to say that the petitioner is a *parda nashin* lady and, therefore, not directly approachable. It was held in *Khiroda Sundari Dasi v. Nabin Chandra Saha* (1) that where a *parda nashin* lady is not able to accept service personally and has no agent empowered to accept service on her behalf and has also no adult member in her family on whom service may be effected, in such a case a valid service is effected under the provi-

(1) 30 Ind. Cas. 64; 21 C. L. J. 653; 19 C. W. N. 1231.

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sions of r. 17 if the serving officer affixes a copy of the summons on an outer door or some other conspicuous part of the house in which the lady ordinarily resides. The question is thus reduced to the second objection, as to whether in fact the petitioner was ordinarily residing at Kazipur or not.

* * * * *

On a consideration of the whole evidence, I am of opinion that the learned Subordinate Judge is right in his decision in this case and that the appeal should be dismissed with costs.

Jwala Prasad, J.—I agree.

Z. K.

Appeal dismissed.

ODISH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 35 OF 1922.
November 16, 1922.

Present—Mr. Daniels, A. J. C.
RADHEY SHIAM—APPLICANT—
APPELLANT

versus

Hak'm Saiyed MOHAMMAD TAQI
alias Mr. J. AN SAHIB—OBJECTOR—
RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 16
—*Provincial Insolvency Act (V of 1920), s. 31,*
whether retrospective—Insolvent, undischarged, under
old Act—Immunity from arrest.

A person who was adjudicated insolvent under the Provincial Insolvency Act of 1907 and has not been discharged, is immune from arrest in execution of a decree and the provisions of the new Act of 1920 do not affect his position.

Under the Provincial Insolvency Act of 1907, an insolvent was normally immune from arrest and his arrest could only be obtained, if at all, by special leave of the Court which might put the creditor to terms and in which the burden of showing the special circumstances for departing from the general rule would be on the creditor. Under the Act of 1920, a creditor can proceed as if no adjudication had taken place. It lies on the debtor to move the Court to obtain protection from arrest and the order may be refused if any act of bad faith on the part of the debtor is shown or so framed as to apply only to certain debts or to be operative only for a limited time.

First appeal against a decree of the District Judge, Lucknow, dated the 5th July 1922.

Messrs. Anant Prasad and Rameshwar Dayal, for the Appellant.

Mr. Ali Mohammad, for the Respondents.

JUDGMENT.—The question that arises in this appeal is one which, so far as I am aware, has not hitherto been decided. The question is, whether a person who was adjudicated insolvent under the Provincial Insolvency Act of 1907 and has not been discharged is liable to arrest in execution of a decree in accordance with the provisions of the Act of 1920, unless he takes out a protection order. The question turns on the interpretation of section 6 of the General Clauses Act which provides among other things that the repeal of any Act shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment or affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, etc. The appellant's contention is that the matter is purely one of procedure and that no privilege to the judgment-debtor is involved. In support of this it is urged that section 16 of the Act of 1907 is so framed as to suggest that the matter is one of procedure. That section directs that, on the making of an order of adjudication, the insolvent, if in prison for debt, shall be released and that no creditor shall have any remedy against his person or property in respect of debts proveable under the Act except by leave of the Court and on such terms as the Court may impose. On the basis of this language it is argued that the liability to arrest exists under the old as under the new Act and that it is merely a question of the procedure by which that liability shall be enforced. On the other hand, looking at the matter from a practical point of view there is no question as to the position of an insolvent under the new Act is very different from what it was under the old Act. Under that Act he was normally immune from arrest and his arrest could only be obtained, if at all, by special leave of the Court, which might put the creditor to terms and in which the burden of showing the special circumstances for departing from the general rule would be on the creditor. Under the present Act the creditor can proceed as if no adjudication had taken place.

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It lies on the debtor to move the Court to obtain protection and the order may be refused if any act of bad faith on the part of the debtor is shown. Moreover, the order may be so framed as to apply only to certain debts or to be operative only for a limited time. The immunity from arrest which an adjudication under the Act of 1907 conferred was certainly regarded as a privilege by the persons concerned, and indeed a highly valued privilege, so much so, that it is notorious that it formed the motive for a large proportion of the applications for adjudication which were filed. The construction contended for by the appellant would have the incidental effect that every debtor who was, at the time of the passing of the Act an insolvent under the old Act, would have been required at once to approach the Court with a view to take out a protection order—a result which can hardly have been within the contemplation of the Legislature. In view of these considerations, it appears to me that the Courts below were right in holding that the debtor was not liable to arrest and I accordingly dismiss the appeal with costs.

N. K.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL MISCELLANEOUS APPEAL NO. 144
OF 1922.

November 13, 1922.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir Jwala Prasad, Kt.
BASANTA KUMARI DASÍ—DEFENDANT—APPELLANT

versus

BALMAKUND MARWARI AND OTHERS
—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 144—Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Restoration, application for, nature of—Limitation—Mortgage by decree-holder—Sale in execution of mortgage-decree—Auction-purchaser, restoration application against, maintainability of.

Although an application for restoration under section 144 of the Civil Procedure Code is not included in O. XXI of the Code, which lays down the rules of procedure in execution cases, in substance an application asking for restitution in consequence of a decree having been set aside is just as much an application in execution of that

decree as any other application which seeks to have the actual declarations in the decree enforced. [p. 914, col. 2; p. 915, col. 1.]

Somasundaram Pillai v. Chokkalingam Pillai, 38 Ind. Cas. 806; 40 M. 789; 5 L. W. 267; relied on.

The result of setting aside a decree in favour of one party is to give the other the right to be restored to the same position as he was in before the decree was passed and to set aside any advantage that the decree-holder might have obtained by executing the decree. [p. 915, col. 1.]

An application for restoration under section 144 of the Civil Procedure Code, is, therefore, governed by Art. 182 of Schedule I to the Limitation Act. [p. 915, col. 2.]

Restitution can be enforced not only as against the decree-holder whose decree has been set aside but also as against any transferee from him. [p. 815, col. 1.]

A decree-holder obtained possession of the property in dispute in execution. He then executed a mortgage of the property. The mortgagee brought the property to sale in execution of mortgage-decree obtained by him on the mortgage and purchased it himself. The original decree was subsequently set aside, and the judgment-debtor in the original suit applied for restitution:

Held, that the mortgagee auction-purchaser was in no better position than his mortgagor and that the application for restoration was maintainable as against him. [p. 913, col. 2; p. 914, col. 1.]

Appeal from an order of the Subordinate Judge, Purulia, dated the 29th May 1922.

Mr. A. K. Rai, for the Appellant.

Mr. A. B. Mukherji, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal from an order of the Subordinate Judge of Purulia, dated the 29th May 1922, refusing the appellant's application for restoration under section 144 of the Civil Procedure Code. It appears that a suit was instituted on behalf of Abinash Chandra Karmakar and Satish Chandra Karmakar, the respondents Nos. 2 and 3, against the appellant and her brother claiming to eject them from the house in question. In that suit a decree was passed *ex parte* on the 10th January 1917 and on the 29th March in the same year the plaintiffs in that suit got possession of the house. On the 18th June in the same year the *ex parte* decree was set aside and the suit was restored for hearing. It came on for hearing, and in the following year, on the 7th March 1918, the suit which was one claiming rent and ejectment of the defendants was dismissed, and on the 13th July 1918 an appeal from that decision to the District Judge was also dismissed on the ground that the plaintiffs had no title to the house. The defence

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of the appellant in that suit was that the house had been acquired by her husband from one Dwarkanath Karmikar and on her husband's death devolved upon her son and that she and her brother were living in the house and were in possession with the consent of her son. The *ex parte* decree having been set aside and the suit after being restored having been dismissed the appellant preferred an application on the 29th June 1921 under section 144 of the Civil Procedure Code asking that she might be restored to possession of the house and put in the same position as she would have been had the original *ex parte* decree which was set aside no been passed. At that time it appears that the plaintiffs in the suit were no longer in possession but the respondent No. 1, Balmakund Marwari, was in possession. I ought to mention here how it was that Balmakund came into possession of the house. Sometime in the year 1914 the respondents Abinash and Satish had mortgaged the house to Balmakund, the respondent No. 1, and on the 25th February 1916 Balmakund, having brought a suit upon his mortgage, obtained a preliminary decree against the respondents Nos. 2 and 3. In execution of that decree the house was put up for sale and purchased by Balmakund himself. That was on the 16th April 1918. On the 24th May in the same year Balmakund got delivery of possession from the other respondents, who, as already pointed out, had dispossessed the appellant in March 1917. Both Balmakund and his mortgagors were made parties to the present application.

Before the learned Munsif who tried the application originally two points were argued. It was contended that section 144 had no application in the circumstances of the present case, as it could not be contended that Balmakund was the representative in interest of the other two respondents and that any rights which the appellant might have as against the other two respondents after their *ex parte* decree was set aside could not be enforced against Balmakund who had got possession of the house at a subsequent period in pursuance of the execution of his mortgage decree. The learned Munsif was of opinion that restitution might be granted even against Balmakund but on the second point which

was raised before him which was one of limitation he came to the conclusion that the appellant's application was barred by limitation. It is not disputed that the period of limitation for an application of this sort is three years. A question has arisen whether it comes under Art. 181 or under Art. 182 of the Limitation Act and I shall deal with that point presently, but the learned Munsif came to the conclusion that, as the plaintiff's right to make the application accrued on the 18th June 1917 when the *ex parte* decree was set aside and, as the application was not made until just over four years later her right to apply was barred by limitation.

From that decision the appellant appealed to the Subordinate Judge. The learned Subordinate Judge took a different view upon the first point from that taken by the Munsif and came to the conclusion that no application under section 144 could be made by the appellant against Balmakund. The learned Subordinate Judge apparently took the view that the appellant was never in possession of the house in her own right but was only claiming to be in possession through the right of another, namely, her son and, therefore, as far as I understand his judgment, he arrived at the conclusion that the appellant was not entitled to regain possession from anybody. Having arrived at that conclusion, he thought it was unnecessary to deal with the question of limitation. In fact, he says no question of limitation arises when it is found that the petition under section 144 of the Civil Procedure Code is not maintainable.

From that decision the appellant has appealed to this Court and the first question to be decided is, whether the application is maintainable against Balmakund or not. I ought, perhaps, to mention that Balmakund obtained his possession of the house as mortgagor from the other two respondents and although that possession was obtained in execution of a decree in his mortgage suit at a sale by the Court I cannot see how that fact can give Balmakund any better rights than those which his mortgagors originally had. When the *ex parte* decree was set aside on the 18th June 1917 it seems to me that the appel-

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plaintiff, who, before the decree was in possession of the house and living there with her brother had a right to be restored to the same position as she would have been in if that decree had never been passed. Therefore, the rights as between the appellant and the respondents Nos. 2 and 3 the plaintiffs in the suit originally were crystallised from that moment and the appellant was entitled clearly at that time and within the period of limitation to be restored to the possession of which she had been wrongfully deprived under the *ex parte* decree of the plaintiffs. The only question, therefore, which arises is whether Balmakund having derived his title under the mortgage from the plaintiffs can set up any better defence to an application under section 144 than his predecessors could. It has been argued before us that Balmakund is not the representative of the judgment-debtors whose property he purchased. I myself can see no difference between a person who purchases by private treaty, and a person who acquires by a sale under a mortgage-decree property from the mortgagor. No authority has been cited to us in support of the proposition that the mortgagee auction-purchaser stands in any better position against a person in the place of the present appellant than the mortgagor himself, and, in my opinion, I confess I can see no reason why he should be treated as having any better rights than the person whose property he has acquired. Therefore, whatever the rights may be that were determined as between the respondents Nos. 2 and 3 and the respondent No. 1 in the mortgage suit those rights cannot, in my opinion, deprive the appellant of the rights she acquired under section 144 to be restored to the same position as she was in previously, namely, in possession of the house when the *ex parte* decree was set aside on the 18th June 1917. As a matter of fact, although perhaps it is unnecessary to refer to this for the purposes of my judgment, it was found when the suit was restored and re-tried that the respondents Nos. 2 and 3 who were claiming to eject the appellant had no title to the house in question the title being not in them but in the appellant's husband originally and subsequently in her son. I think, therefore, that, apart from the question of limitation which must be con-

sidered presently, the decision of the learned Subordinate Judge cannot stand.

On the question of limitation it is not very easy for us sitting here in second appeal to determine that question. The facts which were before the Munsif appear to some extent from his judgment, but it is not quite clear from that how far any application for execution of the decree was made or how far that application included a claim to be restored to possession of the property. The learned Subordinate Judge, as I have already pointed out, did not deal with this matter at all. He, however, would be entitled to go into the evidence upon this matter and arrive at a conclusion about it an advantage which we sitting in second appeal have not got. Before, however, sending back the case for determination upon this question by the lower Appellate Court we must be satisfied that, even upon the facts so far as we know them, the appellant really has a case to present upon this part of the appeal. Assuming that an application under section 144 of the Civil Procedure Code is to be treated as an application in execution, then I think that there is sufficient in the learned Munsif's judgment to indicate that the facts of this case might bring it within the provisions of Art. 182 of the Limitation Act so as to extend the time of limitation beyond the three years from the date of the decree or order, that is to say, the order setting aside the *ex parte* decree. If, on the other hand, an application under section 144 cannot be treated as an application in execution then it is quite clear that the cause of action, having arisen on the 18th June 1917, and the present application having been presented some four years later the application would be barred by limitation. We have been referred to the case of *Somasundaram Pillai v. Chokkalinga Pillai* (1) where it was laid down, following an earlier case of the Madras High Court, that an application for restitution is an application for execution under the present Civil Procedure Code just as it was under the old Procedure Code. In my opinion that case was properly decided. Although an application under section 144 is not included in O. XXI, which

(1) 38 Ind. Cas. 866; 46 M. J. 80; 5 L. W. 267.

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lays down the rules of procedure in execution cases still in substance I think that an application asking for restitution in consequence of a decree having been set aside is just as much an application in execution of that decree as any other application which seeks to have the actual declarations in the decree enforced. It is true that the decree only deals with it in a negative sort of way but in fact the result of setting aside a decree in favour of one party is to give the other the right to be restored to the same position as he was in before that decree was passed and to set aside any advantage that the decree-holder might have obtained by executing the decree. In the present case the appellant had been deprived of possession and the effect of setting aside that decree which gave the respondents the right to possession was, to my mind, just the same in effect as if the order setting aside the decree had, in the circumstances, ordered that possession should be delivered to the appellant. I think, therefore, that it is only right and proper to regard an application under section 144 as an application made in execution of a decree. If I am right in that view then, although it is more than three years since the decree was set aside giving rise to the present claim of the appellant, still I find from the Munsif's judgment that on the 12th June 1918, that is to say, about a year after the decree was set aside, an application for execution was made by the appellant, and we are told that on the same day a stay of that application was granted for two weeks in order to allow an application to the District Judge for the purpose of staying this very execution because there was at that time an appeal pending to the District Judge from the decision in the principal suit. The principal suit on appeal was decided by the District Judge on the 13th July 1918 and, therefore, from that date one must take it that the stay was removed so that if one deducts the time between the 1st June 1918 and the 13th July 1918 from the period allowed for bringing execution proceedings within the meaning of Art. 182 of the Limitation Act, it would follow that the present application having been made on the 29th June 1921 was within three years of the time when the last application for execution was made deducting

the time during which that application was stayed. Whether there was in that previous execution application an application for possession is not absolutely clear but it does appear from the judgment of the Munsif that when the application for execution was made the applicant obtained a *parwana* for possession. Therefore, one is entitled to assume, unless it is clearly shewn to the contrary, that, at that time, the applicant was asking the Court to assist her by giving her possession of the property of which she had been deprived. If in fact that application was made then I think it being, as I have already said, an application in execution and governed by Art. 182 of the Limitation Act, the present application must be regarded as in time. This, however, is to some extent a question of fact which the learned Judge of the lower Appellate Court will have to consider. In the result, we set aside the decision of the Subordinate Judge refusing the appellant's application, but as the appellant's right to succeed in that application must still depend upon the question of limitation, we direct that the learned Subordinate Judge before finally disposing of the appeal do consider the question of limitation and come to a decision thereon in the light of the facts already before him. For this purpose he will be entitled, of course, to consider any orders in the case that have been made and that appear in the ordersheet or in the Court records or in the record before him. The costs of this appeal will be governed by the final decision of the lower Appellate Court.

Jawala Prasad, J.—I agree to the order proposed.

Z. K.

Application dismissed.

UTTAM PRASAD V. KODAI.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 113 OF 1922.

November 2, 1922.

Present:—Mr. Daniels, A. J. C.

UTTAM PRASAD—DEFENDANT

—APPLICANT

versus

KODAI—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. I, Art. 35 (ii)—Misappropriation of money paid—Suit for recovery—Jurisdiction of Court of Small Causes.

A suit to recover money paid to a person and misappropriated by him is, in substance, a suit for compensation within the meaning of Art. 35 (ii) of Schedule I to the Provincial Small Cause Courts Act and, therefore, not triable by a Court of Small Causes.

Cherakuddin v. Ram Siraman, 62 Ind. Cas. 432; 48 C. 879; 25 C. W. N. 256, relied on.

Application against a decree of the Munsif, Tarabganj, Gonda, dated the 12th September 1922.

Mr. S. N. Roy, for the Applicant.

Mr. S. M. Ahmad, for the Opposite Party.

ORDER.—This is an application for revision of a decree of the Munsif of Tarabganj exercising Small Cause Court powers. The ground of revision is that the suit is one coming under clause (ii) Art. 35 of the First Schedule to the Provincial Small Cause Courts Act and, therefore, not triable as a Small Cause Court suit, inasmuch as the act of the defendant which gave rise to the suit was an act of criminal breach of trust amounting to an offence under Chapter XVII of the Indian Penal Code. The defendant was a *Zildar* of the Singha Chanda estate. The plaintiff held certain land in that estate though he was not formally recorded as tenant. The allegation in the plaint was that the defendant as *Zildar* realised a sum of Rs. 97 from the plaintiff promising to give a receipt, that he had neither given a receipt nor returned the money, and the plaintiff, therefore, sued to recover the amount. The defendant denied realising the amount in suit from the plaintiff. The facts found by the Court below are that the defendant did realise it, that he never paid it in to his master and that, in consequence, the plaintiff has been compelled to pay the amount over again. The facts found by the Court below no doubt amount to an offence of criminal breach of trust. It is true that all these facts are not alleged in the plaint but the plaint

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very clearly implies that the amount had not been credited by the defendant against the rent due from the plaintiff and must, therefore, have been misappropriated. If it had been credited the plaintiff would have had no cause of action for its recovery. It is urged that a suit to recover back money paid to the defendant and misappropriated by him is not a suit for compensation within the meaning of Art. 35 but in substance it is such a suit and this has been held by the Calcutta High Court in *Cherakuddin v. Ram Siraman* (1).

The application must, therefore, be allowed, and the suit is accordingly returned to the Court below with directions to return the plaint to the plaintiff to be reinstituted on the regular side. As the applicant has put respondent to a great deal of unnecessary expense by not raising any objection in the Court below but coming up to this Court in revision when the case has been decided against him, it is equitable not only that he should get no costs but that he should pay half of the respondents' costs in the Court and I direct accordingly.

N. K.

Application allowed.

(1) 62 Ind. Cas. 432; 48 C. 879; 25 C. W. N. 256.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 72 OF 1920.

January 29, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

RANJIT SAHI AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

Maulavi QASIM AND OTHERS

—DEFENDANTS—RESPONDENTS.

Partition suit—Preliminary decree—Dismissal of suit after preliminary decree, legality of—Value for purposes of jurisdiction—Suits Valuation Act (VII of 1887), s. 8.

After a preliminary decree has been passed in a partition suit, it is not open to the Court to dismiss the suit altogether on the ground that the Commissioner appointed for carrying out the partition has effected partition of property differently

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from the property ordered to be partitioned under the preliminary decree. [p. 917, col. 2.]

The value for purposes of jurisdiction of a suit for partition pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share, is the value of the whole of the property sought to be partitioned. [p. 917, col. 2.]

Dukhi Singh v. Harihar Sah, 58 Ind. Cas. 236; 1 P. L. T. 595; 5 P. L. J. 540; (1921) Pat. 89, distinguished.

Where, however, the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication, it is the value of his share which will determine the jurisdiction of the Court and not the value of the entire property. [p. 918, col. 1.]

Appeal from a decision of the Subordinate Judge, Second Court, Muzaffarpore, dated the 17th December 1919.

Messrs. L. N. Singh and Hareshwar Prasad Singh, for the Appellants.

Messrs. Nyamatullah and A. P. Upadhyaya, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal against a final decree in a partition suit. The plaintiffs brought the suit for partition of certain lands which were left common in the previous Collectorate partition and in the plaint the Survey numbers, *katha* numbers and *khasra* numbers of the land sought to be partitioned are set out. There was a preliminary decree by consent as against the defendants Nos. 16 to 20 and *ex parte* as against the other defendants, and by that decree the learned Subordinate Judge ordered a Commissioner to be appointed to effect the partition as amongst the parties under the terms of the judgment of the 11th August 1919. It appears that, in conformity with the preliminary decree, a Commissioner was appointed and he effected the partition and submitted his report upon which objections were taken by the plaintiffs as well as by the defendants. The learned Subordinate Judge has now dismissed the suit entirely on the ground that the lands which were claimed to be joint lands in the plaint are not the lands which have been partitioned by the Commissioner. In this the Subordinate Judge appears to be completely wrong. A preliminary decree for partition having been passed it was not open to the learned Subordinate Judge at a later stage to dismiss the suit altogether. It was, no doubt, open to him to come to a decision as to what were the lands which

were ordered to be partitioned by the preliminary decree and to effect a partition of those lands but it was not open to him to dismiss the suit altogether on the ground that the lands which were partitioned by the Commissioner were different from the lands ordered to be partitioned under the preliminary decree. The case must go back to the learned Subordinate Judge in order that he may cause the lands which were ordered to be partitioned under the preliminary decree to be partitioned by the Commissioner.

A preliminary objection has been taken to the hearing of this appeal by the learned Counsel for the respondent on the ground that the value of the plaintiff's share of the properties sought to be partitioned is below Rs. 5,000 and, therefore, the appeal ought to have been filed before the District Judge; and he relies upon a decision in the case of *Dukhi Singh v. Harihar Shah* (1).

The facts of that case are clearly distinguishable from the present case. In that case there had been a previous compromise decree for partition during the minority of the plaintiff who challenged the validity thereof and brought the suit for an adjudication that the compromise partition decree was not binding upon him and that he was in joint possession with the defendants of the ancestral properties and for a declaration of his one-eighth share in the entire properties and of his right to effect a partition thereof. It was held that the suit was one for declaration and with consequential reliefs and was governed by section 7, clause (iv) (o) of the Court-Fees Act and not by Art. 17, clause (vi) of Schedule II of the Act. Their Lordships held that, having regard to the nature of the suit and the reliefs asked for, the value of the suit for the purposes of jurisdiction was the value of the plaintiff's share in the properties and not the value of the entire joint family property. No doubt, in considering the question as to whether the appeal in that case lay to the High Court or to the District Court, their Lordships considered the broad question as to the value of suits in partition cases, but to my mind there is a distinction between suits for parti-

(1) 58 Ind. Cas. 236; 1 P. L. T. 595; 5 P. L. J. 540; (1921) Pat. 89.

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tion, pure and simple where the plaintiff is in joint possession of his share and there is no dispute as to his title or share, and suits where the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication. In the latter case, it is the value of the plaintiff's share which will determine the jurisdiction of the Court and not the value of the entire property. In the present case there is no question as regards the title of the plaintiffs, the only question before the Court was as regards partition; therefore, the value of the whole of the properties sought to be partitioned must be the value for the purposes of jurisdiction. This view is supported by the fact that in a suit for partition, the Court does, often on the application of the defendants, effect a partition of the shares of the different defendants also amongst themselves, and, therefore, in such a case the value, for the purposes of jurisdiction, cannot be the value of the plaintiff's share because the Court deals with the entire estate and effects partition not only of the plaintiff's share but of the defendant's share also. Moreover, a decree in a partition suit is engrossed on a stamp paper required, by Art. 45 of the Indian Stamp Act, the stamp-duty being payable not only on the value of the plaintiff's share but on the value of all the shares separated, and this clearly shows that the value of the plaintiff's share alone cannot determine the jurisdiction of the Court. The Calcutta High Court has uniformly adopted this view and I feel inclined to follow the same. In my view the preliminary objection fails, and the appeal was properly presented to this Court.

The result is that the decree of the learned Subordinate Judge is set aside and the case is sent back to him for disposal.

The appellants are entitled to their costs from the respondent No. 2 alone; hearing fee two gold mohurs.

Das, J.—I agree.

Z. K.

Appeal allowed;
Case remanded.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS Nos. 1872 TO 1876 OF 1920 AND 1535 OF 1922.
December 8, 1922.

Present:—Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao.

ZAMORIN RAJA AVERGAL OF CALICUT ESTATE, CALICUT—

PETITIONER—APPELLANT.

versus

KULAPURA VEETIL KANNAN NAIR.

AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 109 (c), 110—Leave to appeal to Privy Council—Forfeiture on alienation of lands held on Karamkari and Adimayalana tenures, whether substantial question of law—Value less than Rs. 10,000—Leave, when can be granted—Custom, establishment of, whether question of law.

The question whether the permanent tenures known as Karamkari and Adimayalana in Malabar have the incident of forfeiture on alienation attached to them by custom or not is one of general interest in Malabar and is a substantial question of law within the meaning of section 109 of the Civil Procedure Code. [p. 919, col. 2.]

Where the above question arose in a number of suits but in two of them, the subject-matter was less than Rs. 10,000 in value, and all the suits could not be consolidated for purposes of pecuniary valuation under O. XLV, r. 4 of the Civil Procedure Code, on account of the suits having been determined in the Court of first instance by separate judgments, leave to appeal to His Majesty in Council was granted even in those suits in which the value of the subject-matter was less than Rs. 10,000 under section 109 (c) of the Civil Procedure Code, since there was a substantial question of law of general interest in the district concerned involved in the suits. [p. 919, col. 2.]

The question whether a custom has been established or not is a question of law though it has to be inferred from the facts proved. [p. 919, col. 1.]

CIVIL MISCELLANEOUS PETITIONS Nos.

1872 TO 1876 OF 1920.

Petitions under section 109 (c) and O. XLV, r. (2) of the Civil Procedure Code, 1908, praying that, in the circumstances stated therein and in the affidavits filed therewith, the High Court will be pleased to grant a certificate enabling the petitioner herein to appeal to His Majesty in Council against the judgment of the High Court, in Second Appeals Nos. 1079 to 1083 of Palghat, at Calicut, in Appeal Suit No. 313 to 317 of 1917 preferred against the decrees of the Court of the Temporary Subordinate Judge, Palghat, at Calicut, in Appeals Suits Nos. 313 to 317 of 1916, preferred against the decrees of the Court of the District Munsif, Alattur, in

ZAMORIN RAJA, AVERGAL, OF CALICUT ESTATE v. KULAPORA VEEFIL KANNAN NAIR, J.

Original Suits Nos. 437, 353, 472, 371 and 270 of 1914 respectively.

CIVIL MISCELLANEOUS PETITION No.

1535 OF 1922.

Petition, under O. XLV, r. 4, of the Civil Procedure Code, 1908, praying that the aforesaid Civil Miscellaneous Petitions Nos. 1872 to 1876 of 1920 for leave to appeal to His Majesty in Council may be consolidated for the purpose of pecuniary valuation.

Messrs. A. A. Krishnaswami Iyar and K. P. Ramakrishna Aiyar, for the Petitioner.

Mr. K. Kutti Krishna Menon, for the Respondent.

ORDER.—The Sub-Judge has now submitted his report as to the valuation and we accept it. In three of the Second Appeals viz., in 1079, 1080 and 1081 of 1917, the value of the subject-matter of the suits as well as that of the appeal to His Majesty in Council is considerably over Rs. 10,000. But in two of them, Second Appeals Nos. 1082 and 1083 of 1917, the value is in each below Rs. 10,000.

Though we differed from the Subordinate Judge on the question whether it was an incident of the permanent tenures in suit in these second appeals that an alienation would not work a forfeiture of the tenure by itself, and that a custom had not been proved attaching such an incident to those tenures, our judgment was nevertheless an affirming judgment on the whole, and the second appeals were all dismissed. It, therefore, follows that, even in the three second appeals first referred to above, there must be substantial questions of law to justify a grant of leave to appeal under section 110, Civil Procedure Code (1908). The plaintiff had alleged that, according to the custom of Malabar, the tenures in question were subject to forfeiture on alienation and that the landlord was entitled to re-enter and resume the property on such alienation. The Bench hearing the second appeals, of which one of us was a member came to the conclusion that such a custom had not been established. The main point taken by the appellant in the appeal to the Privy Council is that the custom has been established by the evidence given. The question whether a custom has been established or not is a question of law though it has to be inferred from the facts proved. That it is a substantial question

in these second appeals is clear, for the second appeals failed as the result of our view on the question. The question was treated as a question of law of sufficient importance, the tenures being similar to the ones here as to lead to a subsequent reference to the Full Bench whose judgment is reported as *Ayyakutti v. Krishna Patter* (1). We think the question raised, viz., whether the permanent tenures known as *Karamkari* and *Adimayalana* in Malabar have the incident of forfeiture on alienation attached to them by custom or not is a substantial question of law and of general interest in Malabar.

We, therefore, certify that the second appeals mentioned above first are fit cases for appeals to His Majesty in Council under sections 109 (a) and 110, Civil Procedure Code (1908).

As regards the two remaining ones, we doubt whether O. XLV, r. 4 will justify their consolidation as prayed for, as the suits from which they arose were determined by the First Court that of the District Munsif by separate judgments though in deciding the questions common to all that Court wrote a common judgment.

But we think leave may be granted in these cases under section 109 (c) of the Civil Procedure Code, as the question raised as stated above is a substantial question of law of general interest in Malabar and as the same question arises in second appeals in which we have already given leave, we think it may be considered in these cases also.

As to those two second appeals we certify that they are fit cases for appeal under section 109 (c) of the Civil Procedure Code the question arising being the one formulated above.

V. N. V.

Leave granted.

(1) 65 Ind. Cas. 942; 45 M. 394; (1922) M. W. N. 192; 43 M. L. J. 1; 15 L. W. 659; 31 M. L. T. 1; (1922) A. L. R. (M) 274 (F. B.)

NITTALA ACHAYYA v. NITTALA YELLAMMA.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 164
OF 1920.

August 29, 1922.

Present :—Mr. Justice Krishnan and
Mr. Justice Venkatasubba Rao.
NITTALA ACHAYYA (DEAD) AND OTHERS
—PLAINTIFF AND HIS LEGAL
REPRESENTATIVES—APPELLANTS

versus

NITTALA YELLAMMA AND OTHERS
DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 16 (d),
20 (c)—Suit to declare Will forged and for cancella-
tion—Place of suing—"Cause of action,"
meaning of.*

Where a document affects the right of a person to any property, the cause of action for a suit by him to declare the document void arises not only where the document is executed, but also where the property itself is situated. [p. 921, col. 1.]

A suit by a reversioner for a declaration that a Will set up by the widow, alleged to have been executed by the last male owner, is a forgery and is void as against him and for obtaining its cancellation may be instituted in any of the Courts having jurisdiction over any of the properties mentioned in the Will, under section 20, clause (c) of the Civil Procedure Code. [p. 921, col. 1.]

In such a suit, the reversioner's allegation that he is entitled to succeed to the estate on the death of the widow if he survives her, and the threat to his rights involved in the setting up of a forged Will by the widow, constitute parts of his cause of action within the meaning of section 20 (c) of the Civil Procedure Code. [p. 921, col. 2.]

For the application of section 16 (d) of the Civil Procedure Code, it is not enough to say that the relief granted in the suit will indirectly affect the rights in immoveable property; the suit itself must be for the purpose of determining such rights. [p. 921, col. 1.]

The words "cause of action" mean the whole bundle of material facts which it is necessary for a plaintiff to allege and prove to obtain the relief he claims in the suit. [p. 921, col. 2.]

Manepalli Mangamma v. Manepalli Sathiraju, 37 Ind. Cas. 681; 31 M. L. J. 816; 5 L. W. 246 and *Rajabhai Narain v. Haji Karim Mahomed*, 47 Ind. Cas. 708; 35 M. L. J. 189; (1918) M. W. N. 521; 24 M. L. T. 209, referred to.

Per Venkatasubba Rao, J.—There is no difference between moveable and immoveable property in regard to the application of section 20 of the Civil Procedure Code. [p. 923, col. 2.]

Banhe Behari Lal v. Pokhe Ram, 25 A. 48; A. W. N. (1902) 179 and *Hadjee Ismael Hadjee Hubeeb v. Hadjee Mahomed Hadjee Joosub*, 13 B. L. R. 91; 21 W. R. 303, referred to.

Appeal against the order dated 26th January 1920 of the Court of the Temporary Subordinate Judge, Rajahmundry, in Original Suit No. 68 of 1919 (Original Suit No. 67 of 1918 on the file of the District Court, Godavari).

Mr. Y. Suryanarayana, for the Appellants.
Messrs. G. Lakhshminna and A. Satyanarayana, for the Respondents.

JUDGMENT.

Krishnan, J.—The question for our decision in this case is whether the lower Court was right in holding that it had no jurisdiction to try the present suit.

The suit is one brought by the plaintiff as one of the two nearest reversioners to the estate of a deceased Hindu for a declaration that the Will set up by his widow as having been executed by him and as giving her absolute right in his properties is a forgery and is void against him and for obtaining its cancellation. The suit was filed originally in the District Court of Godavari and was transferred by the District Judge to the Temporary Subordinate Judge of Rajahmundry for disposal. That Judge has held, applying section 20, Civil Procedure Code, that the cause of action arose wholly within the jurisdiction of the District Court of Kistna, and that as the parties were all admittedly resident within that jurisdiction, that Court alone could try the case and has directed the plaint to be returned to the plaintiff to be presented to the proper Court.

Now, it is conceded by the respondents that though the bulk of the properties dealt with by the Will lie in Kistna District some moveable and immoveable properties are in the Godavari District. The Subordinate Judge has held that that fact did not affect the question of jurisdiction but it is argued before us that he is wrong on that point. It is contended that section 16, clause (d), Civil Procedure Code, applies to the case and gives jurisdiction to the Godavari Court as some of the immoveables included in the Will are within the Court's jurisdiction, and though the Kistna Court has also jurisdiction, section 16, Civil Procedure Code, gives the choice of the Tribunal to the plaintiff. Clause (d) refers to suits "for the determination of any other right to or interest in immoveable property." It seems to me difficult to apply that description to the present suit for there is no prayer in the plaint for the determination of any such rights. All that it asks for is a declaration and the cancellation of the Will on the ground that

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it is a forgery. For clause (d) to apply, the suit must be expressly for the purpose indicated in it. It is not enough, in my view, for the clause to apply, to say that the relief granted in the suit would indirectly affect rights in immoveable property but the suit itself must be for the purpose of determining such rights. No doubt, as a result of setting aside the Will in the present case, the reversioner's rights in the estate will be safe guarded but there is no prayer for declaring what those rights are and over what properties they exist. In fact, in the present case the Court need not trouble itself to enquire what the properties are which are dealt with by the Will so long as it is clear that plaintiff has a sufficient interest in them to be able to maintain the suit for its cancellation.

If we apply clause (d) to a suit such as this to set aside a Will as a forgery merely because it happens to deal with immoveables, and as we have to apply a different rule under section 20, Civil Procedure Code, to similar suits about other Wills which do not happen to dispose of immoveable properties, we introduce a difference between two similar classes of cases which, I think, it is desirable to avoid. Furthermore, if clause (d) is to be applied the suit can be brought only in the place where the immoveable property is situate and nowhere else, as section 16 makes it imperative that the suit shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. The application of section 20, Civil Procedure Code, will be excluded as that section is "subject to limitation aforesaid" and as a result it would follow that the suit could not be instituted where the parties reside or where the Will is alleged to have been executed or is sought to be enforced or where the bulk of the property is situate if moveable, unless these places coincide with the place where the immoveable property is. That is another result that will flow from applying clause (d) which cannot easily be accepted unless the language of the provision clearly compels us to do so.

All difficulty is avoided if we restrict clause (d) to suits brought for the purpose of determining rights similar to the rights dealt with in clauses (a) to (c) as the lan-

guage plainly shows. The present suit is clearly one falling under section 39 of the Specific Relief Act (I of 1877) as Illustration (b) to the section shows. For such a suit, it seems to me the proper section applicable is section 20, Civil Procedure Code. That gives three alternatives for deciding the place of suing. Clauses (a) and (b), however, cannot be relied on in the present case to give jurisdiction to the Godavari Court for none of the defendants resides or carries on business or works for gain in Godavari. Clause (c), however, is relied on for the purpose. That clause gives jurisdiction to the Court within whose local limits the whole or any part of the cause of action for the particular suit arises. The meaning of the words 'cause of action' in this clause has been considered in several cases, and they have been held to mean the whole bundle of material facts which it is necessary for a plaintiff to allege and prove to obtain the relief he claims in the suit. See *Manepalli Mangamma v. Manepalli Sathiraju* (1) and *Rajabhai Narain v. Haji Karim Mahomed* (2). Now, in a suit to set aside a Will the plaintiff must allege that he has an interest in one or more of the properties dealt with in it to enable him to maintain a suit for its cancellation. Under section 39 of the Specific Relief Act, plaintiff must allege that if the instrument challenged is left outstanding it will cause him serious injury; and to be able to allege that, he must have an interest in the property, which will be jeopardised if the Will is not cancelled. What the plaintiff in the present suit has stated is that he is one of two nearest reversioners to the estate; or, in other words, he will be entitled to succeed to a share in the whole estate on the widow's death if he survives her. Such an interest has been recognised as giving a right of suit for a declaration. His allegation of interest and the threat to his rights involved in the setting up of a forged Will by the widow are thus, according to the definition, clearly parts of his cause of action and as he claims the same interest in the Godavari properties as in the rest of the properties, part of his cause of action, viz.,

(1) 37 Ind. Cas. 681; 31 M. L. J. 816; 5 L. W. 246.

(2) 47 Ind. Cas. 708; 35 M. L. J. 189; (1918) M. W. N. 521; 24 M. L. T. 209.

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that with reference to Godavari properties, must be held to have arisen in Godavari, just in the same way as part of the cause of action viz., that with reference to the Kistna properties, has arisen in Kistna. On this view the Godavari Court had jurisdiction equally with the Kistna Court to try this suit under section 20, clause (c) Civil Procedure Code. This is a case which more than one Court has jurisdiction to try and the choice of the Tribunal was in the first instance in the plaintiff. But if an application had been made under section 22, Civil Procedure Code, this Court could have considered in which of those Courts it would be more convenient to have the suit tried; but no such application has been made and it is not necessary to express any opinion on the point at present.

For the above reasons, the order of the Sub-Judge is set aside and he is directed to take the plaint on his file again and to dispose of the suit according to law. The costs up to date will abide and follow the result.

Venkatasubba Rao, J.—In the plaint it is stated that the husband of the first defendant died at Tanuku in the Kistna District, that his paternal uncle and father concocted a Will which purported to have been executed by him at Nandapaka, also in the District of Kistna, that the said Will was presented by the first defendant for registration to the Sub-Registrar of Tanuku who refused to register it, but that on appeal to the District Registrar, Kistna, he ordered its registration. The properties affected by the Will are situated in the District of Kistna excepting three items of land in the *taluk* of Razole in the Godavari District. The cause of action is alleged in the plaint to have arisen within the jurisdiction of the Godavari Court on the ground that the said three items of land are situated in the District of Godavari. The plaintiff, as the nearest male reversioner entitled to the estate after the death of the first and the third defendants, the wife and the mother respectively of the deceased person, has filed this suit for a declaration that the Will is a forgery and does not affect his rights in the property. The suit was filed in the District Court of Godavari and was transferred to the Court of the Temporary Subordinate Judge of Rajahmundry.

The Sub-Judge held that the suit could not be regarded as one for determination of any right to or interest in immoveable property falling within section 16 clause (d), Civil Procedure Code; that no part of the cause of action arose within the jurisdiction of the District Court under section 20, clause (c) and he accordingly returned the plaint for presentation to the proper Court.

The only relief prayed for in this suit is that it may be declared that the Will is a forgery and is inoperative. It cannot, therefore, be said that the suit falls within section 16, clause (d), Civil Procedure Code, and the Sub-Judge was right in holding that the suit is not one for the determination of any right to or interest in immoveable property.

The question, however, has the cause of action arisen wholly or in part within the jurisdiction of the Godavari Court, is more difficult to decide. No authority has been cited to us bearing on the subject but on a careful consideration it seems to me that a part of the cause of action has in this case arisen within the jurisdiction of the Court in question. The cause of action has been held to mean every fact or the bundle of facts which it is necessary for the plaintiff to prove before he can succeed in his suit. It is not limited to the infraction of the right but it is this plus the right resident in the plaintiff. To take an example: in the case of contract, the cause of action means both the making of a contract and its breach. In a suit for a legacy against an administrator, the grant of administration, for a reward for apprehension and conviction of a thief, the conviction, on a life policy, the death of the assured, are parts of the respective causes of action. (See Woodroffe and Amir Ali's Civil Procedure Code, Second Edition, page 183).

The reasoning that will apply to the case of a Will of this character will be the same as that applicable to a document alleged to have been brought about by the exercise of undue influence or fraud. At the place where the document or the Will is executed, a part of the cause of action certainly arises. It is equally clear that where the whole or a part of the fraud or undue influence is practised or exercised the cause of action also arises. If the document is sought to

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be used to the detriment of a person at a particular place, the cause of action doubtless arises also at that place. *Banke Behari Lal v. Pokhie Ram* (3) I fail to see, then, why, if the document affects the right of a person to a property situated at any place, the cause of action does not arise in that place. The mere existence of the instrument apart from any specific act of the person who relies on the document, prejudicially affects the right of the plaintiff to the property. If the instrument is left outstanding it constitutes a menace to his right; in regard to the property which is within any particular area, it is not merely when the defendant seeks to enforce his rights under the instrument that harm results to the plaintiff. As I observed above, it cannot be denied that the cause of action arises at a place where the document is sought to be enforced independent of the circumstance of its having been executed or the fraud having been practiced at an altogether different place. But why should that act on the part of the defendant be essential to the cause of action arising within that place if, as a matter of fact, there is within it some property which the document affects and to which the plaintiff is entitled? There is no reason to limit the term 'cause of action' as used in section 20 of the Code of Civil Procedure: it applies to all suits of whatever nature subject to the limitations in the preceding sections. In the present case one of the material facts to be proved to entitle the plaintiff to succeed, is that he is interested in the properties within the jurisdiction of the Court of Godavari. In *Hadjee Ismael Hadjee Hubeeb v. Hadjee Mahomed Hadjee Joosub* (4) (a suit to set aside a release in Calcutta of the plaintiff's interest of certain property in Bombay) Couch, C. J., made the following observations in the course of his judgment.

"The fraudulent representations which led to the execution of the release may have been made, and the release may have been executed here; but the cause of action in this case consists of more than that. It includes the effect of the release upon the plaintiff's share of the property; if there had been no property, the execution of the

release would not have injured the plaintiff in any way. In order to constitute a cause of action, there must be an injury to him from the operation of the release. Then, where did the release take effect? Where was it operative? The property was in Bombay."

It was held that a part of the cause of action arose in the place where the property was situate and the release took effect. I respectfully adopt the argument contained in the passage quoted above.

To hold otherwise would lead to an anomaly. If a document is executed at place A and if the whole property affected by the document is situated at place B, why should the plaintiff not have a right to seek relief at the place where the property is situated, that is, where his rights are affected? If a person is a resident of and owns property at Madras and if a stranger claiming right to that property executes a document at Allahabad disposing of the property, it seems unreasonable to hold that a part of the cause of action does not arise within Madras but that the aggrieved person must institute a suit only at Allahabad where there is no particle of property belonging to him, although in a suit to set aside such a document the most essential facts which give the plaintiff a right to relief or the existence of the property and his interest in it. In the view I have taken there is no difference between moveable and immoveable property in regard to the application of the section in question. If the property in this suit within the District Court of Godavari happened to be a sum of money instead of three items of land my decision would still be the same.

For these reasons, I agree in the order proposed by my learned brother.

V. N. V.

N. H.

Case remanded.

(3) 25 A. 48; A. W. N. (1902) 179.

(4) 13 B. L. R. 91; 21 W. R. 303.

WALI MUHAMMAD v. ANTIOO KOERI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 756 OF 1921.

November 29, 1922.

Present:—Mr. Justice Gokul Prasad.

WALI MUHAMMAD AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

ANTIOO KOERI—PLAINTIFF—
RESPONDENT.*Specific Relief Act (I of 1877), ss. 8, 9—Suit for possession based on title—Title not proved—No decree for possession can be given.*

In a suit for possession of a certain plot of land based on title, the plaintiff cannot succeed on the ground of possessory title, if he fails to prove his real title.

Lachman v. Shambu Narain, 7 Ind. Cas. 495; 33 A. 174; 7 A. L. J. 1078, relied on.

Umrao Singh v. Ramji Das, 22 Ind. Cas. 622; 36 A. 51; 11 A. L. J. 1012, distinguished.

Second appeal from the decree of the District Judge, Azamgarh, dated the 9th February 1921.

Mr. M. L. Agarwala, for the Appellants.

Mr. G. Agarwala, for the Respondent.

JUDGMENT.—This is a defendants' appeal arising out of a suit brought by the plaintiff for possession of certain plots, and damages on the ground that they were the occupancy holdings of the plaintiff and the defendants had wrongfully dispossessed him. The defence taken was, so far as two of the plots were concerned, the defendants had nothing to do with them and as to other plots the defence was that the defendants had got a lease of these plots from the *Zemindar* on the 7th of July 1919, that they had sowed the crop and reaped it and that the plaintiff was not entitled to any damages. It appears that one Ram Jiawan, the own brother of the plaintiff, was the recorded occupancy tenant of these plots and after Ram Jiawan's death the name of his widow was entered on these plots. After the widow's death in 1919 the plaintiff claimed the holding as occupancy tenant. The *Zemindar* apparently disputed this and gave a lease of some of the plots to the defendants on the 7th of July 1919, as stated above. It appears further that five days later, that is, on the 12th of July 1919 the plaintiff put in an application against the *Zemindar* under section 95 of the Tenancy Act for a declaration of his rights as a tenant. This suit succeeded in the Assistant Collector's

Court and the appeal in that suit taken by the *Zemindar* to the Commissioner has, I am informed, been dismissed after the decision of this case by the lower Appellate Court. The present suit was decreed in part by the Munsif who awarded possession to the plaintiff and decreed Rs. 36 as damages. The defendants went up in appeal and that appeal has been dismissed. They come here in second appeal. Their first contention is that the learned Judge of the lower Appellate Court having decided the question of title against the plaintiff should have dismissed the plaintiff's claim and not given a decree on what he supposed to be an anterior possession. It is not very easy to understand what title this anterior possession gave. The present suit was not brought until June 1920, that is to say, more than six months after the lease in favour of the defendants. According to the plaintiff the defendants took away his crop in March 1920 and unless the learned Judge of the lower Appellate Court meant to hold that the suit was within six months of that date his decree is meaningless. So far as the question of plaintiff's title as an occupancy tenant was concerned, the learned Judge has not come to any definite conclusion but had left the question undecided. In the concluding part of his judgment he leaves aside the question of title and says that the plaintiff is entitled to recover possession of his holding on the strength of his previous possession. The present suit was based on the question of plaintiff's title and he could not succeed on the ground of possessory title in case he failed to prove his real title. This is clear from the Full Bench case of *Lachman v. Shambu Narain* (1) to which the learned Judge, curiously enough, has referred in his judgment. The case of *Umrao Singh v. Ramji Das* (2) has no application to such a case where the suit was based on the plaintiff's title and not on the basis of possessory right only. As the learned Judge of the lower Appellate Court has not given a definite finding on the question of plaintiff's title. I refer the following issue to him for disposal:—

(1) 7 Ind. Cas. 495; 33 A. 174; 7 A. L. J. 1078.

(2) 22 Ind. Cas. 622; 36 A. 51; 11 A. L. J. 1012.

PERUMALL CHETTY V. KANDASWAMI CHETTY.

Is the plaintiff an occupancy tenant of the land in dispute and is his claim for possession within time?

No further oral evidence is to be received. The issue is to be decided on the evidence actually on the record with such additional documentary evidence which the parties might think fit to produce. On receipt of the finding the usual ten days will be allowed for objections.

N. K.

MADRAS HIGH COURT.

STAMP REGISTER NO. 8201 OF 1922.

December 4, 1922.

Present :—Sir Walter Schwabe, Kt.,
Chief Justice.

PERUMALL CHETTY—APPELLANT
versus

W. KANDASWAMI CHETTY

—RESPONDENT.

Madras Original Side Rules, App. II, Nos. 35, 36—Decision in contentious Probate suit, whether "final judgment".

The decision of a Judge sitting on the Original Side in the High Court in a contentious Probate suit is a "final judgment," so that a memorandum of appeal from it comes under Serial No. 35 of the Appendix II of the Original Side Rules as being from a "final judgment" and not under Serial No. 36 as being from "any other judgment or order".

Mahomed Ishack Sahib v. Mahomed Mohidin, 70 Ind. Cas. 813; 43 M. L. J. 436; 16 L. W. 210; (1922) M. W. N. 511; (1922) A. I. R. (M.) 421; 45 M. 849, *In re Chinnery, Ex parte Chinnery*, (1884) 12 Q. B. D. 342 at p. 345; 53 L. J. Ch. 662; 50 L. T. 342; 32 W. R. 469; 1 Morrell 31, distinguished. *In re Moore, Ex parte Faithfull*, (1885) 14 Q. B. D. 627 at p. 633; 54 L. J. Q. B. 190; 52 L. T. 376; 33 W. R. 438; 2 Morrell 52, *In re Alexander, Ex parte Alexander*, (1892) 1 Q. B. 216; 61 L. J. Q. B. 377; 66 L. T. 133; 40 W. R. 202; 9 Morrell 13 and *Onslow v. Commissioners of Inland Revenue*, (1890) 25 Q. B. D. 465; 59 L. J. Q. B. 556; 63 L. T. 513; 38 W. R. 728, relied on.

Original Side Appeal sought to be preferred against the order and judgment of Mr. Justice Krishnan, dated the 31st of March 1922, passed in the exercise of the Ordinary Original Testamentary Jurisdiction of the High Court, *In the matter of the Will of Gop! Ammal deceased* in T. O. S. No. 2 of 1921, in O. P. No. 77 of 1921.

Mr. G. Krishnaswami Aiyar, for the Appellant.

The Advocate-General (Mr. C. P. Ramaswami Aiyar), for the Government Solicitor, on behalf of the Government.

JUDGMENT:—This is a matter which, acting under section 5 of the Court-Fees Act, VII of 1870, I have referred to myself to decide, the difference having arisen between the officer whose duty it is to see that any fee is paid and the suitor as to the necessity of payment of the fee.

The question is, whether the decision of a Judge sitting on the Original Side in a contentious probate suit is a final judgment, so that a memorandum of appeal from it comes under Serial No. 35 of Appendix II of the Original Side Rules as being from a "final judgment" or under serial No. 36 as being from any other judgment or order. The nature of the proceedings in contested probate suits is clear from an examination of the rules on the Original Side. By rule 474, where a caveat had been entered, the petition which had been previously issued by those claiming to be the legal personal representatives to obtain the probate, and the caveat, shall be numbered and registered as a suit, in which the petitioner shall be the plaintiff and the caveator shall be the defendant. Later sections provide that the petition and the caveat are to be taken as the plaint and the written statement of the defendant respectively; and there are provisions made for the hearing of the matter, and for the payment of costs. It is argued that the decision arrived at by the learned Judge who tries the matter as a suit is not a final judgment, and this argument is based on a passage in *In re Chinnery, Ex parte Chinnery* (1) in the judgment of Cotton, L. J. In that case he had to consider the meaning of the words, "final judgment" in section 4 of the Bankruptcy Act, 1883, which ran "if a creditor has obtained a final judgment against him for any amount, execution whereon has not been stayed, and if bankruptcy notice has been issued the Court may make a receiving order." Cotton, L. J., observes: "I think we ought to give to the words 'final judgment' in this

(1) (1884) 12 Q. B. D. 342 at p. 345; 53 L. J. Ch. 662; 50 L. T. 342; 32 W. R. 469; 1 Morrell 31.

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sub-section their strict and proper meaning, *i.e.*, a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established—unless there is something to show an intention to use the words in a more extended sense.” But these words have been explained by Lord Selborne, L.C., in *In re Moore, Ex parte Faithfull*, (2) as being expressions to be “taken in connection with the particular facts of the cases in relation to which they are used,” and he gave another definition of “final judgment” to this effect: “To constitute an order a final judgment nothing more is necessary than that there should be a proper *litis contestatio*, and a final adjudication between the parties to it on the merits.” That was followed in *In re Alexander, Ex parte Alexander* (3) and in *Onslow v. Commissioners of Inland Revenue* (4) where Lord Esher, M. R., states the same thing more concisely. He says “A ‘judgment’ is a decision obtained in an action, and every other decision is an order.” In my judgment, the definitions of Lord Selborne and of Lord Esher are those that apply in the proper interpretation of the words in the Appendix to the Original Side Rules. There must be a final decision between the parties to a suit. Here by the rule there was a suit. The petition and the caveat were numbered and registered as a suit. The petitioner was the plaintiff and the caveator was the defendant. It follows, in my judgment, that the decision between those parties was a judgment. That it was final I have not the least doubt.

It is worth observing that the appeal from that decision must be under clause 15 of the Letters Patent, because it is only there that one finds a right of appeal from the Original Side, and that right of appeal is limited to judgments. From this it follows that, if this decision is not a judgment, there is no appeal, and it would indeed be a remarkable thing if no appeal lay from such a decision. Indeed, in this

case the appellant is driven to contend, that for the purpose of paying Court-fees it is not a judgment at all, but for the purpose of an appeal, it is a judgment.

I wish to say one word about the decision of my brother, Courts-Trotter, J., in *Mahomed Ishack Sahib v. Mahomed Mohidin*, (5). In that case there was an appeal against an order on an application under the Guardians and Wards Act. The learned Judge said “if anyone were asked whether this was a judgment or order, he would certainly say it is an order,” and he held that it was an order and a final order. Applying his language I should say, if anyone were asked whether this was a judgment or an order, he would certainly say it was a judgment, it being quite different from an order on an application to a Court under the Guardians and Wards Act.

It was argued in that case that serial No. 35 in Appendix II was intended to include the final orders in the word ‘judgment’ and the learned Judge held that it did not. The Advocate-General in this case wishes it to be understood that he reserves the right to raise that point again hereafter. In the view that I take, it is unnecessary for me to decide it. I only wish to say that I express no opinion on the subject whatever.

For these reasons the direction must be that the Court-fee payable on this memorandum of appeal is Rs. 150.

V. N. V.

(5) 70 Ind. Cas. 813; 43 M. L. J. 436; 16 L. W. 210; (1922) M. W. N. 511; (1922) A. I. R. (M.) 421; 45 M. 849.

(2) (1885) 14 Q. B. D. 627 at p. 633; 54 L. J. Q. B. 190; 52 L. T. 376; 33 W.R. 438; 2 Morrell 52.

(3) (1892) 1 Q. B. 216; 61 L. J. Q. B. 377; 66 L. T. 133; 40 W. R. 202; 9 Morrell 13.

(4) (1893) 25 Q. B. D. 465; 59 L. J. Q. B. 556; 63 L. T. 513; 38 W. R. 728.

SHAM DAS-BHIM SAIN v. KALU RAM-BASHESHA NATH.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.SECOND CIVIL APPEAL, No. 39-2 OF 1923.
April 11, 1923.

Present:—Mr. Pison, J. C.

Firm SHAM DAS BHIM SAIN
OF THANA, MALAKAND AGENCY—
DEFENDANTS—APPELLANTS

versus

Firm KALU RAM-BASHESHA NATH
OF PESHAWAR—PLAINTIFFS—

RESPONDENTS.

Frontier Crimes Regulation (III of 1901), ss. 8, 60—Proceedings under s. 8 during pendency of suit, legality of—Jurisdiction of Civil Courts, whether ousted.

There is nothing in section 8 of the Frontier Crimes Regulation or in the Regulation as a whole which makes any distinction between proceedings taken under the section between British subjects or between other persons. [p. 929, col. 2.]

No Officer exercising the powers of a Deputy Commissioner under section 8 of the Frontier Crimes Regulation can legally make a reference to a Council of Elders under that section if a civil suit is already pending between the parties regarding the dispute between them. [p. 929, col. 2.]

An illegal proceeding under section 8 of the Frontier Crimes Regulation cannot oust the jurisdiction of a Civil Court to continue the trial of a civil suit which has been legally instituted before it prior to any proceedings under section 8 of the Regulation. [p. 928, col. 2.]

Second appeal from the order of the Divisional Judge, Peshawar, dated the 9th December 1922, reversing the order of the Sub-Judge, Peshawar, dated the 28th April 1922.

Lala Radha Kishen, for the Appellants.

ORDER.—The facts of this case are these. A contract was entered into between the parties to the present suit by which the firm of Sham Das-Bhim Sain was to supply rice in the Malakand Agency to the firm of Kalu Ram-Bashesha Nath of Peshawar, the rate fixed being Rs. 5-5-6 per maund. A dispute arose between the parties. The firm of Kalu Ram-Bashesha Nath contended that, as the price of rice had risen the firm of Sham Das-Bhim Sain refused to supply the balance which they had contracted to deliver, while the firm of Sham Das-Bhim Sain and their two other partners Hari Chand and Ram Chand alleged that delivery had been made to Kalu Ram-Bashesha Nath at Thana in the Malakand Agency and that they were entitled to recover a balance of about Rs. 4,000 from the latter on these deliveries. On the 10th of January

1922 the firm of Kalu Ram-Bashesha Nath lodged a civil suit in Peshawar in the Court of the District Judge to recover Rs. 3,904 from the firm of Sham Das-Bhim Sain. This suit was transferred for disposal to the Court of the Sub-Judge, Peshawar. It will be convenient in future to allude to the firm of Kalu Ram-Bashesha Nath as the plaintiffs and to the firm of Sham Das-Bhim Sain and their partners as the defendants. Eleven days later, i.e., on the 21st of January 1922 the defendants made an application to the Political Agent, Malakand, for the recovery of Rs. 4,078-9-9 from the plaintiffs. The Political Agent, Malakand, took proceedings in the case and both parties appeared before him. Kalu Ram-Bashesha Nath filed their pleas and in them mentioned that a suit was already pending between the parties in the Court of the Sub-Judge, Peshawar, and alleged that the pendency of this suit was the reason for the counter-claim made against them in the Malakand Agency. The parties before the Political Agent, Malakand, agreed to refer the dispute to arbitration, but the arbitrators who were selected, eventually refused to act. The Political Agent, Malakand, then referred the dispute to a *Jirga* of Hindus selected by himself. The proceedings before this *Jirga* were *ex parte* the representatives of Kalu Ram-Bashesha Nath having failed to appear. On the 10th of April 1922 the Political Agent, Malakand, passed a decree *ex parte* in accordance with the finding put in by this *Jirga* directing that the firm of Kalu Ram-Bashesha Nath should pay Rs. 4,078-9-9 to the firm of Sham Das-Bhim Sain. Meanwhile, the proceedings continued in the civil suit pending before the Sub-Judge, Peshawar. On the 28th of April 1922 the Sub-Judge dismissed the plaintiffs' suit holding that the dispute between the parties had been adjudicated upon by proceedings under section 8, Frontier Crimes Regulation, before the Political Agent, Malakand, and that the decree passed under section 8, Frontier Crimes Regulation, was under the operation of section 9 (a) of the same Regulation, a final settlement of the case and that it could not be called in question by a Civil Court. The plaintiffs appealed to the Divisional Judge of Peshawar who has

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held that the Political Agent, Malakand, acted without jurisdiction under section 8, Frontier Crimes Regulation, inasmuch as that section according to its own term comes into operation "if a suit is not pending in respect of the dispute." The learned Divisional Judge has pointed out that the civil suit was lodged 11 days before the application made under section 8, Frontier Crimes Regulation, and that it was, therefore, pending when the proceedings before the Political Agent, Malakand, began. He has held, therefore, that the Civil Court must ignore the existence of the proceedings and of the decree under section 8, Frontier Crimes Regulation, and had itself jurisdiction to decide the dispute between the parties. He has accordingly remanded the suit for decision on its merits under O. XLI, r. 23, Civil Procedure Code. Against this order the defendants have appealed to this Court.

One of the points put forward by the learned Counsel for the appellants on this appeal is that the Civil Court had in any case, no jurisdiction to hear the suit, inasmuch as the cause of action arose in the Malakand Agency beyond the limits of British India and not in the Peshawar District, and that the defendants were residents of that Agency and not of the Peshawar District. This contention may, or may not, be justified, but I consider that it is essentially one which the Civil Court itself must decide. It does not appear to me to be in any way connected with the finding now overruled by the Divisional Judge to the effect that the jurisdiction of the Civil Court was ousted by reason of the existence of a decree between the parties under section 8, Frontier Crimes Regulation. It is open to the defendants in this case to plead in the Civil Court that the jurisdiction of that Court is ousted by reason of the cause of action having arisen outside British India, or by reason of the defendants residence. That question has not yet been fought out and cannot be dealt with by me upon this appeal. What I have alone to consider on this appeal is whether or not the trial Court was correct in holding that its jurisdiction was ousted merely by reason of the decree passed by the Political Agent, Malakand, under section 8, Frontier Crimes Regulation.

The learned Counsel for the appellants takes up the perfectly intelligible position that the decree passed under section 8 whether passed wrongly, or rightly is an actually subsisting decree and that, under section 60 of the Frontier Crimes Regulation, it cannot be called in question or set aside by any Civil Court. He argues that if the present plaintiffs wish to set aside that decree, their proper remedy is to move the Chief Commissioner of N. W. F. Province to set it aside in the exercise of his revisional jurisdiction under the Frontier Crimes Regulation. He contends that this was their only remedy. I am prepared to concede the correctness of this argument up to a certain point. The decree certainly cannot be actually set aside by a Civil Court. Even if the finding of the Civil Court conflicts with that decree, the decree could not be finally extinguished unless and until the Chief Commissioner had set it aside in the exercise of the powers of the revision. This, however, is not the same thing as holding that the Civil Court cannot proceed at all with the suit which is before it. The learned Counsel for the appellants argues that in doing so it must necessarily "call into question" the decree of the Political Agent, Malakand. I think that it would be straining language to press this point to the extent to which the learned Counsel desires to press it. It appears to me that what the Civil Court is entitled to do is not to call in question the proceedings or the validity of the decree, but simply to ignore them. It is perfectly clear that section 8 cannot, in any circumstances, legally come into operation at all when a civil suit is already pending. The Civil Court has entertained the suit with jurisdiction, so far as this question is concerned, to entertain it, and no illegal proceedings by any outside authority in contravention of the provisions of law could possibly effect its jurisdiction to continue the hearing of the case. I must agree with the view taken by the learned Divisional Judge that an illegal proceeding under section 8, Frontier Crimes Regulation, cannot, in any circumstances, oust the jurisdiction of a Civil Court, to continue the trial of a civil suit which has been legally instituted before it prior to any proceedings under section 8 Frontier Crimes Regulation.

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Another ground taken for the appellants is that the plaintiffs Kalu Ram-Bashesha Nath must be regarded as having submitted to the jurisdiction of the Political Agent, Malakand, when they agreed to the selection of certain specified arbitrators to decide the case. I am unable to see, however, that this action on their part in any way constituted a submission to the jurisdiction of that Court. On the contrary, they protested at the outset against the jurisdiction of the Court and never admitted that the suit against them could be heard in that Court. When their protest was either overruled, or ignored, they had no other alternative except to protect their own interest by designating some of the arbitrators, which the Political Agent should nominate. If they had failed to nominate arbitrators, their interest would have been seriously prejudiced by their having had no voice in the selection of the arbitrators. This did not, in any way, amount to a submission to the jurisdiction of the Court and cannot in any way operate to prevent them continuing to challenge that jurisdiction in subsequent proceeding.

Counsel for the appellants again puts forward the argument that the judgment of the Political Agent, Malakand, must be regarded as a foreign judgment within the meaning of section 13, Civil Procedure Code, and that it is, therefore, conclusive as between the parties. I am unable to follow this argument. It is urged that the Malakand Agency is a foreign territory inasmuch as it is outside British India. On the other hand, it is admitted by the learned Counsel that the proceedings with which we are dealing are proceedings under section 8, Frontier Crimes Regulation. I am unable to see, therefore, how they can be said to be proceedings in a "Foreign Court" or to differ from any other proceedings taken under that Regulation. It is clearly laid down in section 8 of the Regulation that proceedings under section 8 cannot be taken if a suit is pending between the parties. There is nothing to show that this section is to be regarded as qualified or altered if such proceedings under section 8 are taken in a place outside British India. If the officer taking those proceedings has any jurisdiction at all in the matter, he derives jurisdiction from section 8, Frontier Crimes

Regulation, and from that provision of law alone. It might, no doubt, be argued that proceedings taken by him in any other capacity were proceedings taken under some other form of jurisdiction in force outside the limits of British India. I know of no precedent where such a plea has been raised before. But, in any case, it has never been denied in the present proceedings, and indeed such a denial would be inconsistent with the appellants' own case, that the Political Agent, Malakand, was acting under section 8, Frontier Crimes Regulation. I am unable, therefore to accept the argument that section 13, Civil Procedure Code, has any connection with the present case. It is argued, again, for the appellants that cases in which the defendant is a resident of trans-border territory, are to be distinguished from those in which the parties are residents of British territory. Here, again, I am unable to follow the learned Counsel's reasoning. There is nothing in section 8 or in the Frontier Crimes Regulation as a whole which makes any distinction between proceedings taken between British subjects or between other persons. I can only assume that the provisions of section 8 are to be read exactly as they stand and are to be construed literally. The only construction to be put upon that section is, that no officer exercising the powers of a Deputy Commissioner under section 8, Frontier Crimes Regulation, can legally make a reference to a Council of Elders under that section if a civil suit is already pending between the parties regarding the dispute between them. This being so, it is perfectly clear that the proceedings taken in the present case under section 8 were invalid. I have no authority to set those proceedings aside, or to impugn the validity of the decree. The plaintiffs would, no doubt, move the Chief Commissioner in the light of these observations to pass such order as he may deem fit. It would appear, indeed, that the plaintiffs had already taken proceedings in this respect. Meanwhile, I can only hold that the jurisdiction of the Sub-Judge, Peshawar, has never been ousted with respect to the suit pending before him, and that the Divisional Judge had correctly directed him to proceed with the suit on its merits.

The plea that the section 8 decree

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operates as *res judicata* is also raised, but necessarily fails as no question of *res judicata* could arise as against my findings given above. This appeal is rejected.

Z. K.

Appeal rejected.

CALCUTTA HIGH COURT.

CIVIL REVISION CASE NO. 385 OF 1922.

July 28, 1922.

Present:—Justice Sir Lancelot Sanderson,
Kt., Chief Justice, and Mr. Justice

Richardson.

MOHIUDDIN CHOWDHURY

—Petitioner

versus

AMINUDDIN CHOWDHURY AND OTHERS.

—OPPOSITE PARTIES.

Muhammadan Law—Wakf—Mutwalli, appointment of—District Judge, powers of—Civil Procedure Code (Act V of 1908), s. 92, suit under, whether necessary.

A District Judge has the powers of a *Kazi* under the Muhammadan Law in such matters as the appointment of a *Mutwalli*, etc. [p. 931, col. 1.]

Where a deed of endowment provides that a vacancy in the office of *Mutwalli* should be filled by a proper person being appointed to the office by a competent Court, the District Judge has power to make the appointment in accordance with the terms of the deed of endowment on application being made to him on the occurrence of a vacancy in the office, and a suit framed under section 92 of the Civil Procedure Code is not necessary for the purpose. [p. 931, col. 1.]

Jamila Khatun v. Abdul Jalil Meah, 49 Ind. Cas. 799; 23 C. W. N. 138, distinguished.

Quære:—Whether the order of the District Judge in such a case is a judicial or an administrative order.

Miscellaneous Case No. 38 of 1921 of the Court of the District Judge, Sylhet.

Maulvi Nur-ud-din Ahmad (with him Babu Benoyendra Nath Palui), for the Petitioner.—The rule is directed against an order appointing a *Mutwalli* by the Court below. It was obtained by one who is interested in the administration of the endowment, in the village. I am one of the villagers. The office of the *Mutwalli* becoming vacant the learned District Judge has appointed one in his place. According to the deed of endowment it is provided, that the vacancy should be filled up by a pious Muhammadan to be nominated by five re-

spectable and pious Muhammadans of the village. These two persons nominated and the District Judge has appointed one of them. I submit the appointment by Court as contemplated in the deed implied an appointment by the *Kazi*. Here the District Judge acted as a mere Judicial Officer and he had not the powers of a *Kazi*. He had no jurisdiction to decide an application like this except under section 92 of the Civil Procedure Code. See *Jamila Khatun v. Abdul Jalil Meah* (1).

Maulvi Mohamed Saadullah, for the Opposite Party, was not called upon to reply.

JUDGMENT.

Richardson, J.—This is a Rule obtained by one Mohiuddin Chowdhury upon the opposite party to show cause why the order made by the District Judge of Sylhet, dated the 5th March 1922, should not be set aside.

The order relates to a Muhammadan endowment in the village of Phulbari. The then *Mutwalli* had resigned and the office was vacant. The question before the learned District Judge was the appointment of a new *Mutwalli*. The question was raised by an application or applications made to the learned Judge to appoint a Receiver and he has dealt with it, as it appears, in accordance with the directions laid down by the founder in the deed of endowment.

The deed provides in effect, according to the learned District Judge and according to the petitioner himself, that on a vacancy occurring in the office of *Mutwalli*, it should be filled by a pious Muhammadan, appointed by a competent Court on the nomination of five respectable and pious Muhammadans of the village.

On the present occasion five respectable and pious Muhammadans nominated one candidate and five other respectable and pious Muhammadans nominated another candidate. The learned Judge held that both these candidates were duly qualified as pious Muhammadans to hold the office. After fully considering their respective claims, he appointed one of them as *Mutwalli*.

(1) 49 Ind. Cas. 799; 23 C. W. N. 138.

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This Rule was obtained not by the unsuccessful candidate but by another Muhammadan of the village on the footing that he is a person interested in the administration of the endowment; and the Rule has been argued on his behalf on two grounds.

As to the first ground I have no doubt that the District Judge has, in such a matter as this, the powers of a *Kazi* and was a competent Court within the meaning of the deed of endowment.

The second ground is, that the proceedings of the learned District Judge were without jurisdiction. It was argued that he had no jurisdiction to entertain any petition or application for the appointment of a new *Mutwalli* and that, in order to give him jurisdiction, a suit should have been instituted under the provisions of section 92 of the Civil Procedure Code. In my opinion, there is no substance in this contention. The learned District Judge in making the appointment has merely acted in accordance with the wishes and directions of the founder himself as expressed in the deed of endowment.

The present case, as it came before the District Judge and as it comes before us, raises, in my opinion, no such question as is contemplated by section 92 of the Code. It may be assumed that the endowment is a public trust created for purposes of a charitable or religious nature. But the learned Judge had no alleged breach of trust to deal with nor is it a case within the meaning of the Statute in which "the direction of the Court" was "deemed necessary for the administration" of the trust. The District Judge was carrying out a duty imposed upon him by the founder and embedded by the founder in the constitution of the trust. The case, therefore, is clearly distinguishable from the case of *Jamila Khatun v. Abdul Jalil Meah* (1) to which the learned Vakil for the petitioner referred us. There, as the report shows, the *wakfnama* contained no provisions for the appointment of a *Mutwalli* and it did not appear that there was any executor of the original *wakf* who would be competent to make the appointment. It was also clear that, apart from the appointment of a *Mutwali*, other matters of complications might arise. Even in that

case, however, the question whether the District Judge, acting as *Kazi*, might entertain an application to appoint a *Mutwali*, the office being vacant, or whether the only course available for the purpose was a suit under section 92 of the Code, was left undetermined.

In the present case, without deciding the point, I am not sure that the proceedings of the learned Judge are judicial proceedings at all. I am rather disposed to regard them as proceedings of an administrative character, but I express no final opinion to that effect.

The learned Judge decided that the candidate whom he appointed was a fit person to hold the office. If his proceedings were administrative, there is an end of the matter. If they were judicial, no ground is disclosed for our interference in reversion.

Parties interested who question the propriety of the appointment made by the learned Judge may or may not themselves have a remedy open to them by way of suit under section 92 of the Code or otherwise. As to that I say nothing except that those who are dissatisfied must take such course as they may be advised to take in the circumstances.

For these reasons, this Rule should, in my opinion, be discharged with costs, the hearing-fee being assessed at one gold *mohur*.

Sanderson, C. J.— I agree.

N. K.

Rule discharged.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FURTHER CIVIL APPEAL No. 126 of 1922.

January 31, 1923.

Present — Mr. PIPON, J. C.

DHANNA RAM AND OTHERS—DEFENDANTS

—APPELLANTS

versus

CHHABIL, DAS AND OTHERS—PLAINTIFFS

—RESPONDENTS

Evidence Act (I of 1872), ss. 91, 92, 93, 94, 115—

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Construction of document—Oral evidence, when admissible—Estoppel—Mortgage—“Mortgagee represented as owner—Redemption—‘Ta mayad,’ meaning of.

Section 92 of the Evidence Act must be read with sections 91, 93 and 94 of the Act. [p. 934, col. 2.]

Section 115 of the Evidence Act overrides sections 91 to 94 of the Act inasmuch as the law of estoppel must prevail against a mere rule of procedure. So that, in construing a document, evidence of the conduct of the parties is relevant when such conduct operates as an estoppel. [p. 934, col. 2.]

For instance, if one party to a document has by his conduct permitted the other party to believe that the agreement between them is other than that embodied in the document, and has caused him to act upon that belief, he cannot fall back upon the provisions of section 92 of the Evidence Act and thereby escape from the consequences of his own actions. [p. 934, col. 2.]

Where, however, such conduct does not amount to an estoppel it cannot be proved in evidence in order to show that the intention of the parties was something other than that expressed by them in the written document. [p. 934, col. 1.]

If the written document is perfectly clear in its terms and applies to existing facts, evidence to show that it was not meant to apply to such facts is excluded by section 94 of the Evidence Act. [p. 935, col. 1.]

Balshishen Das v. W. F. Legge, 22 A. 149; 4 C.W.N. 153; 2 Bom. L.R. 523; 27 I. A. 58; 7 Sar. P.C.J. 601; 9 Ind. Dec. (N.S.) 1130, (P. C.), *Paksu Lakshman v. Govinda Kanji*, 4 B. 594; 5 Ind. Jur. 527; 2 Ind. Dec. (N. S.) 903, *Ali Sheikh v. Imam Ali Sarkar*, 35 Ind. Cas. 102, *Abdul Ghafur v. Abdul Kadir*, 72 P. R. 1901; 114 P. L. R. 1901 and *Bulaki Mal v. C. J. Floyd*, 10 Ind. Cas. 1004; 27 P. R. 1911; 118 P. W. R. 1911; 191 P. L. R. 1911, considered.

Where the exact status of the parties is not in dispute and a mortgagee holding under a long and onerous mortgage is described for the moment as a person with full title, it does not in any way amount to an admission that his title is something more than that of a mortgagee and cannot estop the other party from subsequently showing that the title was one of mortgagee only. [p. 935, col. 1.]

When a period is specified in a mortgage-deed, the right of redemption can only arise on the expiration of that period, in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage was created. So that, where nothing more than a period is specified the *onus* lies on the mortgagor to prove that he can redeem before that period, and not upon the mortgagee to show that the mortgagor cannot do so. [p. 936, col. 2.]

Bakhtawar Begam v. Husaini Khanam, 23 Ind. Cas. 355; 36 A. 195; 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 41 I. A. 84 (P. C.), followed.

In the North-Western Frontier Province it must be taken as settled law that the expression “*ta mayad*” or “*ba mayad*,” without qualification, in a mortgage-deed, means that time is of the

essence of the contract and that the mortgagor cannot redeem before the expiry of the term mentioned in the deed. [p. 936, col. 2.]

A mortgage-deed executed in respect of a house stated that the mortgage was created for a term of fifty years, and that the mortgagees would remain in possession till payment of the principal and interest. It then concluded “*Mayad mandarja bala tak agar asal wa sud ada ho jawe to bihtar, warna bad mayad makan mazkur pas murtahan basigha bai bil wafa ho jaega.*”

Held, that the mortgage could not be redeemed before the expiry of the fifty years. [p. 937, col. 2.]

Further appeal against a decree, dated the 19th November 1921 of the Divisional Judge, Dera Ismail Khan, affirming an order of the District Judge, Dera Ismail Khan, dated the 17th May 1921, granting a decree for possession by redemption of houses situated in the City of Dera Ismail Khan, on payment of Rs. 9,476-7.

Mr. D. Dina Nath and Pandit Mool Chand, R. S., for the Appellants.

Mr. Saad-ud-Din Khan, K. S., for the Respondents.

JUDGMENT.—This suit relates to a house in Dera Ismail Khan City and the facts are as follows:—The house in question was originally owned by Ghanisham Das and others who became insolvents in 1885. The property of the insolvents was handed over to six Receivers who were appointed out of Court. These Receivers proceeded to realize the assets of the insolvents by sale of their property. On the 2nd of July 1887 they made a bargain with four persons, Hemraj, Chhabil Das, Chiman Ram and Udho Das, to sell to them the house now in suit for Rs. 1,425. A draft agreement of the terms of the sale was drawn up. By this Hemraj and his son, Chhabil Das, were to be the purchasers of half and Chiman Ram and Udho Das of half. No deed of sale, however, followed the draft agreement and on the 23rd March 1888 the Receivers brought a suit for specific performance against the three vendees detailed above. On the 10th of May 1888 the Receivers withdrew their suit, the parties having come to an understanding. The file of the suit has been destroyed but the abstract entered in the register shows the following final order:—

“The withdrawal of the suit is approved and the defendant has paid Rs. 1,425 principal and Rs. 47-8 costs to the plaintiffs and has taken possession of the house. The file to be consigned to the Record

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Room." One day before the withdrawal of the suit a sale-deed was drawn up under which the whole of the house in question was sold to Hemraj alone for Rs. 1,425. This sale-deed was registered on the 14th of May 1888. On the 4th September 1888 Hemraj executed a deed of mortgage of half of the house in favour of Chiman Ram and Udho Das for Rs. 800. The mortgage-deed recited that the mortgage was for 50 years. Rs. 400 of the mortgage-debt were to bear no interest and the remainder Rs. 400 to bear interest at 11 annas per cent. per mensem (Rs. 8-4 per annum). The mortgagees were to have the power of erecting new buildings or repairing. They were to be paid the cost of their outlay in this respect at redemption with interest at 11 annas per cent. per mensem on the sum expended. If principal and interest were not paid "up to" the period of 50 years, the house would become *bai bil wafa* to the mortgagees. Possession was delivered to the mortgagees under this instrument. On the 8th of May 1891 Hemraj executed a sale-deed in favour of one Tahl Ram in respect of three-fourths of the half share which remained unencumbered. His descendants are still in possession of the remaining one-eighth. The sons of Hemraj on the 5th of October 1920 instituted the present suit to redeem the half of the house mortgaged by Hemraj to Chiman Ram and Udho Das by the deed of 9th May 1888. The defendants are the descendants of Chiman Ram and Udho Das. They resist the suit *inter alia* on the ground that the transaction between Hemraj and Chiman Ram and Udho Das embodied in the deed of the 9th of May 1888 was not a mortgage but an out and out sale and that, even if it was a mortgage, a suit for redemption is premature as the mortgagor could not redeem before the expiry of 50 years. The first of these two contentions is based upon the theory that the purchase by Hemraj in May 1888 was a *benami* transaction under which the real vendees were Hemraj, his son Chhabil Das, Chiman Ram and Udho Das with a fourth share each and not Hemraj alone. It is argued that the mortgage-deed of September 1888 was executed merely to confirm the pre-existing title of Chiman Ram and Udho Das as owners of half of

the house. The two Courts below have held that the sale of May 1888 was to Hemraj alone and that the mortgage by him of half his share to Chiman Ram and Udho Das in September 1888 was a genuine mortgage and not an out and out sale. The two Courts below have also held that the suit for redemption is not premature it being a condition of the mortgage that the mortgagor might redeem at any time up to 50 years from the date of the mortgage. In accordance with these findings the plaintiffs have been decreed possession by redemption of the property in suit on payment of the sum representing the principal and interest due under the terms of the mortgage-deed and a further sum with interest for the outlay of the mortgagees upon constructions and repairs.

The defendants appeal to this Court on the grounds (1) that the transaction of 4th September 1888 represents an out and out sale, and (2) that the mortgagor in any case could not redeem until 50 years had expired from the date of the mortgage.

Both the Courts below have ruled that section 92 of the Evidence Act excludes the evidence produced by the defendants to show that the transaction embodied in the mortgage-deed of the 4th September 1888 was other than that shown by the terms of the document itself. It is contended by the appellants that the decision on this point of law was wrong. In this respect there is an undoubted conflict of opinion between the High Courts in India. The learned Judges of the Calcutta High Court have gone very far in admitting evidence to prove that the agreement subsisting between the parties was none other than that expressed by the terms of the deed itself. The conflict of opinion upon this point has become marked since the Privy Council ruling passed in 1899 in the case *Balkishen Das v. W. F. Legge* (1). Prior to that ruling the leading authority on this question was a judgment by Melvill, J., of the Bombay High Court, in the case of *Paksu Lakshman v. Govinda Kanji* (2). The view taken in that judgment was that a

(1) 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).

(2) 4 B. 594; 5 Ind. Jur. 527; 2 Ind. Dec. (N. S.) 903.

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plaintiff or defendant was entitled to show from the conduct of the parties that the transaction was otherwise than that which it purported to be according to the document, and that once a party had succeeded, at the outset of his case, in proving that the conduct of the parties was incompatible with the terms of the contract embodied in the deed, it then became open to that party to produce evidence to show what the real agreement was. The learned Judge considered that the right to produce evidence of conduct varying the terms of the written agreement arose primarily from the operation of the law of estoppel as contained in section 115 of the Evidence Act, but he went even further and held that even where such conduct might not amount to an estoppel, it was nevertheless relevant as showing the intention of the parties. In the Privy Council ruling of 1898 it was held that oral evidence of intention was inadmissible for the purpose of construing clearly worded deeds, ascertaining the intention of the parties. Their Lordships remarked that "the case must, therefore, be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of the surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts." The High Courts of Bombay and Madras have interpreted this ruling as excluding evidence of conduct on the ground that such conduct can only be relevant as leading to the inference of a contemporaneous oral agreement and that as evidence of the existence of a contemporaneous oral agreement is definitely excluded by section 92 of the Act, indirect evidence of it is excluded as well as direct evidence. As against this view the Calcutta ruling of 1916 published as *Ali Sheikh v. Imam Ali Sarkar* (3) has been quoted by the learned Counsel for the appellants. In that case evidence was admitted to show that a deed purporting to be a mortgage-deed in reality embodied a sale. It would appear, however, from that judgment that the learned Judges of the Calcutta High Court admitted that they were following rather the precedents set by their own Court than the view adopt-

ed by other High Courts in India. Two Punjab judgments, *Abdul Ghafur Khan v. Abdul Kadir* (4) and *Bulaki Mal v. C.J. Floyd* (5) have also been quoted by the appellants. These authorities are not very conclusive. In *Abdul Ghafur v. Abdul Kadir* (4) it was held that evidence of acts and conduct of the parties subsequent to the deed is admissible to show that something different from the written contract was intended by them. In the ruling of 1911 the former judgment is referred to and the learned Judges remark that, "We propose to accept this dictum though there is something to be said for the idea that evidence of the subsequent conduct should not in view of section 94, which was not considered in *Abdul Ghafur v. Abdul Kadir* (4) be admitted to show directly what the real meaning of the contract was, where its wording is plain and unambiguous but only to establish an estoppel." It is clear, therefore, that the learned Judges only accepted the view taken by the same Court in 1901 with some hesitation. It appears to me that section 92 must be read with sections 91, 93 and 94. It is difficult to see how the extreme view that, (1) evidence of conduct is admissible to show that the agreement between the parties was not the same as that shown in a deed, and (2) that once such a position is established parties may produce evidence to show what the subsisting agreement really was, can override the clear provisions of the Evidence Act. It is perfectly intelligible that conduct is relevant when such conduct operates as an estoppel. Section 115 of the Evidence Act may no doubt override sections 91 to 94 because the law of estoppel is one which must prevail against a rule of procedure only. If a person has by his act permitted the other party to believe that the agreement was other than that embodied in the document and has caused him to act upon that belief he cannot fall back upon the provisions of section 92 and thereby escape from the consequences of his own actions. But this is a very different thing from holding that when such conduct does not amount to an estoppel it may be

(4) 72 P. R. 1901; 114 P. L. R. 1901.

(5) 10 Ind. Cas. 1004; 27 P. R. 1911; 118 P. W. R. 1911; 191 P. L. R. 1911.

(3) 35 Ind. Cas. 102.

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proved in evidence in order to show that the intention of the parties was something other than that expressed by them in the written document. If the written document is perfectly clear in its terms and applies to existing facts, evidence to show that it was not meant to apply to such facts is distinctly excluded by section 94 of the Evidence Act. In the present case, therefore, I uphold the view taken by the two Courts below that no evidence is admissible to show that the parties intended a sale and not a mortgage by the transaction of September 1888, except in so far as it can be shown that the plaintiffs or their predecessor-in-interest allowed the defendants to believe that the transaction was a sale and to act on that belief.

It is, of course, open to defendants to prove if they can that the purchase by Hemraj in May 1888 was *benami* on behalf of other co-vendees. Evidence as to this is admissible because it is not evidence as between the parties to the instrument. I do not consider, however, that the defendants have succeeded in establishing this. The negotiations prior to the suit brought by the Receivers for a specific performance are not very material. The fact that the Receivers had to lodge a suit shows that the negotiations had not reached the stage of the execution of a final document. The terms of the final order in the case referred to the "defendant" in the singular and this must clearly, in the light of subsequent events, be treated as referring to Hemraj only. It has been shown, however, that one of the Receivers entered in his accounts the receipt of Rs. 1 422 from Udho Das on the 15th of May 1888 and that another Receiver received Rs. 700 out of the amount. There is certainly a presumption that the sum in question refers to the sale-money of the house. Even, however, if this presumption is correct, I fail to see how it can show that Udho Das was necessarily a co-vendee of the house. The fact that he made the payment on behalf of Hemraj does not in itself make him a co-vendee of the property. Nor, again, do I attach very much importance to the fact that in 1900 in another suit the Receiver filed an inventory of the insolvents' property in which they showed the house as being sold to Udho Das and Hemraj jointly. The question was not then in issue as

to whether Hemraj was the sole vendee or not. It is argued again that the whole object of making him sole vendee was to defeat a threatened suit for presumption, Hemraj being the owner of the adjoining property and being able in that capacity to oust the claims of any rival pre-emptions. There is nothing really to show that any pre-emption suit was actually threatened and the idea is nothing more than an assumption. So far as this part of the defendants' case is concerned I agree with the lower Courts that Hemraj must be regarded as the sole vendee from the Receivers.

As regards the mortgage-deed of 4th September of 1888 I have to see, on the findings which I have given above, whether the plaintiffs have by their conduct caused defendants to believe that the house was sold and not mortgaged and whether they permitted them to act upon this belief. It is shown that when Hemraj made a sale of a portion of his share to Tahlram in 1891, a portion of the price was paid to Dhanu Ram and Chiman Ram. This fact does not appear to me to carry great weight. The defendants have never produced any accounts to rebut the obvious explanation that the payment was made because Hemraj owed Chiman Ram, etc., money on a running account. Again, the fact that in 1892 the defendants were shown in a plan embodying a partition as co-sharers of the house in suit and not as mortgagees seems to me of little importance. It is perfectly natural in a case where the exact status of a party is not in suit for a mortgagee holding on a long and onerous mortgage to be regarded for the moment as a person with full title. This does not in any way amount to an admission that his title is something more than that of a mortgagee and cannot be said to estop the other party from subsequently showing that the title was one of mortgagee only. There is again a proceeding in 1905 before the Municipal Committee of Dera Ismail Khan when Tahlram, purchaser of three-eighths of the house, applied to erect a gate. Chiman Ram is shown to have objected on the ground that the house now in suit was his private property. Here again as no question of ultimate redemption was in issue, the fact that the parties allowed Chiman Ram to describe himself as a

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co-owner really means nothing at all. A letter from Chhabil Das, dated the 29th May 1910, has been produced to show that Chhabil Das asked for permission of one of the defendants to build a wall. This again has exactly the same effect as the other proceedings alluded to. A mortgagee in possession, holding under a mortgage which was at the time unlikely to be redeemed in the near future, is naturally treated as having for practical purposes the same position for the moment as an owner. No kind of admission that he is an out and out owner free from the possibility of ultimate exclusion by redemption is really made. I am unable to see any evidence which would estop the plaintiffs, within the meaning of section 115 of the Evidence Act, from claiming as against the defendants that they are entitled to redeem the mortgage.

The contention that the suit is premature appears to me a much more serious one. It is argued by the learned Counsel for the respondents, in the first place, that we have a concurrent interpretation of the wording of a vernacular deed by two Indian Judges. I admit that there is force in this contention, but I consider that it must necessarily be for this Court to interpret the deed itself. It is again argued that the defendants, in the second ground of their memorandum of appeal to the Divisional Court, admitted the position that the plaintiffs were entitled to redeem if the transaction were proved to be a mortgage and not a sale. I cannot see, however, that the ground of appeal in question amounts to an admission of this nature. It is directed to showing solely that the transaction was that of sale, and one of the arguments adduced is that if, as alleged by the plaintiffs, the transaction is only one of mortgage, the plaintiffs would not have allowed so much interest to accumulate against them and would have taken steps to redeem it at an earlier stage. The argument may be a poor one and the grounds of appeal badly expressed, but I cannot regard it as an admission on the part of the defendants that they were entitled under the terms of the contract to object to redemption for 50 years. In fact, such a view would be entirely inconsistent with their having pleaded in the First Court that the suit was

premature and having argued this ground of appeal in the Divisional Court. It may be taken as settled law by the Privy Council ruling published as *Bakhtawar Begam v. Husaini Khanam* (6) that, when a period for mortgage is specified, the right of redemption can only arise on the expiration of that period in the absence of a special condition entitling the mortgagor to redeem during the term for which mortgage was created. In this Province it is undeniable that the great majority of mortgage-deeds merely contain a provision to the effect that the mortgage is for a certain period. For this purpose the words '*ta mayad*' or '*ba mayad*' are commonly used. The effect of the Privy Council ruling is to show that, where nothing more than a period is specified, the *onus* lies on the mortgagor to prove that he can redeem before that period and not upon the mortgagee to show that the mortgagor cannot do so. Mr. Bunbury's Ruling in this Court published as *Judicial Record* 41 of 1907 is, therefore, obsolete and it may be remarked was in direct conflict with the practice in this Province. The view that the simple expression '*ba mayad*' or '*ta mayad*' without qualification means that time is the essence of the contract and that the mortgagor cannot redeem before the expiry of that term is one which must be taken as settled law for the North-Western Frontier Province and I have followed it in a recent case *Badshah Khan v. Ghulam Haidar*, Civil Appeal No. 93 of 921. What must be considered in the present case is, whether the terms of the deed contain a definite provision that the mortgagor may redeem before that period. In respect of period, the deed contains two distinct entries. In the earlier part of the deed it is simply stated that the mortgage is made for a term of 50 years (*ba mayad pachas sal*). Then follows the provision that the mortgagees will remain in possession of half the house till payment of the principal and interest. Terms then follow relating to the conditions of interest and to new constructions and repairs. The deed then concludes '*Mayad mandarja bala tak agar*

(6) 23 Ind. Cas. 355; 36 A. 195; 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 41 I. A. 84 (P. C.).

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asal wa sud ada ho jave to bihtar, warna bad mayad makan mazkur pas murtahinan basigha bai bil wafa ho jaega."

It is argued and this is the view taken by the two Courts below that the word "*tak*" implies "within" and that the deed, therefore, contains a clear provision that if at any time within the period of 50 years the mortgagor pays the principal and interest due the property is to be redeemed. It is argued by the learned Counsel for the respondents that the case is exactly parallel to the Madras case reported as *Chandu v. Koaja Poojari* (7). I cannot, however, admit that the parallel necessarily holds good because the interpretation of a deed of this nature is necessarily one which must be peculiar to the North-Western Frontier Province or at least to that Province and to the Punjab. What we have to consider is the intention of the parties as expressed in the deed and, as I have already shown, the expression "*ba mayad*" in this Province normally means that time is the essence of the contract and that the fixation of the period is in the interests of the mortgagee. In the present case if the mortgage-deed had stopped before the terms of the conditional sale had been given, there cannot be the slightest doubt that it would have been simply a mortgage for 50 years, or, in other words, a mortgage not redeemable until the expiry of 50 years. The question is, whether the subsequent provision in the deed is sufficient to neutralize this. I am unable to hold that it is. The mortgage-deed starts by declaring the mortgage definitely to be one for 50 years. Once this has been done, it requires some very clear provision to create the position that, nevertheless, the mortgagor may redeem within that period. It is argued that the word "*tak*" necessarily means "on or before." This no doubt is a generally correct translation, but I do not think that there is any think inconsistent in the theory that the mortgagee was entitled in any case to retain possession for 50 years and that at the expiry of that period his title was converted into one of sale if the mortgagor had not previously paid the money due on redemption. This theory is perfectly tenable if

we consider the fact that the title of a holder under a "*bai bil wafa*" or mortgage by conditional sale, does not become absolute on the very day that the period expires. Under Regulation XVII of 1806 he cannot treat the mortgage as foreclosed until he has made a demand for foreclosure and has gone through a certain procedure which gives the mortgagor yet another year in which to exercise his rights of redemption. The expiry of the period and the conversion of the mortgagee's title into that of the vendee are, therefore, not absolutely simultaneous events. It appears to me that even if the word "*tak*" is to be translated "on or before" it does not necessarily mean that the mortgagor can enter into possession by redemption "before." The clause of which I have given a transliteration above appears to me to refer to the question of the "*bai bil wafa*" and to that only. It limits the right of the mortgagee to convert his title into one of a vendee by the condition that the title cannot be so converted if the mortgagor has paid the money due on the footing of the mortgage on or before the expiry of 50 years. I am unable to see, however, why this necessarily implies not only that the vendee's title cannot mature if the mortgagor has paid the money but also that the mortgagor can claim redemption and oust the mortgagee in possession prior to the expiry of the period laid down for the mortgage. He would undoubtedly be entitled to do so if the period of 50 years was fixed solely for the purpose of conditional sale; but it is to my mind clear in the present case that the object of the first part of the deed is to create a mortgage for 50 years irredeemable before the expiry of 50 years quite irrespective of the subsequent condition regarding *bai bil wafa*. The condition, again, that the mortgagees will retain possession until the money is paid does not, in my opinion, operate to destroy the previous entry that the mortgage is for a term of 50 years. I have not the least doubt that the intention of the parties was to create a long term mortgage coupled with certain onerous conditions for the benefit of the mortgagees, a further provision being entered that, in the event of the mortgagor not paying the money on or before the expiry of 50 years, the mortgagees' title will mature and be-

(7) 30 Ind. Cas. 370; 29 M. L. J. 86.

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come absolute as that of vendee. On this view of the case the suit is, to my mind, clearly premature and, although the mortgage can be redeemed, it cannot be redeemed until the expiry of 50 years from the 4th of September 1888. I, therefore, accept this appeal and, reversing the order of the two Courts below, dismiss the suit with costs. On this appeal, as the appellants have failed in proving their contention that the transaction was one of sale and not of mortgage, the parties will bear their own costs.

Z. K.

Appeal accepted.

PATNA HIGH COURT.

CIVIL APPEAL NO. 224 OF 1921.

October 30, 1922.

Present:—Mr. Justice Das and
Mr. Justice Adami.

TRILOKE NATH JHA AND OTHERS—
PLAINTIFFS—APPELLANTS

VERSUS

BANSMAN JHA AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 1—
Execution sale—Confirmation, application for
—Possession, application for—Step-in-aid of exe-
cution—Sale of property—Execution, whether comes
to end—“Poundage fee,” meaning of.*

An application for the confirmation of sale is not an application to take some step-in-aid of execution. [p. 939, col. 1.]

Panchanan Chowdhury v. Nrisingha Prosad Roy, 6 Ind. Cas. 264; 11 C. L. J. 356 and Umesh Chandra Dass v. Shib Narain, 31 C. 1011; 9 C. W. N. 193, relied on.

Gobind Pershad v. Rung Lal, 21 C. 23; 10 Ind. Dec. (N. S.) 648, dissented from.

A decree-holder purchaser, though unable to obtain possession of the property sold in execution of his decree, is not entitled to take out further execution for that portion of his purchase-money which is represented by the property purchased by him. Execution comes to an end with the sale of the property and whether or not the auction-purchaser obtains possession of the property sold is wholly immaterial for the purpose of the decree and it does not in any way affect it. Consequently, an application by a decree-holder purchaser to be put in possession of the property is not an application to take some step-in-aid of execution. [p. 940, col. 2; p. 941, col. 1.]

*Sariatoolia Molla v. Raj Kumar Roy, 27 C. 709; 4 C. W. N. 681; 14 Ind. Dec. (N. S.) 466, *Pran Krishna v. Jurumoni*, 1 Ind. Cas. 430; 13 C. W. N. 694, *Annada Prasanna Sen v. Somoruddi Mirdha*, 54 Ind. Cas. 839; 30 C. L. J. 135; 23 C. W. N. 926, dissented from.*

*Bhagwati v. Banwari Lal, 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185, *Bhimlal Das v. Ganesha Koar*, 1 C. W. N. 658, *Mahomed Mosraf v. Hahil Mia*, 6 C. L. J. 749 and *Abdul Gani v. Raja Ram*, 35 Ind. Cas. 468; 1 P. L. J. 232; 20 C. W. N. 829; 3 P. L. W. 62 (F. B.) relied on.*

Obiter.—A poundage fee is a fee calculated upon the price for which the property sells and is payable by the decree-holder after the sale and before taking delivery of the property. [p. 940, col. 1.]

Messrs. S. P. Sen and C. S. Banerji, for the Appellants.

Mr. B. N. Mitter, for the Respondent.

JUDGMENT.

Das, J.—The question involved in this appeal is whether the execution of the decree is barred by limitation. On the 20th July 1917, the plaintiff sought to execute the decree which they had obtained on the 29th March 1917. On the 21st February 1918 certain properties belonging to the judgment-debtors were sold and the decree-holders themselves purchased those properties. The sale-proceeds not being sufficient to satisfy the decree, the decree-holders presented another application for execution of the decree on the 29th March 1921. The lower Court has come to the conclusion that the application of the 29th March 1921 is barred by limitation.

The application of the 29th March 1921 is apparently barred by limitation; but it is pointed out on behalf of the appellants that there was an application on their behalf on the 25th March 1918 for confirmation of the sale which, as I have said, took place on the 21st February 1918 and that there was a further application on their behalf on the 8th July 1918 for delivery of possession. It is urged on behalf of the appellants that each of these applications was an application to take some step-in-aid of execution and that in this view the application of the 29th March 1921 is not barred by limitation. So far as the application of the 25th March 1918 is concerned, I am clearly of opinion that that application does not save limitation. No doubt, it was held in the case of *Gobind Pershad v. Rung Lal* (1), that an applica-

(1) 21 C. 23; 10 Ind. Dec. (N. S.) 648.

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tion for confirmation of sale is an application to take some step-in-aid of execution; but, so far as I am aware, that case has never been followed in the Calcutta High Court. The case of *Gobind Pershad v. Rung Lal* (1) was decided on the 22nd of June 1893; but on the 7th April 1893 it was held by Ameer Ali, J., in the case of *Panchanan Chowdhury v. Nrisingha Prosad Roy* (2), that an application for confirmation of sale is not an application to take some step-in-aid of execution. The case of *Panchanan Chowdhury v. Nrisingha Prosad Roy* (2) was not brought to the notice of the learned Judges who heard the case of *Gobind Pershad v. Rung Lal* (1). In the later case of *Umesh Chandra Dass v. Shib Narain* (3), it was held by the Calcutta High Court that such an application is not an application to take some step-in-aid of execution. It was pointed out in the last mentioned case that such an application, not being made by a decree-holder as such but by an auction-purchaser, can in no sense be regarded as an application by the decree-holder. It was also pointed out that no application is, as a matter of fact, required for the purpose of having the sale confirmed. The decisions of the Calcutta High Court do not support the contention of Mr. Sen and I hold that the application of the 25th March 1918 was not an application to take some step-in-aid of execution.

I now come to the application of the 8th July 1918 which was an application for delivery of possession. There is some difficulty in deciding this point, not because there is any difficulty inherent in the point itself, but because the cases actually deciding this particular point are all in favour of Mr. Sen's contention. So far as I know, the point has been discussed by the Calcutta High Court on three different occasions and on each occasion the Calcutta High Court came to the conclusion that an application by a decree-holder to be put in possession is an application to take some step-in-aid of execution. *Sariatoolla Molla v. Raj Kumar Roy* (4), is the earliest of these cases. The learned

Judges thought that such an application was an application to make the execution final and complete and they followed the decision of the Allahabad High Court, in the case of *Moti Lal v. Makund Singh* (5). It is useful to point out that the decision of the Allahabad High Court in *Moti Lal v. Makund Singh* (5) has been reversed by the Full Bench of the Allahabad High Court in the case of *Bhagwati v. Banwari Lal* (6). The case of *Sariatoolla Molla v. Raj Kumar Roy* (4) was followed by Holmwood and Sharfuddin, JJ., in *Pran Krishna v. Juramoni* (7). It is somewhat difficult to appreciate the reasoning of the learned Judges deciding the case of *Pran Krishna v. Juramoni* (7), but they appear to have thought that the order under section 319 of the Civil Procedure Code being a judicial order, the application which resulted in that order must be considered to be an application to take some step-in-aid of execution. The point was again debated in *Annada Prasanna Sen v. Somoruddi Mirdha* (8). Newbould, J., thought that he was conclusively bound by the decisions of the Court and he accordingly came to the conclusion that an application by a decree-holder to be put in possession is an application to take some step-in-aid of execution. Cuming, J., arrived at the opposite conclusion and he thought that such application could not be regarded as an application to take some step-in-aid of execution. The decisions of the Calcutta High Court undoubtedly support the view that an application by a decree-holder to be put in possession is an application to take some step-in-aid of execution. In Bombay and in Madras a similar view has prevailed; see *Sadasivu Mahadu v. Narayan Vitthal* (9), *Lakshmanan Chettiar v. Kannammal* (10); although eminent Judges in Madras have thought that if the matter were *res integra* they might have decided the point adversely

(2) 6 Ind. Cas. 264; 11 C. L. J. 356.

(3) 31 C. 1011; 9 C. W. N. 193.

(4) 27 C. 709; 4 C. W. N. 681; 14 Ind. Dec. N. S. 466.

(5) 19 A. 477; A. W. N. (1897) 117; 9 Ind. Dec. (N. S.) 308.

(6) 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185.

(7) 1 Ind. Cas. 430; 13 C. W. N. 694.

(8) 54 Ind. Cas. 839; 30 C. L. J. 135; 23 C. W. N. 926.

(9) 11 Ind. Cas. 987; 35 B. 452; 13 Bom. L. R. 667.

(10) 24 M. 185.

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to the decree-holder. See *Kattayat Pathumayi v. Raman Menon* (11); *Sandhu Taraganar v. Hussain Sahib* (12). In Allahabad the view at one time found favour that an application by a decree-holder to be put in possession of the property purchased by him is an application to take some step-in-aid of execution—see *Moti Lal v. Makund Singh* (5); but the Full Bench decision of that Court in the case of *Bhagwati v. Banwari Lal* (6), has undoubtedly overruled the case of *Moti Lal v. Makund Singh* (5), and other cases based on that case. If we had to decide the case merely on the authorities which were placed before us we would be obliged to hold that the application of the 8th July 1918 was an application by the decree-holder to take some step-in-aid of execution and that it consequently saved limitation.

But it seems to me that there are numerous decisions of the Calcutta High Court which cannot be reconciled with the three decisions to which I have referred and upon which Mr. Sen relied. It was held in the case of *Ananda Mohan Roy v. Hara Sundari* (13), that neither an application by a decree-holder to receive poundage fee from him in respect of the judgment-debtor's property purchased by himself nor an application by him to be allowed to set off the purchase-money against the decree instead of paying it into Court is an application to take some step-in-aid of execution. It may be pointed out that a poundage fee is a fee calculated upon the price for which the property sells and is payable by the decree-holder after the sale and before taking delivery of the property. Now, if an application by the decree-holder asking the Court to receive a poundage fee is not regarded as an application to take some step-in-aid of execution, it is difficult to understand how an application to be put in possession of the property purchased by him can be regarded as an application to take some step-in-aid of execution. It was pointed out in that case by the late Chief Justice of the Calcutta High Court that when the sale of the property attached in execution has been com-

pleted and the purchase-money has been paid into Court, nothing more remains to be done in respect of the execution of the decree as against that property. In the case of *Bhimal Das v. Ganesha Koer* (14) it was held that no appeal lies from an order refusing the application of the decree-holder to be put in possession under section 318, the question not falling under section 244. Now, in order to establish that an application by the decree-holder to be put in possession of the property purchased by him is an application to take some step-in-aid of execution, it must be established, first, that the application is in fact, by a decree-holder; and, secondly, that the application relates to the execution of the decree. If these facts are established then the question involved in the decision of such an application would undoubtedly be a question between the parties to the suit and relating to the execution of the decree and would consequently fall under section 47 of the Code of Civil Procedure. The decision in *Bhimal Das v. Ganesha Koer* (14) accordingly denies the validity of the arguments upon which we are invited to hold that an application by a decree-holder to be put in possession of the property is an application to take some step-in-aid of execution. Indeed, if the arguments of Mr. Sen be right, then the case of *Bhimal Das v. Ganesha Koer* (14) was wrongly decided, and it may be pointed out that that case was decided on the view that the execution was at an end with the sale of the property, and that no question relating to execution was involved in an application to be put in possession of the purchased property by the decree-holder. The case of *Bhimal Das v. Ganesha Koer* (14) was followed by Brett and Mookherji, JJ., in *Mahomed Mosraf v. Habil Mia* (15) and this is the view which has been accepted by the Full Bench of this Court in *Abdul Gani v. Raja Ram* (16). No doubt, it was not decided by this Court in the case cited that an application by a decree-holder to be put in possession of the purchased property is not an application to take some step-in-aid of execution but it seems to me that such a decision is involved in a

(11) 26 M. 740; 13 M. L. J. 237.

(12) 28 M. 87; 14 M. L. J. 474.

(13) 23 C. 196; 12 Ind. Dec. (N.S.) 130.

(14) 1 C. W. N. 658.

(15) 6 C. L. J. 749.

(16) 35 Ind. Cas. 468; 1 P. L. J. 232; 20 C. W. N. 829; 3 P. L. W. 62 (F. B.).

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decision that no appeal lies from an order under r. 95 of O. XXI of the Code of Civil Procedure.

It is necessary to deal with an argument which was advanced to us by Mr. Sen on behalf of the decree-holder. He argued that a proceeding in execution cannot be said to be completed in a case of sale until he has obtained the proceeds and the benefit of the sale held in execution of the decree; and just as an application by a decree-holder who is not the auction-purchaser to obtain payment of purchase-money is an application for taking some step-in-aid of execution, so also an application to be put in possession of that which represents the money where the decree-holder himself purchases and consequently no money passes, ought to be regarded as an application to take some step-in-aid of execution. Now, the point to be decided is whether an application by a decree-holder, when he is not the auction-purchaser, to obtain payment of purchase-money is an application for taking some step-in-aid of execution. So far as the Calcutta High Court is concerned, it has invariably held that such an application is not an application to take some step-in-aid of execution. See *Hem Chunder v. Brojo Soondury Debee* (17), *Fazale Iman v. Metta Singh* (18), *Ganga Pershad v. Debi Soondari* (19). A useful test to apply would be this; supposing the decree-holder purchaser is unable to obtain possession, would it entitle him to take out further execution for that portion of the money which is represented by the property purchased by him of which he is unable to obtain possession? If the fact that he is unable to obtain possession would re-open the execution proceedings, then there might be something to be said in favour of the view that execution is not complete until he obtains possession of the property; but it is well established that, though the decree-holder purchaser is unable to obtain possession, that would not entitle him to take out further execution for that portion of his purchase-money which is represented by the property purchased by him. It seems to me that execution comes to an

end with the sale of the property and that whether or not the auction-purchaser obtain possession of the property sold is wholly immaterial for the purpose of the decree and it does not in any way affect it. Mr. Justice Banerji pointed out in the case of *Bhagwati v. Bamwari Lal* (6) that if the decreee-holder purchases the property but does not obtain possession that circumstance would not entitle him to take out execution of the decree which has already been satisfied. It seems to me that the argument advanced before us by Mr. Baikuntha Nath Mitra on behalf of the judgment-debtors must prevail. The argument is founded on principle and is covered by the decision of this Court in *Abdul Gani v. Raja Ram* (16) which is binding on us.

I would dismiss this appeal with costs.

Adami, J.—I agree.

N. K.

Appeal dismissed.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FURTHER CIVIL APPEAL, NO. 45-3 OF 1923.
March 22, 1923.

Present:—Mr. Pipon, J. C.

RAM CHAND—DEFENDANT—APPELLANT.
versus

GHULAM HASAN AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption—Covenant giving mortgagee power to prevent redemption—Clog on equity of redemption.

A term in a mortgage-deed which invests the mortgagee with power to prevent redemption altogether amounts to a clog on the equity of redemption and is unenforceable. [p. 944, col. 2.]

Durga Singh v. Muhammad Raza Husain Khan, 25 Ind. Cas. 912; 17 O. C. 313, relied upon.

A mortgage with possession, which also carried interest, provided for redemption after the expiry of ten "abad" years, that is to say, ten years during which at least one-third of the mortgaged land should be cultivated;

Held, that it being entirely within the hands of the mortgagee to cultivate all or any portion of the land or not, he could, by cultivating just less than one-third of the mortgaged land in each year, deprive the mortgagor of his right of redemption.

(17) 8 C. 89; 10 C. L. R. 272; 4 Ind. Dec. (N. S.) 57.

(18) 10 C. 549; 5 Ind. Dec. (N. S.) 368.

(19) 11 C. 227; 5 Ind. Dec. (N. S.) 910.

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altogether, and that, therefore, the term in the mortgage-deed postponing redemption till after the expiry of ten *abad* years amounted to a clog on the equity of redemption and was unenforceable.

Further appeal from an order of the Divisional Judge, Derajat, dated the 3rd December 1922, reversing that of the Munsif, Second Class, Dera Ismail Khan, dated the 24th July 1922.

Lala Mathra Das, for the Appellant.

Mr. Saaduddin Khan, K. S., for the Respondents.

JUDGMENT.—The facts of this case are given in the order of the lower Appellate Court. The suit is one for redemption of property mortgaged by the predecessor-in-interest of the plaintiffs to the predecessor-in-interest of the defendant by a mortgage-deed executed on the 23rd of September 1903 and registered on the 19th of October 1903. The defendant resisted the suit for redemption *inter alia* on the ground that the suit was premature, the period fixed for the mortgage not having expired. The Trial Court held the suit to be premature and dismissed it. The Divisional Court on appeal has held that the suit is not premature, and having reversed the finding on this preliminary point, has remanded the case for re-trial on its merits under O. XLI, r. 23, Civil Procedure Code. The defendant appeals to this Court on the ground that the suit for redemption is premature.

The period fixed for the mortgage by the deed of 1903 is 10 years *abad*. The meaning of an *abad* year is defined in the deed as a year in which at least one-third of the land mortgaged shall be cultivated. The fixation of a period of this nature may, at first sight, seem peculiar, but it has been shown that it is not unknown in the case of this class of land in the Dera Ismail Khan District. The land in question depends upon the very precarious system of irrigation from hill torrents; and it is a well-known fact that the possibility of any cultivation cannot be guaranteed in any particular year. The mortgage-deed also recites that the mortgagee shall hold possession, and that he can cultivate through any tenant whom he chooses to select. The consideration for the mortgage was Rs. 400. As regards interest upon this sum,

the mortgagee, according to the terms of the deed, was to recoup himself for the interest on half the total or Rs. 200, by receiving half the owner's share of the produce, and as regards the remaining Rs. 200 he was to be entitled to interest at the rate of 1 per cent per mensem up to the time of redemption. It has been shown by evidence in the Trial Court that, during the 19 years which have elapsed since the mortgage was made, the conditions necessary to establish an *abad* year have been fulfilled in five particular years.

The Divisional Judge has remarked, when finding that the suit for redemption is not premature, that "I think there can be no doubt that this form of mortgage, where the period is entirely dependent on the area cultivated in any one year, acts as a clog on the equity of redemption. If the mortgagors remain in possession, it may or may not be physically possible to comply with the terms. If the mortgagee takes possession, the mortgagors have no guarantee that the prescribed area will ever be cultivated. So that, in either case, the period fixed in *abad* years is really an indefinite period which, if it extends to 60 years, might allow the Statute of Limitation to operate." I may remark that this last remark appears hardly justified. Limitation for redemption of a mortgage under Art. 148 of the Limitation Act begins to run when the right to redeem accrues. It would follow, therefore, that the period of 60 years in the present case could never begin to run until the land had fulfilled the condition of being cultivated or *abad* within the meaning of the deed for 10 years, and that, if this period were indefinitely extended, the date from which limitation for redemption would run would equally be indefinitely extended. This aspect of the case, therefore, need not be further considered. I need not, again, consider the arguments put forward by the learned Counsel for the appellant in respect of various points such as that the fixation of period is the essence of the contract and that it is in the interests of the mortgagee, or that the onerous nature of the conditions of the mortgage are not in themselves sufficient to constitute such a clog upon redemption that the terms of the mortgage in this respect can be overridden. There

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is ample authority for both of these propositions. The law on the subject of the fixation for periods has been recently dealt with by my Court in the case *Dhanna Ram v. Chhabil Das*, Civil Appeal No. 12-6 of 1922, which is in course of publication.* The leading authority on this question is the Privy Council ruling published as *Bakhtawar Begam v. Husaini Khanam* (1). Again, apart from other authorities, the ruling of this Court published as J. R. 56 is an authority for holding that the mere length of the period fixed for a mortgage is not sufficient to constitute an undue restriction on the right to redeem. In the case dealt with by that judgment the period for a mortgage was fixed at 150 years and was upheld. *Sayad Abdul Hak v. Gulam Jilani* (2) was quoted with approval on the question as to what constituted oppressive and unreasonable restraint on the right of redemption. The learned Counsel for the respondents, however, supports the finding of the Divisional Judge upon what is undoubtedly the real ground for that finding as shown in the judgment, and that is that the period fixed in the present case, quite apart from whether it is a long or a short period, depends entirely on the volition of the mortgagee. He argues in particular that the mortgagee has, under the deed, a right to possession, and that he has taken steps to enforce this right by recently obtaining a decree for possession. He can now, it is argued, assume exclusive possession of the land and decline, if he so wishes, to cultivate it at all, meanwhile, the interest on half the mortgage money, Rs. 200, will accumulate indefinitely, the right to redeem meanwhile not accruing, and that redemption can be, by the mere act of the mortgagee himself, put off until a point is reached when the accumulated interest would make the equity of redemption worthless. There is obviously very considerable force in this contention. The learned Counsel

for the appellant meets this position with a number of arguments. One of these is that the plaintiffs are estopped from raising this plea at all, because in 1910 they made a compromise with the defendants which admitted the validity of the mortgage. I do not consider that any question of estoppel can seriously be put forward. The suit in question was one by the plaintiffs as reversioners to set aside the mortgage now in suit as made without authority by a widow holding on a limited life-interest. They withdrew their suit under a compromise with a transferee of the mortgagee rights, the terms being that either they should sell certain fields to the mortgagee and put him in possession (in which case the mortgage was to be annulled) or, if they failed to do this, that the mortgage should subsist. The exact terms and the period of the mortgage were not then in issue, and I cannot see how it could be said that the plaintiffs gave the mortgagee to understand that the period was to be interpreted in a particular manner, or that any question of the exact period was in issue between the parties. A second argument is that, up to now, the mortgagors have actually been in possession and that it is premature to say that the mortgagee has any intention of ousting them with a view to leaving the land uncultivated at his own motion. The suit for possession was decided simultaneously with the present suit. The defendant had been obliged to sue for rent of the land as he never succeeded in getting anything out of the plaintiffs. He naturally had, in order to enforce any lien at all, to obtain a decree also for possession. His Counsel in the present appeal, in emphasizing the position that the defendant is acting in perfectly good faith, declares that his client is willing to give an undertaking, if required, that the period for redemption shall not be indefinitely prolonged, and he suggests that it can now be fixed on the same scale as the facts of previous years have brought out, i.e., that as five *abad* years have occurred during the past 19 years, he is willing to allow redemption after the expiry of 19 more. Two other cases have been shown in which similar mortgages for *abad* years have been dealt with by the Courts and in neither

(1) 23 Ind. Cas. 355; 36 A. 195; 18 C. W. N. 596; 2 M. L. J. 474; 12 A. L. J. 473; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 41 I. A. 84 (F. C.).
(2) 20 B. 677; 10 Ind. Dec. (N. S.) 1021.

*Since reported as 72 Ind. Cas. 931—[Ed.]

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of these cases was any pleading raised that a condition of this nature left the determination of the period of mortgage entirely in the hands of the mortgagee. In one of those cases at least the mortgagee had a right to possession under the terms of the mortgage. In the alternative, the appellant's Counsel suggests that the plaintiffs may be allowed to remain in cultivating possession provided that they give an undertaking to use water available for the cultivation of the land in suit instead of for that of their adjoining land. I do not think that it is possible seriously to consider this alternative, and it would be difficult to see how such an undertaking could be incorporated in the decree, or how it would be capable of execution. The first of these two suggestions, however, is more practical. I consider, nevertheless, that it would be extremely difficult for a Court to act upon it. It was never suggested at any previous stage of the proceedings. What I have to determine is whether the terms of the mortgage are such as a Court is entitled to enforce, and, if they are not, there do not appear to me grounds for amending those terms upon a mere assumption as to what was originally intended by the parties, or what may seem to be equitable, I can accept the contention that this form of period is one which is already known and which may, at the time when it was agreed upon, have represented a genuine arrangement. At the same time, whether or not the parties realized the effect of this agreement, it appears to be one which, if the mortgagee once insists upon his right to possession, no Court can be called upon to maintain. It is impossible to get over the simple fact that under the mortgage-deed the mortgagee is entitled to exclusive possession, and that, once he has obtained such possession, it rests entirely with him whether or not to cultivate all, or any portion of the land, and that the mortgagors have no legal or practical method of compelling him to cultivate at all. As pointed out by the learned Counsel for the respondents, the mortgagee would be in the position that he might even cultivate just less than one-third of the land in any particular year and thereby prevent that year being treated as *abad* within the meaning of the deed. Whatever may be

the intention of the mortgagee at this moment, he could always adopt this course if he thought it in his interest to do so, and it may be remarked, there is nothing to bar his transferring his rights to another person who might wish to do the same. I consider, therefore, that the view taken by the learned Divisional Judge is the only possible one, and that we are dealing with a mortgage the terms of which are such as to place it within the power of the mortgagee to prevent redemption at all. Whatever authorities there are for the view that the terms of the mortgage, however onerous, must be upheld if the parties entered into the contract with their eyes open, there is equally good authority for the view that those terms must not be such as to allow the mortgagee to prevent redemption in all circumstances. *Durga Singh v. Muhammad Raza Husain Khan* (3) may be cited as a clear authority for this view. I, therefore, uphold the finding of the Divisional Court in this case and dismiss this appeal with costs.

Z. K.

Appeal dismissed.

(3) 25 Ind. Cas. 912; 17 O. C. 213.

GAJO CHAUDHURY v. DEBI CHAUDHURY.

PATNA HIGH COURT.

CRIMINAL REVISION No. III OF 1923.

April 6, 1923.

Present:—Mr. Justice Kulwant Sahay.

GAJO CHAUDHURY AND OTHERS.

—PETITIONERS

versus

DEBI CHAUDHURY AND ANOTHER—
OPPOSITE-PARTY.*Criminal Procedure Code (Act V of 1898), ss. 203, 369—Order disposing of case—Jurisdiction to revive case.*

Unless it can be shown that there is a legislative enactment giving a power to that effect, cessation by the order of a Magistrate of any criminal proceeding must, until that order is set aside, operate not only as staying the proceedings but as destroying them. [p. 947, col. 2.]

Tarini Charan Chaudhry v. Amulya Ratan Roy, 20 C. 867; 10 Ind. Dec. (N. S.) 583, relied on.

A Magistrate took cognisance of a case under section 190 (c) of the Criminal Procedure Code and sent it to the Police for investigation. On receipt of the report of the Police he made the following order: "Enter false. Mistake of law." Subsequently, on application by the complainant the Magistrate revived the proceedings:

Held, (1) that the first order of the Magistrate was an order finally disposing of the case and had the effect of destroying the proceedings; [p. 948, col. 1.]

Birnarayan Singh v. Emperor, 67 Ind. Cas. 195; 3 P. L. T. 239; (1922) A. I. R. (Pat.) 97; 23 Cr. L. J. 371, distinguished.

(2) that under section 369 of the Criminal Procedure Code the Magistrate had no jurisdiction to alter or review his first order and his subsequent order reviving the proceedings was, therefore, illegal. [p. 948, col. 1.]

Revision from an order of the Sub-Divisional Officer, Monghyr, dated the 3rd February 1923, issuing summonses against the petitioners under sections 379 and 147, Indian Penal Code.

Mr. G. C. Pal, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application for revision of an order, dated the 3rd February 1923, passed by the Sub-Divisional Officer of Monghyr whereby he ordered the issue of summonses against the petitioners under sections 379 and 147, Indian Penal Code. The petitioners pray that, under the circumstances set out in their petition, the learned Sub-Divisional Officer's order should be set aside as being illegal, or, in any event, the proceedings should be quashed.

In order to understand the circumstances under which the order sought to be set aside was passed, it is necessary to state shortly the previous history of the case.

There are three plots of land in village Rahimpur, lying contiguous to each other from east to west. The two plots on the east and west admittedly belonged to the petitioners. The dispute relates to the middle plot measuring about 15 *bighas* which is claimed by the petitioners as being their holding while it is claimed by Debi Chaudhury and others as belonging to them. A dispute arose between the parties as regards the possession of the middle plot and in the year 1920 a case of rioting was started against Debi Chaudhury and others on the complaint of Gajo Chaudhury, one of the petitioners. In that case the Deputy Magistrate convicted Debi Chaudhury and others, sometime in January or February 1922, and in his judgment the Deputy Magistrate found that the petitioner Gajo Chaudhury was in possession of the disputed middle plot. There was an appeal by Debi Chaudhury and others which was heard by the Sessions Judge of Monghyr and the learned Judge upheld the conviction for rioting, but in the course of his judgment he was pleased to observe that Debi Chaudhury and others were really in possession of the middle plot and he maintained the conviction on the ground that the accused persons in that case had exceeded their right of private defence inasmuch as they had chased the complainant of that case, and assaulted him somewhere outside the disputed land. An application for revision was filed by Debi Chaudhury and others to the High Court which was dismissed. It is said, however, that the High Court remarked in its judgment that the question of the possession of the middle plot did not arise in the case.

Subsequently, sometime in August 1922, fresh disputes cropped up between the parties as regard the possession of the middle plot, and proceedings under section 145 of the Criminal Procedure Code were initiated but as it was found that the land had gone under water the said proceedings were dropped. Again, in November 1922, proceedings under section 144 of the Criminal Procedure Code were initiated wherein

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Debi Chaudhury and others were the first party and the petitioners were the second party. Notice was issued upon them to show cause why an order under section 144 should not be passed against them. The petitioner Gajo Chaudhury thereupon filed a petition on 28th November 1922 showing cause as to why an order under section 144, Criminal Procedure Code, should not be passed against him, and in that petition he stated that he was in possession of the land and he had cultivated the land and grown crops thereon which he cut and removed on the 17th of March 1922. Thereupon, without any complaint by any one, simply on the statement in the petition of Gajo Chaudhury that he had cut and removed the crops, the learned Sub-Divisional Magistrate made an order on the 29th November 1922 in which he stated that the petitioners had no right to reap the crops on the 17th of March 1922 as both the Sessions Judge and the High Court had found in the rioting case that the petitioners were not in possession of the disputed land, nor had the land been settled with them and he recorded the following order in the order-sheet: "I, therefore, take cognizance of the offences committed by him (i.e., Gajo Chaudhury) under sections 379 and 447, Indian Penal Code; in 1921 109 and 1922 under the provisions of section 190 (c), Criminal Procedure Code, and remand him to *hajat*. I send the file to the Sub-Inspector Khagaria for investigation." The result was that the petitioner Gajo Chaudhury was at once arrested and taken to the *hajat*. He later on applied for bail on the same date but this was rejected. Bail was, however, subsequently allowed by the learned Sessions Judge. On the 21st of January 1923 final report of the Police was received by the learned Magistrate and he recorded the following order in the order-sheet of that date:—"Final report received. Enter false, mistake of law, sections 379 and 447, Indian Penal Code." On the 3rd 109 of February 1923 Debi Chaudhury filed an application before the Sub-Divisional Magistrate for revival of the case under sections 379 and 447 Indian Penal Code and thereupon the learned Sub-Divisional Magistrate

made the following order on that date: "Petition filed by Debi Chaudhury for continuing the case. His Vakil states orally that he can prove that Debi Chaudhury was in possession till 17th March 1922, on which date accused had the crop cut. The Sub-Inspector's report shows that he considered at that time the evidence of possession was equally balanced. As the title is with the complainant and he has been proved to have been in possession on 13th October 1920, I consider he must in fairness be given an opportunity of proving his case. Issue notice to accused Gajo's bailor to produce him on 19th February. Summon Phul-tan, Bhattu and Shibteyal Singh for that date under sections 379 and 147, Indian Penal Code." It is against this last order of the learned Sub-Divisional Magistrate that the present application for revision has been filed.

The learned Vakil for the petitioners contends, firstly, that the learned Magistrate having by his order of 21st of January found the case to be false, he has acted illegally in taking fresh action and reviving the case. Secondly, it is contended that the learned Magistrate had no jurisdiction to take action as on a complaint inasmuch as there was no complaint before him, and he did not, as a matter of fact, proceed under section 190 (a) of the Criminal Procedure Code as there was no examination of the complainant upon oath under section 200 of the Code. Thirdly, it is contended that, in any event, it is a fit case in which the proceedings should be quashed.

In my opinion, apart from the legal objections taken by the petitioners, having regard to the previous history of the case, it is not proper that the present proceedings should be continued. The finding of the Deputy Magistrate in the rioting case was that the petitioners were in possession of the disputed plot of land. That finding was not upset by the Sessions Judge until the 18th of March 1922 and the crops were removed by the petitioners on the 17th of March 1922 i. e., at a time when the finding of the Deputy Magistrate was still subsisting and had not been upset on appeal and, therefore, there was no ground for holding that they removed the crops with any dishonest motive. Secondly, it is stated by the learned Vakil for the petitioners that the High

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Court in revising the order of the learned Sessions Judge had held that the question of possession did not arise in the case. The learned Assistant Government Advocate does not challenge the correctness of this statement, but the Sub-Divisional Magistrate proceeds on the assumption that the High Court had confirmed the finding of the Sessions Judge as regards possession. I have not a copy of the order of the High Court before me, but in any event it cannot be said that on the 17th of March 1922 the petitioners had no justification for removing the crops which they allege to have been grown by them. Then, again, the learned Magistrate took cognizance of the case under section 190 (c) of the Code of Criminal Procedure upon information received by him in the course of the proceeding under section 144 of the Code. This information was received from the petition of objection filed by the petitioner in the proceeding under section 144 in showing cause against the order under the said section. The petitioners stated as a ground that no order under section 144 should be passed against them; that they had been in possession of the land and had removed the crops on 17th March 1922. There was no complaint before the Magistrate and there was no justification for his coming to the conclusion that the petitioners had committed any offence of which he ought to take cognizance under section 190 (c) of the Code. Again, when the matter was referred to the Police for enquiry the Police made an enquiry and submitted a report in favour of the petitioners. The Magistrate was apparently satisfied with that report and he ordered the case to be entered as "false, mistake of law." Having regard to the fact that the alleged offence took place in March 1922 after which there were fresh proceedings under sections 145 and 144 of the Criminal Procedure Code and that no complaint of theft was made by Debi Chaudhury at any time from the 17th March 1922 upto the 3rd February 1923 I am clearly of opinion that it is improper to revive the proceedings upon the petition of Debi Chaudhury filed on the 3rd February 1923.

As regards the first objection of the learned Vakils for the petitioners that the learned Magistrate had no jurisdiction to revive the proceedings after his order of the

21st of January 1923 his argument is that the order of the 21st of January 1923 had the effect of finally disposing of the case and that order could not be cancelled by the learned Magistrate under any provision of the Code. He relies upon the case of *Tarini Charan Chaudhry v. Amulya Ratan Roy* (1) where their Lordships observed that unless it can be shown that there is a legislative enactment giving a power to that effect, cessation by the order of the Magistrate of any criminal proceedings must, until that order is set aside, operate not only as staying the proceedings, but as destroying them. The learned Assistant Government Advocate for the Crown argues that the order of the 21st of January 1923 was merely an executive order and it was not a judicial order disposing of the case, and he relies upon the observations of Jawala Prasad, J., in the case of *Birmarayan Singh v. Emperor* (2). His Lordships in that case observed that an entry such as that made in that case, namely, "enter true sections 348-114, Indian Penal Code," was an entry which ought not to have found a place in the judgment. The judgment in that case was entirely in favour of the accused but after disposing of all the arguments and considering all the facts and the evidence in the case and coming to the conclusion that the accused in that case was not guilty of the offence charged, the learned Magistrate had made an entry at the end of the judgment "enter true sections 348-114, Indian Penal Code" and his Lordship held that such an entry ought not to have found a place in the judgment. Under the rules contained in the Police Manual such an entry has to be made in the register prescribed by paragraph 314, Chapter XIII, of the Police Manual and his Lordship ordered that the entry be expunged from the judgment. In the course of his judgment his Lordship observed that such an entry had been interpreted by certain authorities as an entry of purely executive character and he gave that as a reason for holding that if it was an entry of an executive character, it ought not to have found place in the judgment of the Court. That case is no authority for

(1) 20 C. 867; 10 Ind. Dec. (N. S.) 583.

(2) 67 Ind. Cas. 195; 3 P. L. T. 239; (1922) A. I. R. (Pat.) 97; 23 Cr. L. J. 371.

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the proposition that such an order as that passed by the Sub-Divisional Magistrate in the present case on the 21st January 1923, was an executive order. It was an order finally disposing of the case and, to use the expressions of their Lordships of the Calcutta High Court in the case of *Tarini Charan Chaudhry v. Amulya Ratan Roy* (1) just cited, it had the effect of "destroying the proceedings." If that is so, then, under section 369 of the Code of Criminal Procedure, the learned Magistrate had no jurisdiction to alter or review that order, and the order of the 3rd of February 1923 must in this view of the case be held to be illegal.

As regards the second objection of the learned Vakil for the petitioners, I am of opinion that that objection is also well-founded. If it is argued that the proceedings were initiated on a complaint made by Debi Chaudhury then the provisions of section 200 of the Code of Criminal Procedure have not been complied with; in fact the petition filed on the 3rd of February cannot be regarded as a complaint and the learned Magistrate himself did not treat it as a complaint but merely as "an application for continuing the case."

For the reasons given above, I am of opinion that no fresh action ought to be taken against the petitioners and the proceedings initiated by the order of the 3rd of February 1923 must be quashed.

Z. K.

*Proceedings quashed.***ODH JUDICIAL COMMISSIONER'S COURT.**

CRIMINAL REVISION NO. 140 OF 1922.

December 14, 1922.

Present:—Mr. Daniels, A. J. C.

SALIM AND ANOTHER—ACCUSED—**APPLICANTS***versus.***EMPEROR—COMPLAINANT.***Criminal Procedure Code (Act V of 1898), s. 264**—Summary trial—Appealable sentence awarded—Judgment, contents of.*

Where in a summary trial under section 264 of the Criminal Procedure Code, the Magistrate passes a sentence upon the accused which is appealable, the judgment ought to embody the substance of the evidence on both sides. Merely stating that the

prosecution witnesses support the statement of the complainant, and that the defence evidence is very conflicting and cannot be believed, is not a sufficient compliance with the requirement of the law, and the conviction and sentence are liable to be set aside by the High Court in revision.

Revision against an order of the Sessions Judge, Sitapur, dated the 11th November 1922, confirming, an order of the Deputy Magistrate, First Class, Kheri, dated the 21st August 1920.

Mr. R. F. Bahadurji, for the Applicants.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application for revision in a case in which the applicants were tried summarily and sentenced to appealable sentences. Section 264, Criminal Procedure Code, requires that in such a case the Magistrate shall write a judgment embodying the substance of the evidence on both sides. It is clear from a perusal of the judgment that the Magistrate has not complied with this requirement. As regards the prosecution witnesses, all he says is that the witnesses support the statement of the complainant. This is hardly sufficient. The record should at least have shown how the witnesses came to be on the spot and how much of the affair they saw. When I come to the defence evidence, the record is still more insufficient. It appears that thirteen witnesses were examined in support of the case set up by the defence. The learned Magistrate gives no indication of what these witnesses said and the only remark he makes about them is that the statement of the witnesses examined by Muhammad is very conflicting and he does not believe them. The ruling in *Jagan Nath v. Emperor* (1) has been cited in support of the application. This is a very much stronger case. The Magistrate has altogether failed to comply with the requirements of the law and I accordingly set aside the convictions and sentences and direct the release of the accused. The fines, if paid, will be refunded. I refrain from ordering a re-trial as the accused have already undergone a substantial portion of the sentences imposed on them.

W. C. A. *Convictions and sentences set aside.*

(1) 21 Ind. Cas. 466; 16 O. C. 357; 14 Cr. L. J. 594.

AKBAR ALI v. EMPEROR.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 26 OF 1923.

April 6, 1923.

Present:—Mr. Pison, J. C.

AKBAR ALI SON OF BARKATULLAH

ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 216—Harbouring proclaimed offender—Giving warning, whether amounts to harbouring—Sentence.

A person who deliberately gives warning to a proclaimed offender of the approach of the Police, with the intention to assist him to escape, is guilty of an offence under section 216 of the Penal Code. [p. 949, col. 2; p. 950, col. 1.]

Emperor v. Husain Bakhsh, 25 A. 261; A. W. N. (1903) 29, dissented from.

An outlaw, especially in the North-West Frontier Province, is a menace and an enemy to the public at large, and any person who conspires to assist him must be held to be also an enemy of the public and should be severely dealt with. [p. 950, col. 1.]

Appeal from the order of Additional District Magistrate, Mansehra, dated the 25th January 1923.

Mr. Nader Ali, Agent for the Appellant.
Mehta Mangal Sain, for the Crown.

JUDGMENT.—The appellant, Akbar Ali, a Gujjar, aged 40 of Doga in the Mansehra Tahsil, has been convicted under section 216, Indian Penal Code, of harbouring a proclaimed offender named Mahmud Shah who was charged with a capital as well as with other offences, and has been sentenced to 7 years' rigorous imprisonment including three months' solitary confinement.

The first point to be established is whether Mahmud Shah was a proclaimed offender on a capital sentence. It has been shown that he was a notorious outlaw against whom charges under sections 302, 307, 395 and 397, Indian Penal Code, were pending.

The next question is whether Akbar Ali "harboured him" within the meaning of section 216, Indian Penal Code. The facts shown by the prosecution are that on the 26th of November 1922 a party of Police and Frontier Constabulary, on receipt of information, surrounded the house of the outlaw at Doga with a view to his arrest. They found the present accused, Akbar Ali watching the outlaw's house in the capacity of a Chaukidar. They at once told him that they intended to arrest Mahmud Shah,

and that he must keep quiet in order to facilitate their object. Akbar Ali, nevertheless, did his utmost to give Mahmud Shah a warning of the arrival of the Police force and kept on shouting at the top of his voice until he was eventually gagged by the Police with a blanket. The result of this was that Mahmud Shah was warned and attempted to escape. He fired upon the Police, wounding one of their number, but was eventually himself shot dead. The defence of the accused is that he was not actually at Mahmud Shah's house, but was at some distance away in a cattle-shed; that he did nothing to warn Mahmud Shah, and that he is not guilty of assisting the latter in his attempt to escape, or of obstructing his arrest.

There is not the least doubt that the accused was employed as a Chaukidar by the father of the outlaw. There is, again, not the least doubt, on the evidence, that he was, on that occasion, posted over the house of the outlaw with the express intention of keeping watch and of warning him of any possible danger from the Forces of the Crown. There is, again, not the least doubt that he did his best to warn the outlaw of the arrival of the Police and thereby to assist him in his attempt to escape. The appellant being unrepresented by Counsel, I have asked the learned Public Prosecutor to assist me by pointing to any aspect of the case which could possibly tell in the accused's favour. He has shown me a ruling of the Allahabad High Court published as *Emperor v. Husain Bakhsh* (1) in which it was held that the definition of harbouring contained in section 216 (B) of the Indian Penal Code does not include the assisting of an accused person to escape by merely telling lies to the Police as to his whereabouts. The learned Public Prosecutor, however, brings to my notice the fact that in the present case we have very much more than this. The case against Akbar Ali is not that he gave any false information to the Police with a view to assisting the outlaw to escape, but that he directly and deliberately warned the outlaw in order to save him. The cases, therefore, are not parallel. I cannot, however, avoid making the observation that the view taken by the Allahabad High Court

(1) 25 A. 261; A. W. N. (1903) 29.

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in the case referred to appears to me open to the gravest doubt. Section 216 (B) lays down that the word "harbour" includes the assisting a person in any way to evade apprehension. The idea that it, nevertheless, does not include giving false information to the Police with a view to assisting an outlaw to escape, appears to me, with due respect to the high authority which passed the ruling, little short of a negation of the law, and one might almost say that such a view constitutes a direct encouragement to defeat the forces of law and order in dealing with what can only be described as a menace to the public. I should, therefore, even if the two cases were exactly parallel, decline to follow that ruling as a precedent. The cases, however, as I have already said, are in no way parallel. Akbar Ali not only did his best to assist the outlaw to escape, but it is clear that his intention was, even before the arrival of the Police, to assist the outlaw by warning him of any possible danger and of defeating his arrest. I, therefore, uphold the conviction of Akbar Ali under section 216, Indian Penal Code.

As regards the sentence, the most that could be said for the accused, is that he was in a position of dependence upon Mahmud Shah, and that he may have been influenced by the natural obligation of a servant towards his master. I do not consider, however, that such a plea can avail him. An outlaw, especially in the North Western Frontier Province, is a menace and an enemy to the public at large, and any person who conspires to assist him, must be held to be also an enemy of the public. There may be cases where Courts cannot withhold their sympathy for the actions of persons who have assisted outlaws by reason of relationship or overwhelming natural affection. There are no features, however, of this nature in the present case. I consider, therefore, that the sentence of 7 years' imprisonment passed upon the appellant was fully justified, and I must decline to reduce it. I, therefore, uphold the conviction and the sentence and reject this appeal.

Z. K.

*Appeal rejected.***PATNA HIGH COURT.**

CRIMINAL REVISION NO. 550 OF 1921.

November 25, 1921.

Present:—Justice Sir John Bucknill, Kt.
RAKTU SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1908), s. 437
—Discharge, order of—Further enquiry.

Where a person has been prosecuted before a competent officer, and has, after a fair trial before that officer, been found not guilty and discharged, the Magistrate finding definitely that the Crown had failed to make out a case against him, it is very improper, in the absence of some positive allegation of impropriety of conduct against the trying officer, for the accused person to be placed on his trial a second time for the same offence.

Application against the order of the District Magistrate, Darbhanga, dated the 13th September 1921.

Mr. Janak Kishor, for the Petitioner.

JUDGMENT.—This is an application in Criminal Revisional Jurisdiction No. 550 of 1921 made by one Raktu Singh. The applicant asks that an order of the District Magistrate of Darbhanga, dated the 13th of September 1921, directing that a further enquiry into a criminal case brought against the petitioner, in which he was tried and discharged by the Sub-Divisional Magistrate of Darbhanga for various offences notably against the provisions of sections 465, 468, 471 and 193 of the Indian Penal Code, be set aside.

There is a long history behind the case stretching back to the year 1918. I need not go into the details of the matter at great length but the story is that the petitioner purchased a share in certain villages from some persons, one of whom is the person who brought the original complaint against the present applicant. This person says that the applicant committed these various offences relative to forgery. It is said that when the applicant made an application to have his name registered before the proper authority that authority in the first instance allowed the application; on an appeal a higher authority again took the same view, but subsequently, on still further appeal, the Commissioner of the Division appears to have taken the opposite view and to have sanctioned the prosecution of the applicant under the sections of the Penal

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Code to which I have already referred. Then on this sanction which was apparently granted under section 476 of the Code of Criminal Procedure the applicant was tried before Mr. Shamsul Zoha, the Magistrate of Darbhanga, and this Magistrate, after hearing the case, gave a judgment of considerable length in which he very straightly states that the Crown had completely failed to make out the case for the prosecution. The applicant was, therefore, discharged. However, the person to whom I have referred as the complainant then went before the District Magistrate of Darbhanga and seems to have succeeded in persuading him somehow that the trial before the District Magistrate of Darbhanga had not been properly carried out; and this District Magistrate, who seems to have taken it for granted that the applicant was guilty, ordered that the matter should be re-opened (and I presume) that the applicant should be re-tried.

I cannot find any reason to support this finding. Here this man has been prosecuted before a competent officer and has been, after a trial before that officer, found not guilty and discharged. The Magistrate found definitely that the Crown had failed to make out a case against the accused. Under such circumstances, whatever may be the powers of the District Magistrate to order a re-opening of the matter, unless there is some positive allegation of impropriety of conduct (which there is not here) against the Trying Officer, I think it very improper that an accused person who had been definitely acquitted should be placed on his trial a second time for the offence. To me such a proposition is quite unsatisfactory. I must, therefore, set aside the order.

W. C. A.

Order set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 89 OF 1923.

March 23, 1923.

Present:—Mr. Justice Kulwant Sahay.

ABDUL HAMID—PETITIONER

versus

HASAN RAZA AND OTHERS

—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 147, 192, 528—Transfer of proceedings under ss. 145, 147—Magistrate, power of—Local inspection—Inspection, whether can be made by presiding Magistrate—Inspection, note of.

Proceedings under sections 145 and 147 of the Criminal Procedure Code are criminal cases and a Magistrate has power to transfer such cases under sections 192 and 528 of the Code. Consequently, where a District Magistrate, on receipt of a Police report to the effect that there is likelihood of a breach of the peace in certain locality, makes an order to draw up proceedings under section 147 of the Criminal Procedure Code and serve notices on the parties, ordering them to appear before another Magistrate, the order is not without jurisdiction. [p. 952, col. 2; p. 953, col. 1.]

The rule that in criminal cases a Court is only justified in holding a local inspection in order to explain the facts appearing in the evidence does not apply to section 147 of the Criminal Procedure Code. Special provision is made in the Code for local inspection in these cases. In cases where rights of irrigation and rights of taking water through particular channels from particular reservoirs are concerned, a local inspection is eminently necessary. Although, as a rule, it is better to have such an inspection made by some other person, there is nothing in law to prevent the presiding Magistrate from making it himself provided he records what he sees and does not act upon hearsay evidence. [p. 953, col. 1.]

A Court's finding must be based upon evidence duly recorded by it and not upon the impression formed by the Judge on a local inspection of the locality. He can, in order to elucidate the evidence, make a local inspection and the object of a local enquiry would be only with a view to understand the evidence actually adduced in the case. But it is absolutely necessary that if a Magistrate makes a local enquiry he must make a note of what he sees and must place it on the record, so that the parties may be in a position to know his impression and correct it if it is wrong. [p. 953, col. 2.]

Application against an order, dated 19th December 1922, passed by the Deputy Magistrate, Monghyr.

Mr. N. N. Sinha, for the Petitioner.

JUDGMENT.—The petitioner was the second party in a proceeding under section 147 of the Criminal Procedure Code. The dispute related to the right of taking water

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from Bhonria Ahar in village Jamuara belonging to the first party to the Kunda Ahar belonging to the second party. The case of the second party was that there is a river known as Husainabad river towards the south from which water used to come to Eksari Ahar through a channel, and from that Ahar the water used to be taken to the Bhonria Ahar in Jamuara, and from this Ahar the water passed through a channel to Khurumpur Ahar from where it was taken to the Kunda Ahar of the second party. The case of the first party was that the second party has no right to take the water from the Bhonria Ahar to the Kunda Ahar. The proceeding was initiated upon a report of the Sub-Inspector of Sheikhpura as regards the likelihood of a breach of the peace between the first party and the second party with regard to their right to irrigate the lands from the Bhonria Ahar. On the 7th November 1922 Mr. Lee, the District Magistrate, on receipt of the Police report, made an order to draw up proceedings under section 147, Criminal Procedure Code, and to serve notices on the parties by a special peon. The order of that date is as follows:—"The parties to appear with their witnesses and show cause at Sheikhpura Dak Bungalow before Second Lieutenant Ram Prasad Narain Sahi, on the 20th November. The case is transferred to his file for disposal. Evidence should be heard and the case decided on 20th November and 21st November at Sheikhpura." On the 20th November 1922, written statement and the *Fard-ab-pashi* were filed by the parties before the Second Lieutenant Ram Prasad Narain Sahi, and on the same date, after perusing the written statement and examining the Sub-Inspector at Sheikhpura the learned Deputy Magistrate went to the locality, made a local inspection, and after noting the facts of his having made the local inspection, he recorded in the order-sheet of the 20th November the following order: "I do not think it is necessary to examine any witnesses because they will not be able to say anything beyond what I have already seen. I have also perused the *Fard-ab-pashi* of Eksari" and then upon the application of the Mukhtar for the second party, who wanted to place certain lawpoints and other Record of Rights before the learned Deputy Magistrate, he

made the following order: "Put up in Monghyr on 23rd November 1922 for hearing parties about law points." On the 23rd November 1922 the following order is recorded in the order-sheet: "A law point is raised that evidence must be recorded. I shall do so on 27th November 1922. I shall also consider this point in the meantime. A petition is put up that I did not visit the locality at a place from which the channel comes from the river. I had been as far as it was pointed out to me. I could not go indefinitely. So this is rejected. Put up on 27th November 1922." A petition was thereupon filed before the learned District Magistrate for transfer of the case on the ground that the Deputy Magistrate did not make the local enquiry as requested and that he had already made up his mind that the petitioner was in the wrong. The learned District Magistrate, however, rejected the application for transfer and on the case being taken up by the Deputy Magistrate on the 13th of December 1922, he examined some witnesses for the parties and on the 19th December 1922, he made the final order in favour of the first party.

The first point taken by the learned Vakil for the petitioner is that the learned District Magistrate's order of the 7th of November 1922 directing the parties to appear and show cause before the Deputy Magistrate at Sheikhpura was without jurisdiction. He relies upon the case of *Misri Chaudhury v. Narsingh Prasad Tewari* (1). In that case it was held that section 147, as well as section 145, of the Code require that the Magistrate drawing up the proceeding shall require the parties concerned to attend his Court; and, therefore, when the Magistrate who draws up the proceeding orders the parties to appear before another Magistrate, he acts against the clear direction in the Code and acts without jurisdiction. Now, it has been held in a number of cases that proceedings under sections 145 and 147 are criminal cases and a Magistrate has power to transfer such cases under sections 192 and 528 of the Code of Criminal Procedure. If that is so, I see no ground for holding that the order for transfer

(1) 62 Ind. Cas. 179; 2 F. L. 5, 186; 22 Cr. L. J. 483.

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made in the present case was without jurisdiction. Indeed, it was conceded in the case just cited that the Magistrate had the power to transfer the case, but it was held in that case that the Sub-Divisional Magistrate who had drawn up the proceedings, did not transfer the case expressly or by implication to another Magistrate. In the case now before us, there is a clear order in the order-sheet of the 7th November 1922 transferring the case to the file of Second Lieutenant Ram Prasad Narain Sahi. I am, therefore, of opinion that the Deputy Magistrate, to whom the case had been transferred, had jurisdiction to deal with the case, and the Magistrate, who drew up the proceedings, had power to transfer the case.

The second point urged by the learned Vakil for the petitioner is that the learned Deputy Magistrate acted without jurisdiction in making the local inspection prior to taking evidence in the case. In my opinion there is no substance in this objection. Section 148 clearly provides for local inspection whenever such enquiry is deemed necessary for the purposes of Chapter XII of the Code. Such enquiry can be made either by any Magistrate subordinate to the Magistrate before whom the case is pending or by that Magistrate himself, as was held in the case of *Dowlat Koer v. Siva Pershad Pandit* (2). The rule that in criminal cases the Court is only justified in holding a local inspection in order to explain the facts appearing in the evidence does not apply to section 147 of the Criminal Procedure Code. Special provision is made in the Code for local inspection in these cases; and in cases where rights of irrigation and rights of taking water through particular channels from particular reservoirs are concerned, a local inspection is imminently necessary. It was also laid down in the same case that although, as a rule, it is better to have such an investigation made by some other person, there is nothing in law to prevent the presiding Magistrate from making the investigation himself provided he records what he saw and does not act upon hearsay evidence. This objection, therefore, must be disallowed.

The third objection taken by the learned (2) 10 Ind. Cas. 615; 15 C. L. J. 267; 12 Cr. L. J. 319.

Vakil for the petitioner is that in deciding the case the learned Magistrate has relied upon the result of his own local inspection and not upon the evidence on the record. This objection appears to be of substance and ought to be allowed. On a reference to the judgment of the learned Deputy Magistrate it is quite evident that his finding is based upon the results of his own local inspection. It is a salutary principle of law that the finding of a Court must be based upon evidence duly recorded by it and not upon the impression formed by the Judge on a local inspection of the locality. He can, in order to elucidate the evidence, make a local inspection and the object of a local enquiry would be only with a view to understand the evidence actually adduced in the case. Moreover, it is absolutely necessary that, if a Magistrate makes a local enquiry he must make a note of what he saw and must place it on the record so that the parties may be in a position to know what impression the Magistrate had got by the local enquiry. It is possible that the Magistrate may have formed a wrong impression, and, if the results of his inspection are recorded, the parties would be in a position to know if there has been an error and will be in a position to remove the wrong impression formed by the Magistrate. In the present case the learned Deputy Magistrate made no note of his local inspection and there is no record of it either in the order-sheet or anywhere else in the record. This objection ought, in my opinion, to prevail and the order of the learned Deputy Magistrate is set aside and the case remanded to him for disposal according to law.

N. K.

Case remanded.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 3 OF 1923.

March 7, 1923.

Present.—Mr. Justice Newbould and Mr. Justice Suhrawardy.

BAISHNAB CHARAN DAS AND OTHERS—
ACCUSED—PETITIONERS—
versusAMIN ALI—COMPLAINANT—OPPOSITE
PARTY.

Criminal Procedure Code (Act V of 1898), s. 350—Transfer of Magistrate—Judgment written after transfer—Delivery of judgment by successor—Jurisdiction.

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Section 350 of the Criminal Procedure Code does not give a Magistrate jurisdiction to deliver a judgment written by his predecessor.

Where a Magistrate after hearing evidence in a case is transferred and sends a written judgment to his successor, the latter acts without jurisdiction in delivering it. Even if the Magistrate himself delivers it after his transfer, he would be acting without jurisdiction.

Empress of India v. Anand Sarup, 3 A. 563; A. W. N. (1881) 37; 2 Ind. Dec. (N. S.) 343, relied on. Rule.

Syed Md. Saadulla, for the Petitioners.

Babu Priya Nath Dutt, for Babu Paresh Lal Shome, for the Opposite Party.

JUDGMENT.—This case was heard by Babu Sris Kumar Sen, the Sub-Divisional Officer of Karimganj, in the District of Sylhet, and after the hearing of evidence the Trying Magistrate was transferred to Haila Kandi in the District of Cachar and from there he sent a written judgment which was delivered at Karimganj by M. Muhammad Chowdhury, the Magistrate in charge of that Sub-Division. The Code of Criminal Procedure makes no provision for delivery of judgment written by the Magistrate who heard the case after he had ceased to have jurisdiction in the District. Even if the Magistrate, Babu Sris Kumar Sen, after his transfer, had himself delivered this judgment he would have acted without jurisdiction as was held in the case of *Empress of India v. Anand Sarup* (1). It is contended on behalf of the opposite party that section 350 would apply. Section 350 would, under certain circumstances, give the Magistrate at Karimganj jurisdiction to decide the case on evidence recorded by his predecessor but it could not give him jurisdiction to deliver judgment written by his predecessor. We must hold that the conviction and sentence passed on the accused were passed without jurisdiction.

We accordingly make this Rule absolute. We set aside the conviction and sentence and direct that the petitioners be re-tried. The fines, if paid, will be refunded.

N. K. Rule made absolute.

(1) 3 A. 563; A. W. N. (1881) 37; 2 Ind. Dec. (N. S.) 343.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 750 OF 1922.

January 24, 1923.

Present:—Mr. Justice Ross.

JAIRAM SAHU AND OTHERS—ACCUSED
—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 353—Income Tax Act (XI of 1922), s. 46—Jurisdiction of Income Tax Collector to issue distress warrant—Resistance to constable executing such warrant.

A Collector, acting under section 46 of the Income Tax Act, has no authority to issue a distress warrant to a Police Officer, and a Police Officer executing such a warrant cannot be said to be acting in the execution of his duty as a Police Officer within the meaning of section 353 of the Penal Code. [p. 955, col. 1.]

Application against a decision of the Judicial Commissioner of Chota Nagpur, dated the 16th October 1922, modifying a decision of the Sub-Divisional Magistrate, Chatra, dated the 18th September 1922.

Messrs. P. K. Sen and S. C. Dey, for the Petitioners.

Mr. L. N. Singh, Government Pleader, for the Crown.

JUDGMENT.—Petitioners Nos. 1 to 3 have been sentenced on appeal to two months' rigorous imprisonment each under section 353 of the Indian Penal Code, and petitioners Nos. 4 to 6 to six weeks under the same section. The case for the prosecution was that, on the 20th June 1922, a market was being held at Pathalgaria, and that the petitioners Nos. 1 to 3 with other shop-keepers were keeping a stall jointly. The Sub-Inspector of Gidhour Police Station appeared with a warrant for the realisation of income-tax from petitioner No. 1. Petitioners Nos. 2 and 3 were present and the Sub-Inspector attached a bag of money which was lying in front of them in execution of the warrant. The petitioners Nos. 2 and 3 protested that it was their money and that the Sub-Inspector had no right to take it. A disturbance followed and the Police Officer and the party accompanying him retired; a mob collected and chased them, but no personal injury was inflicted. The defence was that the warrant was illegal and that in executing it

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the Sub-Inspector could not be said to be a 'public servant' executing his duty as such. It was further urged on behalf of the accused that the petitioners Nos. 2 and 3 were separate from petitioner No. 1, and that, even if the warrant was good, the Sub-Inspector was not entitled to take their money. The warrant is a distress warrant issued by the Income-Tax Collector on the 3rd April 1922. It is in the old form and purports to be under section 26 of Act VII of 1918. The new Act (XI of 1922) came into force on the 1st April, and the corresponding section is section 46. That section describes the mode of recovering income-tax. The Collector may on receipt of a certificate from the Income-Tax Officer recover the amount specified therein as if it were an arrear of land revenue, and in areas notified by the Commissioner arrears may also be recovered by any process enforceable for the recovery of an arrear of any Municipal tax or Local rate. This latter provision corresponds to section 36 (4) of the old Act, except that there the local Government is the authority in place of the Commissioner. In Mazumdar's "Commentary on the Law of Income Tax" published in 1922, it is stated that no orders had been issued by the Lieutenant-Governor of Bihar and Orissa in Council under section 36 (4) and it was intended that the Collector should recover arrears by his own agency and not by the Municipality. No orders passed by the Commissioner under section 46, clauses (3) and (4), have been produced, and it would appear that this arrear of income-tax should have been recovered as if it had been an arrear of land revenue. But even supposing that a distress warrant could legally be issued, the Collector had, in my opinion, no authority to issue it to an Officer of the Police and the Police Officer executing such a warrant could not be said to be acting in execution of his duty as a Police Officer. On this ground, therefore, the charge under section 353 must fail.

There is a defect in the judgment in this case, in that no finding has been come to as to whether petitioners Nos. 2 and 3 were separate from petitioner No. 1 against whom the warrant was issued. It appears from the judgment of the Judicial Commissioner that one of the prosecution witnesses had agreed with the defence evidence

on this point; and if it was a fact that the money belonged to the petitioners Nos. 2 and 3 and that they were separate from petitioner No. 1, then, clearly, the seizure of the money was illegal. The petitioners could not be convicted without a finding on this part of the case. On both these grounds, therefore, I set aside the conviction and sentence passed on the petitioners and direct that they be acquitted and released from bail.

Z. K.

Rule made absolute.

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OUDE JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 76 OF 1922.

July 27, 1922.

Present:—Mr. Wazir Hassan, A. J. C.

Mahant DURGA BHARATHI—

APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 106, application of.

A *Patwari* was doing his duty, in making a *partial* accompanied by two tenants of the village, when the accused emerged from his house followed by two servants. An altercation ensued between him and the *patwari* resulting in grievous hurt being caused to the latter:

Held, that there was nothing in the circumstances to suggest that the grievous hurt was caused in a manner or under conditions which would either necessarily or likely cause a breach of the peace. [p. 956, col. 1.]

Application.

JUDGMENT.—This application was partly disposed of by my order of the 4th July 1922. The only ground which now remains for decision is whether the order of security passed against the applicant, Mahant Durga Bharathi, under section 106 of the Code of Criminal Procedure is a valid one. He has been convicted under section 325 of the Indian Penal Code. The question of law for decision is whether such a conviction is for "an offence involving a breach of the peace." The view taken in the Calcutta High Court is that those words connote offences in which a breach of the peace is an ingredient, *Arun Samanta v. Emperor* (1). The High Court of Madras is of the same opinion, *Muthiah Chetty v. Emperor* (2). These cases were considered by the

(1) 30 C. 366.

(2) 29 M. 190; 3 Cr. L. J. 461.

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High Court of Allahabad in the case of *Emperor v. Manik Rai* (3) and the learned Judge of that Court refused to accept the view taken in the High Courts of Calcutta and Madras. In the case of *Dubri v. Emperor* (4) the point of view was expressed as follows:—

“Without attempting to put a narrow construction on the word ‘involving’ I think it may well be doubted whether an offence under section 325 committed in the circumstances in which this particular offence was committed was an offence which in any way involved a breach of the peace.”

The learned Judge of this Court, however, definitely held that the expression “breach of the peace” implies some offence against the public.

In the case before me, I do not think it can well be predicated of the circumstances in which the offence of grievous hurt was committed, that there was any likelihood of an offence being committed which would amount to a breach of the peace in the sense adopted in the judgment of this Court just now referred to. The Patwari to whom the injury was caused was doing his duty of making *partal*. In the course of his wanderings he happened to come near the house of the applicant. He was accompanied, as he would naturally be, by two tenants of the village. The applicant emerged from his house in the company of three servants and the altercation which resulted in the injury to the Patwari ensued. There is nothing in these circumstances to suggest that the grievous hurt was caused in a manner or in conditions which would either necessarily or likely cause a breach of the peace. The fact that a general feeling of hostility existed in the village between the *zemindar* and the tenants is no part of the offence of grievous hurt for which the applicant has been convicted. Without deciding the question as to whether the interpretation adopted by the Calcutta and Madras High Courts of the term ‘involving a breach of the peace’ or of the Allahabad High Court is correct, I am clearly of opinion, that, in this particular case, there were no circumstances which constituted a breach of the peace as a necessary ingredient

in the offence for which the applicant has been convicted, nor even the circumstances were such as were likely to lead to “a breach of the peace.” I, therefore, accept the application in so far that I set aside the order calling upon Durga Bharti to execute a personal bond in the sum of Rs. 10,000 for keeping the peace for a term of two years. The application is dismissed in other respects.

N. K.

Application partly accepted & partly dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 658 OF 1922.

December 4, 1922.

Present:—Mr. Justice Adami.

JIBLAL TELI AND OTHERS—SECOND PARTY—PETITIONER

versus

GENA SAHU AND OTHERS—FIRST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 135, 141—Proceedings for removal of public nuisance—Jury, appointment of—Failure to return verdict—Procedure.

Where a person against whom a conditional order under section 133 of the Criminal Procedure Code is made obtains the appointment of a Jury but the Jury fails to return a verdict within the time fixed by the Magistrate, the latter has jurisdiction to make the order absolute under section 141 of the Code. [p. 957, col. 1.]

Where, however, the Jury fails to perform its duty through no fault of the person against whom a conditional order has been passed, he should be allowed to revert to the other alternative given him by section 135 of the Code and to show cause against the conditional order. [p. 957, col. 1.]

Kishori Lal Panuri v. Emperor, 4 Ind. Cas. 72; 13 C. W. N. 367; 10 Cr. L. J. 494, relied on.

Application against the order of the Sub-Divisional Magistrate of Madhubani, dated the 17th of May 1922.

Mr. S. M. Tahir, for the Petitioners.

Mr. Brij Kishore Prasad, for the Opposite Party.

JUDGMENT.—This application is directed against an order of the Sub-Divisional Magistrate of Madhubani passed under section 141 of the Criminal Procedure Code, directing the petitioners to remove an obstruction in

(3) 11 Ind. Cas. 589; 33 A. 771; 8 A. L. J. 925; 12 Cr. L. J. 405.

(4) 71 Ind. Cas. 691; 8 Q. L. J. 318; 24 Cr. L. J. 227.

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a certain road. Notice was issued by the Magistrate under section 133 of the Criminal Procedure Code on the application of the first party. It was alleged that an obstruction caused by the second party prevented free access to a certain well which had been used by the public. On receipt of the notice the petitioners came forward and, under section 135, applied for the appointment of a Jury. Certain members of the Jury were nominated by the parties and others by the Magistrate and the Sub-Registrar was appointed to be Foreman of the Jury with instructions to report by the 28th April. On the 28th of April 1922 the report had not been received and time was extended till the 17th of May. On this latter date the Sub-Divisional Magistrate recorded in the order sheet that the Foreman had sent back the papers stating that he was unable to meet the other members of the Jury as he was too busy. Thereupon the Sub-Divisional Magistrate made the order absolute under section 141 and directed the petitioners to remove the encroachment which had been reported to exist by the Sub-Overseer. Time was given for a report as to compliance with the order. On the 28th of July the Sub-Overseer reported that the encroachment had not been removed and the petitioners were then called upon to show cause why they should not be prosecuted under section 188, Indian Penal Code.

Now, according to the provisions of the Code, the Sub-Divisional Magistrate had jurisdiction to pass the order that he did. The petitioner had the choice under section 135 of either showing cause against the order under section 133 or to ask for the appointment of a Jury. They chose the latter alternative and, under section 141, if the Jury failed to return their verdict within the time fixed, the Magistrate had jurisdiction to make the order absolute.

Mr. Mohamed Tahir on behalf of the petitioners points out that the failure of the Jury to return their verdict was not due to any fault on their side and that the order absolute was passed without their knowledge; they did not come to know about it until the notice calling upon them to show cause why they should not be prosecuted under section 188 was received by them.

Had they known of the notice they would have applied to the Sub-Divisional Magistrate either to extend the time or to allow them to show cause and produce evidence.

Now, though, as I have said, there is no want of jurisdiction or improper exercise of jurisdiction in this matter, in the circumstances of the case, I think, that the petitioners should be given a chance of showing cause and producing evidence to show that they had a right to make the encroachments complained about. It was due to no fault of their own that the Jury had failed to perform the task allotted to them. I think that the Magistrate might, in the exercise of his discretion under section 141, have given the petitioners a chance of showing cause and satisfying himself that there was no reason to make the order absolute. The case of *Kishori Lal Panuri v. Emperor* (1) seems to indicate that, where the Jury fails to perform its duty through no fault of the person against whom a conditional order has been passed, that person should be allowed to revert to the other alternative given him by section 135. In this view, I set aside the order passed under section 141 and direct that the Sub-Divisional Magistrate give the petitioners a chance of showing cause under section 135 and producing such evidence as may seem fit to them. The proceedings taken under section 188 will be set aside.

Z. K.

Case remanded.

(1) 4 Ind. Cas. 72; 13 C. W. N. 367; 10 Cr. L. J. 494.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 679 OF 1922.

July 17, 1922.

Present.—Mr. Justice Harrison.

LAL CHAND—COMPLAINANT—PETITIONER
versus

DASONDHI—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 522, proceedings under—Conviction set aside—Property, restoration of.

Once it is held that no offence has been committed the consequences arising from the commission of the offence must automatically cease to be. Consequently, where a conviction is set aside, an order

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under section 522 of the Criminal Procedure Code resulting therefrom must also be set aside. But the order regarding the proceedings taken under section 522 of the Code should follow on the order disposing of the appeal from conviction and not precede it.

Kirpal Singh v. Labhu, 5 P. R. 1895 Cr. (F. B.), relied on.

Criminal revision from the order of Sessions Judge, Lahore, dated the 27th January 1922.

Dr. Gokal Chand Narang, for the Petitioner.

Mr. M. Saleem, for the Respondent.

JUDGMENT.—One Dasondhi was convicted by a First Class Magistrate under section 447, Indian Penal Code, and an order was also passed under section 522, Criminal Procedure Code, directing that the complainant should be put in possession of the property regarding which the offence had been committed. The conviction has been set aside on appeal by the learned Sessions Judge and the order under section 522 has also been set aside, and the complainant applies for revision.

It is clearly laid down in *Kirpal Singh v. Labhu* (1) that where a conviction is set aside the order under section 522 resulting therefrom must also be set aside. But, it is contended this is not exactly what has happened here. An appeal from the conviction was first presented and then a separate appeal from the order under section 522, and, on the application of the accused, this was dealt with first and independently of the appeal. This procedure was not correct, for the order regarding the proceedings taken under section 522 should have followed on the order disposing of the appeal. As, however, the appeal was eventually accepted the irregularity appears to me to be only technical and it would anyhow have been necessary either for the Sessions Judge or for this Court to have set aside the order under section 522 which arose from and depended entirely upon the existence of the conviction. Once it has been held that no offence has been committed the consequences arising from the commission of the offence must automatically cease to be. I, therefore, dismiss the application for revision and cancel my temporary order staying

proceedings. The order of the Sessions Judge will now be carried out in its entirety.

N. K.

Application dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION NO. 101 OF 1922.

October 5, 1922.

Present.—Mr. Daniels, J. C.

RAM LAKHAM—ACCUSED—APPLICANT
versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 133
—Public nuisance—Encroachment—Bona fide dispute—Procedure.

Where there is a bona fide dispute as to whether an encroachment exists or not, section 133 of the Criminal Procedure Code should not be applied in order to relieve the Government of the necessity of filing a civil suit. This is particularly the case where the encroachment has been in existence for a large number of years at the time the notice is issued under section 133 of the Code.

Luckhee Narain v. Ram Kumar Mukherjee, 15 C. 564; 7 Ind. Dec. (N. S.) 960 and *Emperor v. Dost Muhammad*, 28 A. 98; A. W. N. (1905) 202; 2 A. L. J. 599; 2 Cr. L. J. 517, relied on.

Criminal application against the order of the District Magistrate, Sultanpur, dated the 25th May, 1922.

Mr. H. D. Chandra, for the Appellant.

The Government Pleader, for the Crown.

ORDER.—This is an application for revision of an order passed under section 137, Criminal Procedure Code, directing the applicant to demolish a portion of his house which is alleged to encroach on a public road. The prosecution case is that the road at this point is 55 feet wide. The applicant appeared to show cause against the order and his contention is that the road is only 50 feet wide, in which case the encroachment complained of is really on private property. The case has not been carefully tried. The prosecution evidence shows that the disputed construction has been in existence for 20 or 25 years. It is not, therefore, a case of a new encroachment. The prosecution practically depends

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upon a map produced by the Sub-Overseer which shows the road as 55 feet wide at this point. The Sub-Overseer did not state and does not appear to have been asked at what date or under what authority this map was prepared. On the other hand, the Naib-Registrar Quanungo deposed on the basis of the Nazul Register that the road was 6 *gattas*, i.e., slightly under 50 feet wide, and he was not, so far as the record shows, cross-examined. These are very scanty materials on which to come to a conclusion that the applicant has been guilty of an unlawful obstruction. There is a long series of rulings, commencing with *Luckhee Narain v. Ram Kumar Mukherjee* (1), and including *Emperor v. Dost Muhammad* (2), which lay down that where there is a *bona fide* dispute as to whether an encroachment exists or not, section 133 should not be applied in order to relieve the Government of the necessity of filing a civil suit. (The rulings are collected in Mr. Boy's Commentary on the Code of Criminal Procedure.) This is particularly the case where the alleged encroachment has been in existence for over twenty years at the time when the notice was issued. The principle on which the decisions are based is, that the existence of a genuine dispute as to title suitable for decision by the Civil Courts is a sufficient ground within the meaning of section 137 for holding that the order is not reasonable and proper. In this case I find that there were no sufficient grounds on the record for making the order absolute and I accordingly allow the application and set aside the order. I may note that considerable difficulty has been experienced in this Court in deciphering the Magistrate's record of evidence.

N. K.

Application allowed.

(1) 15 C. 564; 7 Ind. Dec. (N. S.) 960.

(2) 28 A. 98; A. W. N. (1905) 202; 2 A. L. J. 599; 2 Cr. L. J. 517.

PATNA HIGH COURT.

CRIMINAL REVISION No. 684 OF 1922.

December 15, 1922.

Present:—Mr. Justice Mullick and
Mr. Justice Kulwant Sahay.

GAJO SINGH AND OTHERS—ACCUSED

—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 297, 408, 439—Trial by Jury—Charge to Jury—Opinion on evidence—Misdirection—Revision.

In a trial by Jury whether the evidence has been adequately criticised by the Judge in his charge to the Jury must depend upon the special circumstances of each case, such as the constitution of the Jury, their intelligence and education, the elaboration with which the case has been conducted on both sides, the skill of the defence and a variety of other circumstances.

It is open to a Judge in his charge to the Jury to express his own opinion of the evidence provided he cautions the Jury that they are not bound by that opinion.

Although a motion for revision lies against an order of a Sessions Judge passed in an appeal from a conviction by an Assistant Sessions Judge in a trial by Jury, it is not the intention of the law that the motion should be heard as an appeal. All that a petitioner can claim in an application for revision of this kind is a right to show that the Sessions Judge has decided wrongly, and he starts with a heavy onus.

Application against the order of the Sessions Judge of Monghyr dated the 23rd October 1922, affirming that of the Assistant Sessions Judge, Monghyr, dated the 18th August 1922.

Messrs. G. C. Pal and S. S. Bose, for the Petitioners.

Mr. H. L. Nandkoleyar, Assistant Government Advocate, for the Crown.

JUDGMENT.

Mullick, J.—This application for revision arises out of the alleged kidnapping of *Musammal Bhukni*, a Babhan girl, aged 11 or 12 years, on the 15th April last. It is alleged that the accused, Gajo Singh, Ramtahal Singh, Kuer Singh, Sahu Singh and Baso Singh, seized her on the bank of the river Chandail in her village where she had been taken to have a bath in connection with the *Mangrore* ceremony for her approaching marriage with one Lalbehari of her village which was to take place on the following Monday. She was then carried across the river and the above accused were join-

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ed by Chako Singh, Dhako Singh and Jamuna Singh of *Mauza Pine*. It is alleged that the intention of her assailants was to marry her to Chako Singh. Information was given that night by her brother, Sheodhari, to the Police, *Mouza Pine* was surrounded by the Police force on the following morning. Bhukni is said to have been detained by her assailants in various places in *Mauza Pine* till early on Monday morning when she was taken back to her village and left there. Her marriage with Lalbehari was celebrated, as arranged, on the evening of Monday the 17th.

The Assistant Sessions Judge, agreeing with the unanimous verdict of the Jury, has found the first set of accused guilty under sections 147, 363 and 363 read with section 149, Indian Penal Code, and sentenced them under sections 363 and 363, read with section 149, Indian Penal Code, to rigorous imprisonment for two years each. The three accused in the second set have been sentenced under section 363, read with sections 114 and 368, Indian Penal Code, to rigorous imprisonment for two years each.

There was an appeal to the Sessions Judge on the ground of misdirection. The learned Judge, after dealing carefully with the charges of the Assistant Sessions Judge, found that there had been no misdirection which had caused a miscarriage of justice and he has dismissed the appeal.

The present application before us is for the revision of the order of the Sessions Judge. The learned Vakil for the petitioners has taken us through the learned Assistant Sessions Judge's charge and has characterised it as being throughout hostile to the accused. The learned Vakil has also taken exception to the manner in which the learned Judge has expressed his own opinion of the evidence for the prosecution. Now, whether the evidence has been adequately criticised by the Court must depend upon the special circumstances of each case, such as the constitution of the Jury, their intelligence and education, the elaboration with which the case has been conducted on both sides, the skill of the defence and a variety of other circumstances. Here I find that the trial lasted ten days before a Jury of two Muhammadans and three Hindus, all of whom were apparently intelligent and educated men and some of whom were certainly

acquainted with local conditions in rural districts. I cannot, after reading through the evidence and the charge, say that any matter of prime importance has been omitted. It was open to the Judge to express his own opinion of the evidence provided he cautioned the Jury that they were not bound by that opinion, and in the present case this injunction has been carefully observed by the Assistant Sessions Judge.

I think, therefore, the application must be rejected.

I desire to observe that the learned Sessions Judge in disposing of the appeal has carefully dealt with all the points of misdirection taken before him and that, although a motion for revision does lie against the Sessions Judge's order, it is not the intention of the law that the motion shall be heard by us as an appeal; for if that were the case, then there would be no object in giving a right of appeal to the Sessions Judge at all. I think all that the petitioners can claim in an application for revision in a case of this kind is a right to show that the Sessions Judge has decided wrongly. They start with a heavy onus, and, approaching the case from that standpoint, I have no hesitation in rejecting the application.

The learned Vakil for the petitioners has made an appeal to us for the reduction of the sentence, but having regard to the fact that the girl belongs to the Babhan caste and that, even though she was not molested, her removal for two nights to another village and out of the custody of her guardian, is likely to cause considerable social injury, I do not think we should interfere. The object of the petitioners was to marry the girl to Chako Singh, but that is not any ground for mitigation.

Kulwant Sahay, J.—I agree.

Z. K.

Rule discharged.

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PATNA HIGH COURT.

DEATH REFERENCE NO. 13 OF 1922.
CRIMINAL APPEAL NO. 146 OF 1922.

October 23, 1922:

Present:—Mr. Justice Das and
Mr. Justice Adami.

EMPEROR—PROSECUTOR

versus

DEWAN KAHAR—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 164, 364—Evidence Act (I of 1872), ss. 24, 80—Confession—Mode of recording—Inquiry from accused, nature of—Failure to read statement to accused, effect of—Voluntary nature of confession, proof of—Retracted confession, value of—Corroboration—Conduct, evidence of, value of.

The Legislature, in section 364 of the Criminal Procedure Code, has made it obligatory upon a Magistrate examining an accused person to show or read the record to the accused person; and the reason is that he is at liberty to explain or add to his answers until he puts his signature to the record. In the absence of evidence that the record was shown or read to the accused person, a statement made by him to the Committing Magistrate cannot be used as evidence against him at his trial. [p. 963, col. 2.]

There is no real conflict between section 24 of the Evidence Act and section 80 of that Act. Whenever the conditions specified in section 80 are complied with it must be presumed that the document is genuine, and that the confession was duly taken; but, nevertheless, the Court is bound to treat it as irrelevant if it should appear to the Court that it was procured by any inducement, threat or promise. It is not possible for a Court to say that the making of a confession appears to it to have been caused by any inducement, threat or promise except upon evidence which is before it. The inference may be suggested by the confession itself, or by the evidence of the prosecution or by the evidence adduced by the accused person, or by the surrounding circumstances which the Court is always bound to take into consideration; but the conclusion cannot be reached on surmise or conjecture. [p. 964, col. 1.]

There is no rule of law which compels a Court to raise an inference of improper inducement from the mere fact that a confession is retracted; but, as a rule of prudence, the Courts in India have consistently declined to act on a retracted confession, unless, after consideration of the whole evidence in the case, the Court is in the position to come to the unhesitating conclusion that the confession is true. [p. 964, col. 1.]

This procedure practically effects the same result as a rule requiring proof of the voluntary character of a confession, inasmuch as, though the decisions require evidence of the truth of the confession and not of its voluntary character, the truth of voluntariness may not unreasonably, though not necessarily, be inferred where the truth of the confession is established. [p. 964, cols. 1 & 2.]

Evidence which itself requires explanation cannot, however, be used as corroboration of a confession. [p. 970, col. 1.]

Evidence of the conduct of an accused person, unless it is incompatible with his innocence is, in fact, a make-weight and nothing more, and care should be taken that it may not have an exaggerated effect. It depends upon temperaments, surroundings and other circumstances as to how a man would act in a particular situation, and all these combine to form a most fallacious basis for assured conclusions. [p. 969, col. 1.]

Jogjiban Ghose v. Emperor, 2 Ind. Cas. 681; 13 C. W. N. 861; 9 C. L. J. 663; 10 Cr. L. J. 125, followed.

An admission or confession must be taken and considered as a whole; the Court is not entitled to ignore a portion of the admission or confession and act upon what remains of it [p. 967, col. 1.]

Section 164 of the Criminal Procedure Code lays down very emphatically that no Magistrate shall record any confession unless upon questioning the person making it he has reason to believe that it was made voluntarily. No particular form of questions is indicated by the Code, for each case depends on its own facts, and just as there are cases which, on the face of them, attract the suspicion of a Magistrate, there are others which do not attract the suspicion of the Magistrate, so that no hard and fast rule can be laid down on the subject. [p. 965, col. 2.]

The Court must in each case satisfy itself that the Magistrate recording the confession honestly believed that the confession was a voluntary one. If the Court is so satisfied then the failure on the part of the Magistrate to put any particular question to the accused person would not involve the rejection of the confession. [p. 965, col. 2.]

Queen-Empress v. Navayan, 25 B. 543; 3 Bom. L. R. 122 and *Jiubodhan v. Emperor*, 39 Ind. Cas. 991; 1 P. L. W. 388; (1917) Pat. 149; 18 Cr. L. J. 623, referred to.

It is desirable that a Magistrate recording a confession should put various questions to the accused person to enable him to decide whether the confession is a voluntary one or not, but there is nothing in law which lays down that a Magistrate cannot satisfy himself as to the voluntariness of a confession by putting a single question to the accused person. [p. 965, col. 2; p. 966, col. 1.]

It is highly irregular for a Magistrate recording a confession to peruse the alleged statement of the accused person made to and recorded by the Police before recording the confession. [p. 965, col. 1.]

Emperor v. Radhe Halwai, 7 C. W. N. 220 and *Jogjiban Ghose v. Emperor*, 2 Ind. Cas. 681; 13 C. W. N. 861; 9 C. L. J. 663; 10 Cr. L. J. 125, relied on.

Reference made by the Judicial Commissioner, Chota Nagpur.

Mr. Devaki Prasad Sinha, for the Accused.
Syed Mohammad Tahir, Government Pleader, for the Crown.

JUDGMENT.

Das, J.—This is a reference by the Judicial Commissioner of Chota Nagpur for confirmation of sentence of death passed on one Dewan Kahar, who was charged with having murdered his wife on the afternoon

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of Monday the 15th of June 1922. There is also an appeal by Dewan Kahar against the conviction and sentence passed on him.

The admitted facts are very few and may be stated as follows :—

Dewan, the appellant, and Bhawan are two brothers and they lived near each other in separate houses in the same *mohalla*. On the day of the alleged occurrence, Dewan's daughter and the younger sister of Bhawan's wife were both married, and it appears that the ceremony took place in the house of Bhawan, who had more accommodation in his house and whose wife is very much attached to Dewan's children. Dewan and Bhawan each contributed Rs. 125 for the expenses in connection with the wedding ceremony. The wedding took place between 6 A.M. and 8 A.M. and the *barat* parties left at about 11 A.M.; before the parties left, Bhawan asked Dewan for Rs. 20 as he wanted to give each girl a present of Rs. 20 at the time of their going away, but Dewan said that he had no more money. The parties left, as I have said, at about 11 A.M. and Dewan and his wife stayed on in Bhawan's house, and it appears that the two brothers lay down to rest. At about 2 P.M. Bhawan got up and he saw Dewan still reposing and Dewan's wife sitting near Dewan. Shortly after, Dewan's wife got up, took the key of the house from Dewan, and went off, leaving her husband in Bhawan's house. At about 4-30 P.M. Dewan himself got up and left his brother's house taking with him his little child. He returned in about fifteen or twenty minutes with his child, and it is the prosecution case that the occurrence took place between the time he left his brother's house and the time he returned to it. Dewan returned to Bhawan's house, as I have said, in fifteen or twenty minutes, and asked for a glass of water. Bhawan saw marks of blood on his *dhoti* and asked him how those marks came on his *dhoti*. He gave no answer, but put his boy on the ground and threw down Rs. 40-8-0 which he had with him. Bhawan again asked him what had happened, and he said "We shall meet in Hell:" and then he added "Some one has killed my wife," and then he went off in the direction of the *Thana*. At the *Thana* he made a statement which the Police took down as the First Informa-

tion Report in the case, but which the learned Judicial Commissioner very properly excluded from his consideration on the ground that it was in the nature of a confession. The appellant was then sent by the Police to a Deputy Magistrate, in order to enable him to make a confession to the Deputy Magistrate. The Deputy Magistrate, Babu Baij Nath Sahay, for some reason which has not been made clear, did not record the confession that day. The appellant remained in the *Hajat* that night, and was again sent to the Deputy Magistrate the next morning. The Deputy Magistrate then recorded the confession under section 164 of the Criminal Procedure Code. The Inquiring Magistrate examined the appellant under section 364 of the Criminal Procedure Code, and it appears that the appellant made another statement before the Committing Magistrate which was in the nature of a confession. In the Sessions Court, however, the appellant retracted his confession and said that some one came to him at midnight while he was in the *Hajat* and asked him to admit the murder and said that if he admitted it he would be discharged by the Magistrate. His case before the Sessions Judge was that he followed the instruction given to him by this unknown person or persons as he thought that the Magistrate would discharge him if he admitted the murder.

The whole case of the prosecution rests on the confession alleged to have been made by the appellant; first, before Babu Baij Nath Sahay, and, secondly, before the Committing Magistrate. Apart from these confessions, there is no evidence whatever to connect the appellant with the murder of his wife, except, perhaps, certain statements alleged to have been made by him to certain persons as he was proceeding to the *Thana* after the alleged occurrence. It has not been argued before us that there is sufficient evidence to support the conviction if for any reason we are unable to act upon the confessions. It, therefore, becomes very material to consider, first, as to whether the confessions were properly admitted in evidence, and, secondly, whether they or any of them can be acted upon in the present case.

The argument in regard to the confession recorded by the Committing Magistrate

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is a short one, and it will be convenient to dispose of it at once. The argument is that there is no evidence that the confession, as recorded by the Committing Magistrate, was shown or read to the appellant or that he had any opportunity to explain or add to his answers. The argument is founded upon the express provisions of section 364 of the Criminal Procedure Code which provides as follows:—

"Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter, or the Chief Court of the Punjab, or the Chief Court of Lower Burma, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers."

It will be noticed that the Legislature makes it obligatory on the Court to show or read the record to the accused person: and the reason is that he is at liberty to explain or to add to his answers until he puts his signature to the record. Now, there is nothing in the record itself to show that it was shown or read to the accused person; but the learned Sessions Judge has taken the view that there is no law requiring the Magistrate to record any formal note in excess of what is prescribed by the form. We are not for the moment concerned with the question whether there is anything in the law which requires the Magistrate to record a note to the effect that the record was shown or read to the accused person. It may be pointed out that there is nothing in section 360 of the Criminal Procedure Code, for instance, which requires a Magistrate or Sessions Judge to record any formal note to the effect that the evidence of a witness has been read over and explained to a witness; but we find that the learned Sessions Judge has been very careful to add that formal note to the evidence of each of the witnesses

examined by him. The question is not whether there is any obligation on a Magistrate or a Sessions Judge to record any formal note to the effect that the record was read over to the accused person, but whether there is any evidence that the record was in fact read over to the accused person. The point was taken before him before the evidence was concluded, and the learned Sessions Judge should certainly have examined the Committing Magistrate on the point. As it happens, there is no evidence whatever that the record was shown or read to the accused person, and I must hold that the statement made by the accused person to the Committing Magistrate cannot be used as evidence against him.

I now come to the confession recorded under section 164 of the Criminal Procedure Code. There is an endorsement of the Deputy Magistrate to the effect that the confession was voluntarily taken and that it was taken in his presence and hearing and was read over to the person making it who admitted it to be correct, and that it contained a full and true account of the statement made by him. The learned Deputy Magistrate who recorded the confession has been examined in the case, and he says that he "judged that Dewan, accused, was talking quite voluntarily and without pressure."

The learned Vakil for the appellant has argued before us that, notwithstanding the certificate of the Magistrate, it has still to be proved by the prosecution that the confession was a voluntary one, and in support of his argument he relied upon section 24 of the Evidence Act. That section runs as follows:—

"A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by an inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

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It was argued that the use of the word "appear" shows that the section does not require positive proof of improper inducement to justify the rejection of the confession, such word indicating a lesser degree of probability than would be necessary if "proof" had been required. The argument, in my opinion, is not correct; for section 80 of the Evidence Act provides in distinct terms that whenever any document is produced before any Court purporting to be a statement or confession by any prisoner or accused person taken in accordance with law, purporting to be signed by any Judge or Magistrate, the Court shall presume that the document is genuine; that statements as to the circumstances under which it was taken purporting to be made by the person signing it, are true, and that such statement or confession was duly taken. In my opinion there is no real conflict between section 24 of the Evidence Act and section 80 of that Act. Whenever the conditions specified in section 80 are complied with it must be presumed that the document is genuine, and that the confession was duly taken; but, nevertheless, the Court is bound to treat it as irrelevant if it should appear to the Court that the confession was procured by any inducement, threat or promise. Now I do not see how it is possible for a Court to say that the making of the confession "appears" to it to have been caused by any inducement, threat, or promise, except upon evidence which is before the Court. The inference may be suggested by the confession itself, or by the evidence of the prosecution or by the evidence adduced by the accused person, or by the surrounding circumstances which the Court is always bound to take into consideration; but the conclusion cannot be reached on surmise or conjecture. The question, however, is of academical interest in this case for, as I have pointed out, the confession has been retracted, and it is the universal practice of this Court not to rely or act on a confession which has been retracted unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true. As it has been pointed out, this procedure will practically effect the same results as a rule requiring proof of the voluntary character of a con-

fession, inasmuch as though the decision require evidence of the truth of the confession and not of its voluntary character the truth of voluntariness may not unreasonably though not necessarily, be inferred where the truth of the confession is established. I hold on the argument which has been advanced before us that the confession was properly admitted in evidence by the learned Sessions Judge.

It was next argued that the learned Magistrate in recording the confession acted so irregularly that we ought not to give effect to the confession. It was said that the learned Magistrate did not ask the accused person how long he was in custody. I quite understand that where an accused person has been in the custody of the Police for a very considerable time, that circumstance itself ought to put the Magistrate on his guard in recording the confession of an accused person; but in this case the learned Magistrate was aware of the fact that the accused person was in the custody of the Police, if at all, for one night. I myself think that the learned Deputy Magistrate should have recorded the confession of the accused person as soon as he was produced before him. If he had done so, it would not have been open to the accused person to put forward the story that while he was in the *Hajat* after his arrest he was tutored to make a confession by some body or other. It is greatly to be deplored that the learned Deputy Magistrate waited till the next morning to record the confession of the accused person but that is entirely a different matter. The question which we have to decide now is, is the confession to be excluded because the Magistrate did not ask the question how long the accused person had been in the Police custody? In the case of *Queen-Empress v. Narayan* (1) upon which reliance was placed, the Court found that, although the accused person was in fact arrested on the 11th of June, the Police records showed, and falsely showed that he had been arrested on the 21st June, on which date he made the confession. The Bombay High Court thought that in a case where the confessing accused had been for ten days in detention by the Police, obviously the first question which a Magistrate

(1) 25 B. 349; 3 B.O.M. L. R. 122.

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should put, in order to satisfy himself, that the confession will be a voluntary one, is, how long has the accused been in custody of the Police? Each case must be decided on its own facts, and I can see no resemblance whatever between the case of *Queen-Empress v. Narayan* (1) and this case. Section 164 (3) of the Criminal Procedure Code forbids a Magistrate to record a confession, unless upon questioning the person making it he has reason to believe that it was made voluntarily. The form of questions is not indicated in the Code, for the obvious reason that each case has its own peculiarities. In the present case the accused person was actually produced before the Magistrate as soon as he was arrested and was produced before him the next day. I am unable to hold that the confession should be ignored on the ground that the Magistrate did not ask him how long he was in Police custody. I do desire to point out, however, that it was highly irregular for the Magistrate to have perused the alleged statements of the accused made to and recorded by the Police Officer before proceeding to question the prisoner. This was pointed out in *Emperor v. Radhe Halwai* (2) and was repeated in *Jogjiban Ghose v. Emperor* (3). It is a matter of considerable surprise to us that these decisions were ignored by the Deputy Magistrate in question.

It was next argued that the learned Magistrate should have asked the accused person his motive for making the confession. In support of this argument a dictum of Roe, J., in the case of *Jinbodhan v. Emperor* (4) was relied upon. In that case the Court found, first, that the confession was made in response to an inducement by the Police to the effect that nothing would happen to the persons making the confession if they gave information, secondly, that they were recorded in the presence of a Police Officer by a Magistrate who failed to comply with the provisions of section 164 of the Criminal Procedure Code, and thirdly, that the confessions were inconsistent with each other and with the evidence recorded in the case. On these findings the Court re-

fused to take the confession into its consideration. Mr. Justice Roe, in the course of his judgment said as follows:—

"In the second place, as I understand section 164 (3), a Magistrate is bound to question the accused closely as to his motives in making a confession, and if he fails to do so, he has no jurisdiction to say that he is satisfied that the confession is voluntarily made."

If Mr. Justice Roe intended to lay down the proposition which he in fact did, as a proposition of law, then I respectfully dissent from it. If, on the other hand, he laid down the rule as a rule of prudence then I entirely endorse it. As I have pointed out, the Criminal Procedure Code lays down very emphatically that no Magistrate shall record any confession unless upon questioning the person making it he has reason to believe that it was made voluntarily. Now, each case depends on its own facts and just as there are cases which on the face of them attract the suspicion of a Magistrate, there are others which do not attract the suspicion of the Magistrate. It is quite impossible to lay down any hard and fast rule on the subject. The Court must in each case satisfy itself that the Magistrate honestly believed that the confession is a voluntary one. If a Court is so satisfied, then the failure on the part of the Magistrate to put any particular question to the accused person would not involve the rejection of the confession. The rules laid down in various cases to which we are referred are rules of prudence rather than rules of law, and though it is very necessary that the Magistrates in this country should, in recording the confession, observe these rules it must be remembered that these rules have been formulated in order to enable the Magistrate to decide whether the confession is a voluntary one or not, and where the Court is satisfied that there was nothing in the circumstances connected with the making of the confession to attract the suspicion of the Magistrate, the confession will stand, though the rules were not strictly observed.

It was next argued that a comprehensive question, such as was put by the Magistrate in this case, is not sufficient. It is, I think, desirable that a Magistrate in recording the confession should put various questions

(2) 7 C. W. N. 220.

(3) 2 Ind. Cas. 681; 13 C. W. N. 861; 9 C. L. J. 663; 10 Cr. L. J. 125.

(4) 39 Ind. Cas. 991; 1 P. L. W. 388; (1917) Pat. 149, 18 Cr. L. J. 623.

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to an accused to enable him to decide whether the confession is a voluntary one or not; but, as I have said before, there is nothing in law which lays down that a Magistrate cannot satisfy himself as to the voluntariness of the confession by putting a single question to the accused person. In my opinion, if the accused person had not retracted his confession, there would be no ground whatever for not acting on the confession made by him.

But, as I have pointed out, the confession has been retracted and the question which we have to decide is whether we ought to convict the accused person on the confession which he has retracted. Now, there is no rule or law which compels us to raise an inference of improper inducement from the mere fact that a confession is retracted; but as a rule of prudence, the Courts in this country have consistently declined to act on a retracted confession, unless after consideration of the whole evidence in the case the Court is in the position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated by credible independent evidence.

I propose then to consider whether we are in a position to come to the unhesitating conclusion that the confession upon which the prosecution relies is true. The learned Sessions Judge has come to the conclusion from the evidence in the record and from the surrounding circumstances that the confession is true. I have come to the opposite conclusion. It is, therefore, necessary to deal with this subject with some care, and I propose to deal with the whole confession in order to see whether the confession has received corroboration from independent evidence.

The confession runs as follows:—

"I had in my house Rs. 500 (in cash) tied in a piece of cloth in an earthen jar (*Chukka*) which was put underneath the ground below the hearth. Out of the sum I paid Rs. 260 to one creditor named Haricharan, he is a Munshi in a Coolie Depot." There is no evidence whatever to show that he did in fact conceal Rs. 500 underneath the ground, or that he paid Rs. 260 to one creditor named Haricharan. It may be urged that with the appellant in the dock and his wife dead it is impossible

for the prosecution to prove that he did in fact conceal Rs. 500 underneath the ground; that is undoubtedly so. But, it was possible for the prosecution to prove that he did in fact pay Rs. 260 to a creditor named Haricharan. I lay particular stress on this point because the burying of the money underground, as will presently appear, is an important part in the confession. The confession goes on as follows:—

"I had taken out of it Rs. 120 for the celebration of the marriage ceremony, Rs. 140 was left as balance. It is two months since I last concealed it underground. I had settled the marriage of my daughter with the Rs. 100 which I had taken out, besides I had an extra sum of Rs. 100 which I had kept for the marriage."

Stopping here for a moment, it is sufficient to point out that he gave his brother Rs. 125 and not Rs. 100 as is alleged by him in the confession; but the point is a small one and may be ignored. The confession then goes on as follows:—

"The *Barat* party came to my place the day before yesterday at 8 P. M. There was a dancing party in the *Barat*. A large number of persons were witnessing the dance. I was working inside the house. I felt thirsty and asked my wife to give me water to drink. After fifteen minutes she said that she would give me water on her coming back, and she went away towards the place where the boy was dancing. But I felt very thirsty and so I followed her. She went into the courtyard of *Mistiri*. I remained standing there. The *Mistiri* whose name was Mangar Kahar, was also witnessing the dance. He left the place and went into the house. Suspicion arose into my mind. I went into the house and then I found Mangar *Mistiri* having sexual intercourse with my wife in the *Varandah*. I did not raise any alarm and came back silently."

This is an important part of the story and undoubtedly constitutes, so far as the confession is concerned, one of the motives for the murder. Now, there is not only no corroboration of the incident to which the confession refers; but the learned Sessions Judge has recorded a distinct finding to the effect that this portion of the story is untrue, and was probably introduced by him to save himself. The view of the learned

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Sessions Judge is that some friend with superficial knowledge of law must have advised the accused that he would be acquitted of murder, if he showed that his wife had been unfaithful. The conclusion of the learned Sessions Judge is, in my opinion, a remarkable one. There was no obligation whatever on the accused person to make any confession to the Magistrate. It is only when a person is seized with remorse after committing a crime that he at all thinks of making a confession of his crime unless indeed any inducement is offered to him. We will assume in this case that no inducement whatever was offered to the accused person. Why then should he make any confession at all to the Magistrate, if at the same time he thought it necessary to invent a story in order to escape the penalty of law? I know of no authority which enables a Court of law in the case of an admission or confession to ignore a portion of such admission or confession and act upon what remains of that admission or confession. It is settled law that an admission or confession must be taken and considered as a whole. It is, however, sufficient to say at this stage that this portion of the confession which, undoubtedly, according to the confessing accused person, constituted one of the motives for the crime has not only not received any corroboration from the evidence in the case, but has been distinctly found to be false by the learned Sessions Judge. The confession then goes on as follows:—

"I had to send back the *Barat* party the following morning. I then asked my wife to come with me and point out the money as I had to send back the marriage party. Then my wife and I went to the spot where the money was buried."

This again is at variance with the evidence of Bhawan Kahar. Bhawan Kahar's evidence is that he wanted Rs. 20 from his brother as he wanted to give each of the girls Rs. 20 at the time of the going away of the brides, and that his brother told him that he had no money with him. The evidence of Bhawan Kahar establishes beyond a shadow of doubt that the accused person stayed in his house after the *Barat* parties had gone, and did not leave his house till about 4 or 4-30 P. M., his wife having preceded him shortly after 2 P. M. The confes-

sion suggests that he went to his house with his wife before the *Barat* parties actually left Bhawan's house and that he went to his house in order to get the money which he might give to his daughter at the time of the going away. The confession is, therefore, in material respects at variance with the evidence for the prosecution. In the next place, as the confession later on makes it clear, he had some money with him. According to the evidence of Bhawan Kahar, he had Rs. 40-8-0 in his pocket at that time. His brother asked him for Rs. 20. It is unlikely that he should have gone to his house to fetch Rs. 20 buried under the *Chulha*, when he had Rs. 40-8-0 in his pocket.

The confession then runs as follows:—

"I found the spot where the money was buried dug out and there was no money."

So far as this portion of the confession is concerned, the prosecution claims that there is corroboration in the circumstances that the Police found that there was disturbed earth on the floor under the *Chulha*. I can hardly regard it as corroboration, although this is a circumstance on which the prosecution is entitled to rely.

"Then I asked my wife what had become of the money. She said that she did not know it. I said that, none but you and me have got an entrance into the house, who else will then take the money? I asked her twice but she said that she knew nothing about the money. She then said that she would tell the truth. She then said that with the money she had purchased a pair of *Goraon* of silver, a pair of *Angutha* and *Haikal* all made of silver from her maternal uncle Rangi Kahar. But she further said that she was tutored by her uncle not to confess it at first, but that when she would be vexed much, she should say so."

Now, it was open to the prosecution to examine Rangi Kahar on this point. Rangi Kahar, the maternal uncle of the deceased, was in fact examined on behalf of the prosecution. He was in no way friendly to the accused person, and would most certainly have taken to heart the fact that his niece had been murdered by the appellant. If in point of fact, the deceased had purchased the jewellery through her uncle Rangi Kahar, it is incredible that the prosecution while examining Rangi Kahar,

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should have missed the point that his evidence could have corroborated the confession on a material point, but there is nothing in the evidence of Rangi Kahar which lends any support to the confession. The inference is irresistible that Rangi Kahar, if he had been asked, would have failed to support this portion of confession. The confession then runs as follows :—

"I was much annoyed at this—Why had she spent the money without my permission? Thereupon my wife laid down upon the *Charpoy*, but she was awake. I then went to cut her throat with a knife. She then got up and began to raise an alarm. I then took up a *Tabal* (axe) that was kept on the *Patwat* of the room."

Stopping here for a moment, it may be pointed out that the axe, which was produced in Court and which was alleged to be the instrument with which the accused person killed his wife, had not been identified as the property of the accused person. There is absolutely no evidence on the record on this point, and it is impossible to hold that the axe with which the murder is alleged to have been committed is the property of the accused person. It may also be pointed out that the Police made no attempt to find out whether any one heard the cries of the deceased. The confession then proceeds as follows :—

"I struck her with it and she fell down on the *Khatia*. I dealt her several blows with the axe on the neck and then she died. I then started for the Police Station to lodge information. I locked up the room in which was the corpse of my wife, and shut the door of the *verandah*. I started with my son. I met an old Dusadhin in my way, I said to her, 'Look here, I have killed my wife. I am now going for good. You will please take care of my son.' Thence I went to my brother. He having seen my *dhoti* stained with blood, enquired of me what the matter was, I said to him 'I have killed my wife. Here is my son, keep him in your custody.' I gave him what I have left with me out of Rs. 200 and told him that I was then leaving the place for good, that there was no hope of my escape and that he would take care of my son. In my way I met one Chhatu Teli's wife to whom also I said that I had killed my wife

and that I was going to the Police Station. Thus I proceeded raising an alarm and telling similar things to lots of persons. I met Laloo Constable as well, I told him the same thing. Thence I went to Mangtu Seth. I purchased cloth from his shop and owed some money to him. I asked him for my account. He replied that some pice was due from me. I told him that I had paid the pice. Then he replied that it would be due from my brother then, and that it would be realized from him. I did not speak to him about my killing my wife. I then went direct to the Police Station and having arrived there myself lodged the information. I shall not make any further statement."

The learned Sessions Judge strongly relies upon the statements which he did make to various persons on the way from his house to the Police Station and he comes to the conclusion that there is strong corroboration in the evidence of the persons, whose names are mentioned by him in the confession, of the truth of the confession. It is necessary then to see whether the view of the learned Sessions Judge can be supported. The first person mentioned by the accused person is an old Dusadhin to whom he is alleged to have said, "Look here, I have killed my wife. I am now going for good. You will please take care of my son." The old Dusadhin is Kalpha Dusadhin, the fifth witness examined on behalf of the prosecution. Her evidence is as follows:

"About 4 P.M. on the day of occurrence I came home and saw Dewan pass with his infant child and I greeted him. After we had passed he turned and said he was going away and asked me to look after his son and daughter. He went in the direction of his brother's house. At 5 P.M. a crowd collected at Dewan's house and I heard that Koili had been killed." It is quite clear from the evidence of Kalpha Dusadhin that she never knew anything about the occurrence until 5 P.M. when she heard that Koili, that is to say, the wife of the accused person, had been killed. It was one thing to say that he was going away, and quite another thing to say that he had killed his wife and that the Dusadhin would have to take care of his son. It is quite clear that the Dusadhin did not infer from what the accused person stated to her that he had killed his wife. Next, he is alleged to have

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admitted to his brother that he had killed his wife. The evidence of Bhawan Kahar and Sheo Lochan does not support the confession on this point. Bhawan distinctly says that the accused told him that some one had killed his wife. It is quite true he also said this, "We shall meet in Hell," but it is impossible to come to an inference of guilt from the expression used by him. Sheo Lochan, it may be pointed out, is a friend of his brother, and was present in the house of Bhawan when Dewan came to him after the alleged occurrence. The evidence of Bhawan Kahar and Sheo Lochan is undoubtedly at variance with the confession. The next person mentioned in the confession to whom he is alleged to have confessed is Chattoo Teli's wife, but she has not been examined in the case. The next person mentioned in the confession is one Laloo Constable who is probably the same person as Latoo Ram, the 9th witness examined on behalf of the prosecution. His evidence is as follows:—

"On the Monday of occurrence I was at my door and saw accused passing in the direction of the *thana*. He said '*Ham Jahannum Jate, Jai Ganga*.'"

"I called to him but he said no more. Later the Police came and I heard that his wife had been killed."

Now, there is no implication of guilt in the expression used by him to Latoo Ram, and it is clear that Latoo Ram himself did not think that he had committed any crime. The expression is capable of a perfectly reasonable explanation, and I can hardly regard the expression "*Ham Jahannum Jate, Jai Ganga*" as corroborating the confession when he says that he confessed his guilt to Latoo Constable. In this connection it is important to remember that the evidence of conduct of an accused person, unless it is incompatible with his innocence, is, as was pointed out by Sir Lawrence Jenkins in *Jogjiban Ghose v. Emperor* (3), in fact a make-weight and nothing more, and care should be taken that it may not have an exaggerated effect. As was pointed out in that case, it depends upon temperament, surroundings, and other circumstances as to how a man would act in a particular situation, and that all these combine to form a more fallacious basis for assured conclusions. The expression used

by the accused person is, at best, an equivocal one, and you cannot have corroboration of that which requires corroboration by evidence which itself requires explanation. These are all the persons mentioned in the confession; but certain other persons have been examined by the prosecution, and it is necessary to examine their evidence with a view to see whether they, or any of them, in any way, corroborates the confession made by the accused person. I have already dealt with the evidence of witnesses Nos. 1 and 2 examined on behalf of prosecution.

The third witness is *Musammât Etwarîa Kaharî*, the wife of Bhawan. She says definitely that she heard the accused telling her husband that some one has killed his wife, and that he was going to the *Thana* to lodge information. There is clearly a conflict between her evidence and the confession. The next witness is Deodhari Teli who says that the accused was passing his house and was repeating "*Zananna ke mar delin*." In his cross-examination he said that when he saw Dewan pass, he was sitting at the door of his stall in the Bazar, that it was a Bazar day and that many persons were about. With reference to this evidence the learned Sessions Judge says as follows:—

"This important evidence may perhaps have less weight when it is remembered that the witness was busy in the market, and that it would be quite possible for him to make a mistake between the first and third persons of the verb. The third person would be *Mar delak* or *Mar delan*. This is important, as it is accused's case now that he found his wife murdered by someone and ran to the *Thana* to report it."

The seventh and eighth witnesses are important from this point of view. The seventh witness is Mahadeo Prasad and the eighth witness is Gazafir Hussain. They were both seated at the Marwari Library, when the accused Dewan passed the road and saluted Mahadeo Prasad. It is the evidence of both the witnesses that what the accused person said was addressed to Mahadeo Prasad. Mahadeo Prasad's evidence is this:—

"I was sitting at the Marwari Library about 4 P. M. about three months ago, when this accused Dewan passed on the

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road and salaamed me. He said he was going. I said where" His answer was "Hamesh ke waste jate hain." Thence he went towards the Bazar. He had on yellow clothes. From his articulation I took him to be intoxicated."

The expression used by the accused person to him, according to the evidence of Mahadeo Prasad, in no way lends any corroboration to the confession because, as I have said before, you cannot rely upon an expression which itself requires explanation as corroborating a fact which requires corroboration. Gazafir Hussain, however, supports the prosecution on this point. His evidence is as follows:—He salaamed to Mahadeo Babu and said:—I have finished one person and now am off for the rest of my life."

It may be pointed out that he is the only witness who does support the prosecution on this point. Now, both Mahadeo Prasad and Gazafir Hussain are undoubtedly independent witnesses, and it is remarkable that what the accused person did say to Mahadeo Prasad was interpreted by them in two different ways. He is, however, the only witness who supports the prosecution, and when all the circumstances connected with the confession are considered and critically considered, it is impossible to rely upon the evidence of a single witness, and to hold that the confession has received corroboration in material parts.

In my opinion, the confession is in material respects at variance with the evidence for the prosecution, and it is quite impossible to say that the truth of the confession has been established. It is admitted that if the confession be excluded from our consideration there is not sufficient evidence on the record on which we can support the decision of the learned Sessions Judge. It may be that the whole conduct of the accused person is very suspicious, but then, as has been pointed out more than once, "suspicion," however strong, can never take the place of "legal proof." In my opinion, the evidence in the case falls far short of the proof which we would require in a case of this nature. I would allow this appeal, set aside the conviction and the sentence passed on the appellant, and

direct that he be set at liberty forthwith. The reference will stand discharged.

Adami, J.—I agree.

Appeal allowed.

Z. K.

LAHORE HIGH COURT.

CRIMINAL REVISION NO. 340 OF 1922.

August 3, 1922.

Present.—Mr. Justice Campbell.

CHARN DAS—PETITIONER

versus

RODU AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195
—Sanction to prosecute—Jurisdiction to grant sanction—Notice, issue of, whether necessary—Notice, omission to issue—Revision.

A Magistrate has no jurisdiction to sanction prosecution for a statement made before another Magistrate. [p. 971, col. 1.]

Before sanction to prosecute a person is granted under section 195 of the Criminal Procedure Code, a notice should be issued to him asking him to show cause against the grant of sanction. Such notice may not be legally necessary but it is desirable it should be given. The omission to give notice taken into consideration with other circumstances, for instance, the fact that the sanction is vague and not in specific terms or is in excess of the Magistrate's power, is a sufficient ground for setting aside, on revision, an order granting the sanction. [p. 971, col. 1.]

Inayat Ali v. Mohar Singh, 28 A. 142; A.W.N. (1905) 231; 2 Cr. L. J. 598, relied on.

Criminal revision against an order of the Sessions Judge, Amritsar, dated the 21st February 1922,

Lala Hukam Chand and Mr. Lal Chand Mehra, for the Petitioner.

Mr. Govind Ram, for the Respondents.

JUDGMENT.—The petition is by Charn Das for revision of the order of Sardar Sundar Singh, Magistrate of the First Class, Amritsar, sanctioning under section 195, Criminal Procedure Code, his prosecution for an offence under section 193, Indian Penal Code.

The learned Sessions Judge refused to interfere under section 195, sub-section (6).

The order complained about sets forth that Charn Das lodged a false complaint

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against Maharaj Mal and others under section 500, Indian Penal Code, and that he made many false statements in the complaint. Three instances are then detailed and the order ends by granting sanction for the prosecution of Charn Das under section 193, Indian Penal Code, in regard to all the wrong statements which he has made in Court and out of which some have been mentioned below by way of example.

The three instances are:—

(1) A statement by Charn Das that he had not been convicted previously for theft.

(2) His denial that he had made a statement admitting such conviction in the Court of Laia Rangi Ram on the 2nd October 1920, and

(3) A statement that the betrothal of his son was cancelled on account of the defamatory allegations by Maharaj Mal and others, which statement Charn Das had subsequently admitted to be correct.

Notice was issued in the present proceedings on the ground that the sanction was vague, and it is certainly so. Furthermore, the statement referred to in (3) above which the Magistrate considers to be false was made before Mr. Connor, Additional District Magistrate, at the time when the complaint was first presented and not before Sardar Sundar Singh to whom it was transferred subsequently. The latter had no jurisdiction to sanction prosecution for a statement made before the Additional District Magistrate.

I find also that sanction was given without previous notice to Charn Das, the petitioner. Such notice may not be legally necessary, but it has been held repeatedly to be highly desirable that it should be given and the omission to give notice taken into consideration with other circumstances has been the ground for setting aside on revision such orders as the present, for example in *Inayat Ali v. Mohar Singh* (1).

In regard to the present case the absence of previous notice to the petitioner renders it necessary to take stricter notice of the vagueness of the sanction than might have been taken had Charn Das been in Court

when the order was passed. In my opinion, since it is not in specific terms and since it appears in one respect to be in excess of the Magistrate's powers, I decide to set aside the order in question and accepting the revision direct accordingly. Should the learned Magistrate desire to revive the proceedings before him with a view to granting fresh sanction which shall not be open to the objections above stated, he must give the respondent an opportunity of showing cause against the grant of sanction and the sanction, if given, must specify each particular portion of the particular deposition made by the respondent in respect of which the petitioner for sanction is authorised to accuse the respondent. The Magistrate might also consider, before going further with the matter, whether any real useful purpose is served by permitting the parties to continue to use the Courts for prosecuting their squabble.

N. K.

Order accordingly.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 353 OF 1922.

July 19, 1922.

Present.—Mr. Justice Coutts and Mr. Justice Das.

LACHMI NARAIN AGRAWALA—

PETITIONER

versus

MUKHRAM MARWARI—OPPOSITE

PARTY.

Practice—Local inspection before hearing of case—Inspection restricted to situation and features of disputed property—Magistrate, jurisdiction of.

Where in a proceeding under section 145, Criminal Procedure Code, the Magistrate, before beginning to hear the case, goes to the spot in order to see the exact land in dispute and the features of the disputed property and does not take any evidence on the spot or direct his enquiry to any matter which can be proved by oral evidence and places on record a note of his inspection, he acts within his jurisdiction. [p. 973, col. 1.]

Batbon Shaikh v. Emperor, 5 Ind. Cas. 365; 37 C. 343; 14 C. W. N. 422; 11 C. L. J. 335; 11 Cr. L. J. 121, distinguished.

(1) 28 A. 142; A. W. N. (1905) 231; 2 Cr. L. J. 596.

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Criminal revision.

Misses. P. K. Sen, G. C. Pal and S. C. Majumdar, for the Petitioner.

The Government Advocate and Mr. B. N. Mitter, for the Opposite Party.

JUDGMENT.

Coutts, J.—This is an application in revision against an order passed in favour of the first party in a proceeding under section 145 of the Criminal Procedure Code. The dispute relates to some 100 *bighas* of land situated in *Mouza* Barmeshia. The first party obtained a lease from Thakur Ran Bahadur Singh of some 700 *bighas* of coal land covering the whole of the northern portion of the *Mouza*. Subsequently, the second party obtained a lease of 100 *bighas* of land which they allege was excluded from the lease of 700 *bighas* which had been granted to the first party. The dispute is with regard to this 100 *bighas* the first party claiming that it is within their 700 *bighas* and that they have been in possession, the second party claiming that it is not within the 700 *bighas* and that the first party have not been in possession.

The learned Deputy Magistrate who heard the matter decided in favour of the first party and the second party made this application in revision.

The first point urged is, that the learned Deputy Magistrate has approached the case from a wrong point of view inasmuch as he has considered the document of title of the first party and has not considered the document of title of the second party. What, in fact, the learned Deputy Magistrate has done is that he has considered the lease of the first party, on a consideration of the terms of the lease and the boundaries, he has come to the conclusion that the disputed land is within the area leased to the first party, and on a consideration of the oral evidence he has found that the first party is in possession. He has then said that even if the disputed land is within the area which was leased to the second party it would not affect the matter. In taking this view of the case not only has he not approached the case from a wrong standpoint, but, in my opinion, he has approached it from the only proper standpoint, for it is perfectly clear that if the first party shows that the land in dispute

is within the boundaries of the land leased to him and if on the oral evidence he establishes possession, it is immaterial that the land was subsequently leased to the second party. Moreover, the learned Magistrate was bound to decide on a consideration of the lease of the first party itself whether the disputed land was within the land leased to the first party, he was not entitled to go outside that document in order to interpret its terms.

The next point which is urged is that the Deputy Magistrate had no jurisdiction to hold the local inspection, which was held by him, before he began to hear the case. What happened was that before he began to take evidence the Deputy Magistrate went to the place in order to see the exact land in dispute and the features of the disputed property. He restricted his inquiry very closely to these points and it does not appear that he directed his inquiry to any matter which could be proved by oral evidence. No evidence was taken at the local enquiry and all that was done was to inspect the locality, make a note of what the disputed area was and prepare a plan. Everything was placed on the record. I am unable to see how in holding a local inspection of this sort the Deputy Magistrate in any way acted outside the jurisdiction vested in him by law.

We have been referred to the case of *Babbon Shaikh v. Emporor* (1) for authority as to what a Magistrate may do by way of local inspection. That case, however, has no bearing on the present case, because in that case the Magistrate did not merely view the place of occurrence for the purpose of following or understanding the evidence, but he imported into his judgment matters of opinion and inference based on circumstances not on the record and did not place the results of his local inspection on the record. That case and the many other cases which are to the same effect have no bearing on the case now before us.

The last point which has been urged is in regard to a certain plan (Exhibit 14) which has been used by the learned Deputy Magistrate in coming to his conclusion, and which, it is contended, he was not entitled to use.

(1) 5 Ind. Cas. 365; 37 C. 340; 14 C. W. N. 422; 11 C. L. J. 335; 11 Cr. L. J. 121.

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The reason why it is said that he is not entitled to use this document is that it purports to have been sent with a covering letter, which is Exhibit 15, to the first party in 1918. It is a plan of the land which was leased to the first party and it is contended that the covering letter was written on paper which from the water-mark on it appears not to have been made before the year 1920. If this is so, it is suggested that the letter and the plan are both forgeries and it is clear that, if they were, this would certainly materially affect the result of the case. During the hearing it was suggested by the second party that the letter was a forgery and a petition asking the Magistrate to send the letter to the Controller of Stamps and Stationery was filed. The Magistrate declined to pass such an order and said he would deal with the matter later. He did so in his judgment and what he says is that he declined to hold an enquiry into the matter because the signature on the letter had been proved to be the signature of Thakur Ram Bahadur Singh by his agent. He was entitled to deal with the matter in this way and, in my opinion, he dealt with it in the right way. If the second party had desired to pursue the matter, they should have summoned some one from the Department of Stamps and Stationery. They, however, did not choose to take this course and the learned Magistrate, as I have said, not only acted within his jurisdiction in not taking up the matter himself but I think he acted properly in not doing so.

In the result, then, I see no reason to interfere with the order of the learned Magistrate and I would dismiss this application.

Das, J.—I agree.

N. K.

Application dismissed.

CALCUTTA HIGH COURT.

ORIGINAL CRIMINAL.

February 20, 1922.

Present.—Sir Lancelot Sanderson, Kt.,
Chief Justice.

EMPEROR—PROSECUTOR

versus

JHABBAR MULL, LAKKAR—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 403—Penal Code (Act XLV of 1860), ss. 408, 477 A—Criminal breach of trust—Acquittal—Falsifying accounts—Subsequent trial on same facts, whether competent.

An accused was entrusted with three sums of money on various dates. He committed criminal breach of trust by dishonestly misappropriating them and was tried under section 408 of the Penal Code. It was a part of the prosecution case at the trial that the accused had made false entries in the account-book for the purpose of carrying out the alleged misappropriation and with the intention of concealing his alleged breach of trust. He was unanimously acquitted by the Jury and was subsequently charged under section 477 A of the Penal Code for having made false entries in the account-book in respect of the said three sums of money.

Held that, on the facts of the case, the accused ought not to be put on his trial in respect of these charges, as it would in effect amount to trying him again in respect of the same evidence and in respect of the same matters upon which he had already been tried and acquitted by the Jury. [p. 974, col. 1.]

Mr. A. N. Sen, for the Accused.

Mr. S. K. Sen, for the Prosecution.

JUDGMENT.—In December 1921 J. M. Lakkar, the accused, was tried at the Criminal Sessions by my learned brother Mr. Justice Walmsley, and the Jury in respect of three alleged offences under section 408 of the Indian Penal Code.

The charges were that on or about three dates, viz., 25th April 1921, 2nd May 1921 and 13th May 1921, he being the cashier of Messrs. Radhakissen Sewdutt Roy and entrusted with three sums, viz., Rs. 5,000, Rs. 3,000 and Rs. 2,000, committed criminal breach of trust by dishonestly misappropriating the said sums.

The Jury unanimously found him not guilty in respect of each of the three charges.

J. M. Lakkar is now charged again in respect of the same three matters but in a different form. It is now alleged that he, being a cashier in the above named firm, as aforesaid, with intent to defraud made false entries in the *pukka rokur* book

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of the said firm on or about the 25th April, 2nd May and 13th May 1921, in respect of the said three sums of money, and that he committed offences in respect thereof punishable under section 477A of the Indian Penal Code.

It was argued by the learned Counsel on his behalf that as J. M. Lakkar was acquitted at the last Sessions, he ought not to be tried on the present charges by reason of section 403 of the Criminal Procedure Code.

It is conceded by the learned Counsel for the prosecution that the evidence which would be given in respect of the present charges, would be identical with the evidence given against the accused at the last Sessions, and the learned Counsel further informed me that the matter of the alleged false entries was investigated at the trial before my learned brother Mr. Justice Walmsley and the Jury. In other words, it was a part of the prosecution case, at the trial at the last Sessions, that the accused had made the alleged false entries in the book for the purpose of a carrying out the alleged misappropriation, and with the intention of concealing his alleged breach of trust.

Since the case was argued last Friday I have considered the matter, and I have come to the conclusion that, on the facts of this case, the accused ought not to be put on his trial in respect of these charges. If he were so tried, in my judgment, it would in effect amount to trying him again for the same offences as those upon which he has already been tried and acquitted by the Jury, although the charges now before the Court are framed in a different manner.

Apart from this, I am not at present satisfied that, if it had been thought advisable to lay before the Court at the trial at the last Sessions, the facts as constituting offences under section 477 A as well as offences under section 408, a form of procedure could not have been adopted for the purpose of carrying out such object.

Under these circumstances, in my judgment, it would not be right to put the accused man on his trial for the second time in respect of the same evidence and in respect of the same matters upon which he has already been unanimously acquitted by the Jury.

I confine my judgment to the facts of this case, and I hold that the accused is not liable to be tried on the charges now made against him. Let the accused be discharged.

N. K.

Accused charged.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 35 OF 1921.

February 9, 1922.

Present:—Mr. Saunders, J. C.

MA E SHI—APPELLANT

versus

U ADITSA *alias* MAUNG PO SEIN

—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance—Father having means, liability of—Buddhist priest, liability of.

Section 488 of the Criminal Procedure Code applies to the case of a father who has sufficient means to maintain his child but neglects to do so. [p. 975, col. 1.]

A member of the Buddhist priesthood dies a civil death when he enters the priesthood and the presumption is undoubtedly that he does not possess any property, except such as is necessary for his religious life and which is held under conditions which do not make it available for other purposes, for instance, maintenance of a child. [p. 915, cols. 1 & 2.]

Criminal revision from an order of the Sub-Divisional Magistrate, Kanbalu, in Criminal Miscellaneous No. 83 of 1921.

Mr. D. Dutt, for the Petitioner.

Mr. Miller, for the Respondent.

JUDGMENT.—The applicant applied for maintenance for a child, the father of which she said was the respondent. The respondent appears to have been a *Pongyi* at the time of the birth but has since become a *koyin* and he denies paternity. The order of the Magistrate is not very satisfactory. He appears to have evaded coming to a definite decision as to the paternity of the child. He said that the attempt to attack the mother's character had failed, and that it had not been proved that she had sexual intercourse with any one else, and the presumption, therefore, was that the boy was conceived by the act of the respondent.

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ent. If the Magistrate intended to find that the respondent was the father of the child I am not prepared to hold that he was wrong. There seems to be no doubt that the applicant reported the matter to the respondent's ecclesiastical superior and that the latter questioned the respondent, who did not deny the paternity. It seems inconceivable that if he had not been the father he would not have denied the paternity. No sentence was pronounced against the respondent because he did not make confession of a fault, but apparently the villagers treated the charge as proved and refused to supply him with food, and he, therefore, allowed himself to be reduced to the rank of *koyin* so that he could cook his own meal. The evidence of the two young men who say they actually saw and heard the complainant and the respondent together in the *kyaung* under compromising circumstances was possibly not true; but, on the other hand, other respectable witnesses for the applicant have, I think, proved that her relations with the respondent were not those of a disciple to her spiritual adviser. Mg Chit Pwe, for instance, who built the *kyaung* for the respondent, says, that he taxed the respondent with his immoral conduct with the applicant and did not receive a direct denial and that the respondent was asked to renounce the *pongyihood*. He also says that the respondent apparently admitted having given a sum of Rs. 165 to the applicant. The defence witnesses do not, I think, prove that the child was not the respondent's child. The Magistrate was, however, I think, justified in holding that the respondent could not be ordered under section 488 of the Criminal Procedure Code to maintain the child. That provision of law applies to the case of a father who has sufficient means to maintain the child but neglects to do so. It has been repeatedly held in the cases cited by the Magistrate in other cases that a member of the Buddhist priesthood dies a civil death when he enters the priesthood, and I do not think that it has been satisfactorily proved that the respondent in this case possesses property. The presumption in the case of a Buddhist priest is undoubtedly that he does not possess any property except such as is necessary for his religious

life and which is held under conditions which do not make it available for other purposes. It has, no doubt, been held in Upper Burma that an able bodied father who is capable of earning money by the work of his hands has means with which to support a child and it is possible that, if a layman were deliberately to enter the priesthood in order to avoid his responsibilities as a father, the law might refuse to recognise such an evasion. Here, however, the respondent had been in the priesthood for a great many years and it does not appear to me to be in the public interest that a woman who allows herself to be seduced by a member of the priesthood should obtain support for the child born of such intercourse by what, after all, in my opinion, would be a straining of the law contained in the provisions of the Criminal Procedure Code. The application must, therefore, be dismissed.

N. K.

Application dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 137 OF 1921.

July 10, 1922.

Present.—Mr. Justice Duckworth.

KARUPIAH NAIDU alias GOVINDA-SWAMY—APPLICANT

versus

R. M. S. MUTHUSWAMI—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195 (6)—Sanction to prosecute—Township Court granting sanction—Revocation of sanction by District Court—Divisional Court, jurisdiction of, to interfere—Costs, whether allowable.

KARUPIAH NAIDU v. MUTHUSWAMI.

A Divisional Court in Lower Burma has no jurisdiction, appellate or revisional, to interfere with an order of a District Court revoking under section 195 (6) of the Criminal Procedure Code, a sanction to prosecute granted by a Township Court, the only Court having jurisdiction in such a case being the High Court.

Muthuswami Mudali v. Veeni Chetti, 30 M. 382; 17 M. L. J. 266; 2 M. L. T. 239; 6 Cr. L. J. 102 (F. B.), *Ram Deni v. Nand Lal Rai*, 30 A. 109; 4 A. L. J. 805; 6 Cr. L. J. 454; A. W. N. (1908) 28; 3 M. L. T. 115 and *Emperor v. Serh Mal*, 30 A. 243; A. W. N. (1908) 102; 3 M. L. T. 377; 7 Cr. L. J. 389; 5 A. L. J. 247 relied on.

Costs ought not to be allowed in a proceeding under section 195, Criminal Procedure Code, even though the inquiry for the purposes of that section, is made by a Civil Court.

Nga Tha Win v. Nga San, 20 Ind. Cas. 406; U. B. R. (1913) I, 166 at p. 169; 14 Cr. L. J. 422, followed.

Civil revision of the order passed by the Divisional Judge, Myaungmya, setting aside the order of the District Judge, Pyapone, and restoring the order of the Township Judge, Bogale.

Mr. *Tambe*, for the Applicant.

Mr. *N. N. Sen*, for the Respondent.

JUDGMENT.—The respondent applied in the Township Court of Bogale for sanction to prosecute the applicant under section 205, Indian Penal Code, for false personation of a witness in Civil Miscellaneous Case No. 5 of 1920. The application was made under section 195, Criminal Procedure Code. Sanction was granted with costs. Applicant then applied to the District Court for revocation of that sanction. The said sanction was revoked with costs in Civil Miscellaneous Case No. 59 of 1920. The present respondent then moved the Divisional Court in Civil Miscellaneous Appeal No. 28 of 1921, and the learned Judge of that Court cancelled the revocation order, and restored the sanction with costs in all Courts. Against this last order the applicant now moves this Court on revision under section 115, Civil Procedure Code.

In the first place, the matter was being dealt with by Civil Courts. Naturally, the order of the Township Court could be considered by the District Court, but once the latter Court had passed an order under section 195, Criminal Procedure Code, clause (6), the only remedy of the party aggrieved was to move the High Court, probably on revision, and the Divisional Court had no right to deal with the case. This latter Court has in Civil matters no right to revise

or hear appeals from decisions of Township Courts, even when they have been on appeal before the District Court. That this is so will be clear from a perusal of the cases of *Muthuswami Mudali v. Veeni Chetti* (1), *Ram Deni v. Nand Lal Rai* (2) and *Emperor v. Serh Mal* (3). These cases anyhow serve to indicate beyond any doubt that, in a case like the present, once the District Court had acted under section 195 (6), Criminal Procedure Code, the only Court with jurisdiction, would be the High Court. If the Original proceedings are held in the Sub-Divisional or District Court, then it would seem that the Divisional Court has jurisdiction but only when it is the Court intended by section 195 (7), Criminal Procedure Code.

The Divisional Court, therefore, in this case acted without jurisdiction and its orders were void *ab initio*.

Further, the orders granting costs were erroneous. Though Civil Courts were acting, the inquiry was for the purpose of section 195, Criminal Procedure Code, and costs should not have been allowed. The case of *Nga Tha Win v. Nga San* (4) shows this very clearly. The matter is also dealt with at page 516, Edition X, Sohoni's Criminal Procedure Code. It is unnecessary to deal with other points raised. The application is allowed, and the order of the Divisional Court granting the sanction is set aside. I make no order as to costs.

W. C. A.

Application allowed.

(1) 30 M. 382; 17 M. L. J. 266; 2 M. L. T. 239; 6 Cr. L. J. 102 (F. B.).

(2) 30 A. 109; 4 A. L. J. 805; 6 Cr. L. J. 454; A. W. N. (1908) 28; 3 M. L. T. 115.

(3) 30 A. 243; A. W. N. (1908) 102; 3 M. L. T. 377; 7 Cr. L. J. 389; 5 A. L. J. 247.

(4) 20 Ind. Cas. 406; U. B. R. (1913) I, 166 at p. 169; 14 Cr. L. J. 422.

MUHAMMADI V. KARAM BAKHSH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 141 OF 1921.

June 12, 1922.

Present.—Mr. Justice Scott-Smith.

Musammal MUHAMMADI, FOR HERSELF
AND FOR KARAM ILAHI, MINOR—DEFEND-
ANTS—APPELLANTS

versus.

KARAM BAKHSH AND ANOTHER—PLAINT-
IFFS, ALLAH DAD AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Construction of document—Gift in favour of
wife—Estate taken—"Malik," meaning of.

Deeds in favour of females must be interpreted
in the same way as any other deeds.

The words "malik" and "milkiyat" in a formal
document imply an absolute estate unless there is
something in the context to qualify it.

Surajmani v. Rabi Nath Ojha, 30 A. 84; 5 A.
L. J. 67; 12 C. W. N. 1; 231; 18 M. L. J. 7; 10
Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35
I. A. 17 (P. C.); *Gurmukh Singh v. Makhan Singh*,
11 Ind. Cas. 846; 61 P. R. 1911; 147 P. W. R. 1911;
Wazir Devi v. Ram Chand, 58 Ind. Cas. 988;
1 L. 415; 75 P. W. R. 1920, followed.

Rallia Ram v. Musammal Ved Kaur, 27 P.
R. 1898, dissented from.

Where a husband purported to sell a house
to his wife in lieu of dower and stated in the deed
that he had given proprietary possession to her
and that she had the full powers of a proprietor
to alienate the house:

Held, that the intention of the husband was
to confer an absolute estate upon the wife and the
latter was, therefore, entitled to make a gift of it
to whomsoever she pleased.

Second appeal from a decree of the
District Judge, Ambala, dated the 15th
October 1920, reversing that of the Munsif,
First Class, Ambala, dated the 21st July
1919.

Lala Tirath Ram, for the Appellants.

Mr. M. Obedullah, for the Respondents.

JUDGMENT.—Shadi, a Kahar by caste,
and tailor by occupation, living in the town
of Ambala, was the proprietor of the house
in dispute and died in 1909. On the 28th
July 1904 he conveyed the house to his
wife, Musammal Muhammadi, by a regis-
tered deed in lieu of Rs. 400 prompt
and deferred dower. She gifted the house
to Karam Ilahi whom she alleged to be
Shadi's adopted son. It has been held
that the adoption was not proved. The
First Court held that the deed of the 28th
July 1904 was a deed of sale by Shadi in
favour of his wife and that by it she became
a full owner and had, therefore, a right to

alienate it in any way she pleased. It,
therefore, dismissed the suit of the plain-
tiffs-respondents, who are reversioners
of Shadi, for a declaration that the gift
should not affect their reversionary rights.
The plaintiffs appealed to the District Judge
who held that Musammal Muhammadi
had only limited rights in the house and had
no power to make a gift. He, therefore,
reversed the lower Court's decision and
gave the plaintiffs a decree for a declara-
tion as prayed. Musammal Muhammadi
and Karam Ilahi have filed a second appeal
to this Court.

The Courts below have held that the
parties are governed by custom and not
by Muhammadan Law and the learned
District Judge referred to the decision of
Wilberforce, J., in Civil Appeal No. 863 of
1920, dated the 14th July 1920, wherein it
was held that these Muhammadan Kahars
of Ambala City were not bound by the
strict Muhammadan Law as regards succe-
sion and that amongst them a widow did
not get a definite share of her husband's
property. Counsel for the respondents urges
that this finding cannot be questioned
without a certificate, but there does not
appear to be any necessity for the defend-
ants to question it. Their main point
is that the deed of sale of 1904 shows that
Shadi intended to confer full proprietary
rights upon Musammal Muhammadi. The
learned District Judge has not come to
any clear finding as to what the inten-
tion of Shadi was, but he referred to
the case reported as *Rallia Ram v.
Musammal Ved Kaur* (1) in which it was
held that the word "malik" in a Will does
not necessarily imply an absolute es-
tate. Now, as pointed out in *Gurmukh
Singh v. Makhan Singh* (2), the decision of
their Lordships of the Privy Council in the
case of *Surajmani v. Rabi Nath Ojha*
(3) might be taken as rendering obsolete
the main principle on which the
ruling in *Rallia Ram v. Musammal
Ved Kaur* (1) was based. *Surajmani v.
Rabi Nath Ojha* (3) together with *Gurmukh*

(1) 27 P. R. 1898.

(2) 11 Ind. Cas. 846; 61 P. R. 1911; 147 P.
W. R. 1911.

(3) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231;
18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131;
3 M. L. T. 144; 35 I. A. 17 (P. C.).

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Singh v. Makhan Singh (2) and *Wazir Devi v. Ram Chand* (4) are authority for the proposition that the words "*malik*" and "*malkiyat*" in a formal document imply an absolute estate unless there is something in the context to qualify it, and it was also laid down that deeds in favour of females must be interpreted in the same way as any other deeds. Now, in the deed in question in the present suit Shadi clearly states that he has given proprietary possession (*gabza malikana*) to *Musammam Muhammad* and also that she has the full power of a proprietor (*malikana ikhtiyar*) to alienate the house sold. Under these circumstances, I think it must be held that Shadi's intention was to confer an absolute estate upon *Musammam Muhammad*. She had, therefore, full power to make the gift in favour of *Karam Ilahi* and the collaterals cannot question it.

I, therefore, accept the appeal and setting aside the order of the lower Appellate Court restore that of the First Court dismissing the plaintiff's suit with costs throughout.

Z. K.

Appeal accepted.

(4) 58 Ind. Cas. 988; 1 L. 415; 75 P.W.R. 1920.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1334 OF 1921.

February 12, 1923.

Present:—Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

RASA GOUNDAN AND OTHERS—

DEFENDANTS—APPELLANTS

versus

ARUNACHELLA GOUNDAN AND OTHERS

—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—*Partition, whether transfer—Limitation Act* (IX of 1908), Sch. I, Art. 120—*Suit to set aside transfer of property by stranger—Limitation.*

A partition signifies the surrender of a portion of a joint right in exchange for a similar right from the other co-sharers and, therefore, is a "transfer" of property within the meaning of section 53 of the *Transfer of Property Act*.

Atrabannassa Bibi v. Safatullah, 31 Ind. Cas. 189; 43 C. 504 at p. 509; 22 C. L. J. 259, followed.

Dictum of Spencer, J. in *Indoji Jithaji v. Kothapalli Rama Charlu*, 54 Ind. Cas. 146; 10 L. W. 498 at p. 507, not followed.

A suit to set aside a transfer of property under a document to which the plaintiff was not a party is governed by Art. 120 of Sch. I to the *Limitation Act*.

Appeal against the decree of the District Court of Coimbatore, in Appeal Suit No. 21 of 1921, preferred against the decree of the Court of the Principal District Munsif of Erode, in Original Suit No. 239 of 1919.

Mr. A. Krishnaswami Iyer, for the Appellants.

Messrs. D. Ramaswami Iyengar for C. S. Venkata Chariar, for the Respondents.

JUDGMENT.—In the lower Appellate Court this case was argued only with reference to limitation. We agree that Art. 120 is applicable, because there is no necessity for the plaintiff, a stranger to the document in question, to have it set aside and no obstacle to his limiting his claim to a declaration of its validity.

This failing, it is contended that the lower Courts were wrong in applying section 53 of the *Transfer of Property Act* to the transaction in question before them, because that transaction is a partition and partitions are not transfers within the meaning of section 53. We are unable to understand how a partition is not a transfer of property within the meaning of that section, since it must be regarded, as it is described in *Atrabannassa Bibi v. Safatullah* (1), "as signifying the surrender of a portion of a joint right in exchange for a similar right from the co-sharer." The argument attempted has in fact been supported only by reference to the words in that decision preceding those quoted:—"The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners," and the dictum of Spencer, J., in *Indoji Jithaji v. Kothapalli Rama Charlu* (2) "It effects a change in the modes of enjoyment of property, but it is not an act of conveying property from one living person to another." In reply to those citations we need observe only that one of the objects of a suit for partition is to alter the form of enjoyment

(1) 31 Ind. Cas. 189; 43 C. 504 at p. 509; 22 C. L. J. 259.

(2) 54 Ind. Cas. 146; 10 L. W. 498 at p. 507.

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of joint property, without at the same time depriving the partition of its character as a transfer, and that we have been shown no other authority in agreement with the opinion of Spencer, J. Holding that a partition is a transfer of property to which section 53 is applicable, we reject this ground of appeal. The second appeal fails and is dismissed with costs of the plaintiff second respondent.

V. N. V.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS.

863, 926, 1211 TO 1215 OF 1920.

August 11, 1922.

Present:—Justice Sir Asutosh Mookerjee, K.T., and Mr. Justice Chotzner.

Kazi NURUL HUQ—DEFENDANT—
APPELLANT

versus

Maharaja BIRENDRA KISHORE
MANIKYA BAHADUR—PLAINTIFF
—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 6, 7
—Landlord and tenant—Enhancement of rent—
Tenure held from time of Permanent Settlement—
Order for confiscation of zemindari, effect of—
Fixity of rent—Alteration, effect of.

Where certain taluks included in a zemindari have been held from the time of the Permanent Settlement, the fact that the zemindari was subsequently confiscated by Government and after the escheat dawks were taken from the talukdars, would not lead to the conclusion that the zemindari was extinguished and the tenure-holders became independent talukdars. The true effect of an order for confiscation must depend on its terms. If the tenures can be identified with those in existence at the time of the escheat, they must be deemed to have been held from the time of the Permanent Settlement within the meaning of section 6 of the Bengal Tenancy Act. [p. 980, col. 2.]

Rajah Dundial Singh v. Rajah Anund Kishwur Singh, 1 M. I. A. 482; 1 Sar. P. C. J. 142; 18 E. R. 192, *Baboo Beer Pertab Sahoe v. Maharajah Rajender Pertab Sahoe*, 12 M.I.A. 1; 9 W. R. 15 (P. C.) 2 Suth P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241 and *Ram Nundun Singh v. Janhi Koer*, 29 I. A. 178; 29 C. 828; 4 Bom. L. R. 664; 7 C. W. N. 57; 8 Sar. P. C. J. 351 (P. C.), referred to.

Where the original nature of a tenancy is not known the fact that the rent has been altered once, negatives the hypothesis that the rent had been fixed in perpetuity. [p. 981, col. 2.]

Bamapada Roy v. Midnapore Zemindari Co., Limited, 16 Ind. Cas. 376; 16 C. L. J. 322, followed.

Ramanuj Mahanta v. Midnapore Zemindari Co., Limited, 14 Ind. Cas. 729; 16 C. W. N. 725, distinguished.

Appeal against the decrees of the Additional District Judge, Noakhali, dated the 17th of December 1919, reversing those of the Assistant Settlement Officer, Feni, dated the 16th of October 1917.

Babu Gunada Charan Sen (with him Babu Nilkantha Ghose and Moulvi Nurul Haq), for the Appellants:—The defendants are appellants. The appeals arise out of applications under section 105 of the Bengal Tenancy Act. The first Court dismissed the suits. On appeal the learned Judge has held that the rents are enhanceable. I submit it has been established beyond doubt that these tenures were existing beyond the time of the Permanent Settlement. Therefore, section 6 of the Bengal Tenancy Act would apply. See also 51 of Regulation VIII of 1793.

My next point is that the enhancement at the rate of 10 per cent leaves me nothing. The question of improvements by tenants should have been considered under section 9, Bengal Tenancy Act. I submit the case should go back.

Babu Mahendranath Roy (with him Babus Gobinda Chandra De Roy, Rames Chandra Sen and Birendra Chandra Das), for the Respondent.—The zemindari was originally confiscated and a new one was created in 1869. There is nothing to show that the rents were fixed in perpetuity. There have been various rates fixed at various times. See *Bamapada Roy v. Midnapore Zemindari Co., Limited* (1). As regards the second point I submit the assessment has been correctly made.

Babu Gunada Charan Sen, replied in brief.

JUDGMENT.

Mookherjee, J.—These seven appeals arise out of as many proceedings instituted, under section 105 of the Bengal Tenancy Act, by a landlord for assessment of fair and equitable rents in respect of lands in the occupation of his tenure-holders. The Settlement Officer held that the rents were unalterable and dismissed the suits. Upon appeal, the Special Judge has held that the rents were enhanceable and he has accordingly settled fair and

(1) 16 Ind. Cas. 376; 16 C. L. J. 322.

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equitable rents. The tenure-holders have appealed to this Court and have urged, first, that the rents of their tenures are not enhanceable; and, secondly, that if the tenures are not protected from enhancement, the Special Judge has settled rent on principles erroneous in law.

As regards the first point, the tenure-holders rely upon section 6 of the Bengal Tenancy Act which is in the following terms:—

"6. Where a tenure has been held from the time of the Permanent Settlement, its rent shall not be liable to enhancement except on proof—

"(a) that the landlord under whom it is held is entitled to enhance the rent thereof either by local custom or by the conditions under which the tenure is held, or

"(b) that the tenure-holder, by receiving reductions of his rent, otherwise than on account of a diminution of the area of the tenure, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it."

This section is founded upon the first sub-section 51 of Regulation VIII of 1793 which was repealed by Schedule I to the Bengal Tenancy Act and was in the following terms:

"No *zemindar* or other actual proprietor of land shall demand an increase from the *talukdars* dependent on him, although he should himself be subject to the payment of an increase of *jama* to Government, except upon proof that he is entitled so to do, either by the special custom of the district, or by the conditions under which the *talukdar* holds his tenure, or that the *talukdar*, by receiving abatements from his *jama*, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it."

Section 6 (a) prescribes that where a tenure has been held from the time of the Permanent Settlement, its rent shall not be liable to enhancement, except upon proof that the rent is enhanceable either by local custom or by the conditions under which the tenure is held. In the cases before us, there is no proof of local custom. Consequently, we have to determine, first, whether the tenures have been held from the time of the Permanent Settlement, and, secondly, what

are the conditions under which the tenures are held.

As regards the first branch of this enquiry, there can be no doubt that the tenures have been held from the time of the Permanent Settlement. The tenures are comprised in Estate No. 209. The Courts below have found that from a time antecedent to the Decennial Settlement, Pargana Dandra was held in two shares, namely, four annas and twelve annas. The four annas share belonged to one Muhammad Ali Chaudhuri. He was imprisoned for life as a rebel, by an order of the Supreme Council, dated 7th December 1792, and by a subsequent order dated 8th February 1793 his estate was confiscated. The evidence shows that before this escheat, there were 45 *taluks* under the four annas *zemindari*, and Mahomed Ali had a *nij taluk*, which, after the escheat, was divided into 35 *topas*. When the Government took possession of the *zemindari* after the escheat, *dowls* were taken from the *talukdars* and rents were specified thereto without specification of the area of the land comprised in each *taluk*. The tenures now in dispute have been identified with those in existence at the time of the escheat, and there can accordingly be no doubt that these tenures must be deemed to have been held from the time of the Permanent Settlement within the meaning of section 6 of the Bengal Tenancy Act.

As regards the second branch of the enquiry into the history of the disputed tenures, it may be stated at the outset that an endeavour was made in the course of argument to establish that they were independent *taluks*. This contention was based on the assumption that when the *zemindari* was confiscated by order of the Supreme Council on the 8th February 1793 it was extinguished, and that the lands were thereafter held by the Government as the Sovereign power. This position has not been made out by relevant evidence. The true effect of an order for confiscation must depend on its terms, as happened in the cases of *Rajah Dandial Singh v. Rajah Anant Kishore Singh* (2), *Baboo Bazar Pertab Sahoe v. Maharajah Rajender Pertab Sahoe* (3).

(2) 1 M.L.A. 482; 1 Sar. P.C.J. 142; 18 B. R. 192.

(3) 12 M. L. A. 119; W.R. 15, (P. C.); 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 B. R. 247.

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and *Ram Nundim Singh v. Janki Koer* (4). In the present case, the order for confiscation has not been produced, nor have we on the record the order made in 1869 whereby the estate was returned to one of the heirs of Muhammad Ali Chowdhuri and to the representatives of the other heirs. It is impossible, in these circumstances, to assume that the original *zemindari* was extinguished in 1793 and a new *zemindari* was created in 1869. On the other hand, there is some indication that for several years *malikana* was paid to the heirs of Muhammad Ali Chaudhuri, which is consistent with the theory that the *zemindari* continued to exist, but was held *khas* and managed by Government through its own servants. We hold accordingly that the Courts below rightly declined to adopt the view that the tenure-holders in these cases were independent *talukdars*.

We have next to examine the conditions under which the tenures are held. No document has been produced to show that the rents were fixed in perpetuity when the settlements were made with the *talukdars* after the *zemindari* had been confiscated. For many years there was considerable difficulty in the management of the estate by the Revenue Authorities, and successive projects for settlement were tried and kept in abeyance. The real difficulty was that, notwithstanding surveys and measurements, the area of the land which each *talukdar* was entitled to hold, as compared with the land actually in his occupation, could not be determined with any approach to accuracy. Two shares in the *zemindari* which had been carved out of the twelve annas share, were sold for arrears of revenue in 1835 and were purchased by the Government. The result was that whenever there was a dispute as to the land in the occupation of *talukdar*, the question arose, whether it was comprised in the four annas *zemindari* of Muhammad Ali Chaudhuri held *khas* by the Government after confiscation, or to one or other of the two shares purchased by the Government at the revenue sale, or to the residuary share. In such a state of uncertainty, settlement of rent in perpetuity was impracticable. In 1846, however, on the basis of measurement and re-measurement previously made,

rent was assessed at the rate of Rs. 3-15-6 per *kani*. There is no indication that this was the rate adopted at the time of the Permanent Settlement; indeed, there is no evidence to show that the rent had been settled in 1793 at a fixed rate applied to an ascertained area. On the other hand, there is ample evidence that the rate of Rs. 3-15-6 which was made the basis of settlement in 1846, was adopted as the fair and equitable rate. Different Revenue Officers had proposed different rates, such as Rs. 5-8-0, Rs. 5, Rs. 4-6-0, Rs. 4, Rs. 3-15-0 and Rs. 3-8-0. On consideration of the productive character of the lands, the rate was ultimately fixed at Rs. 3-15-6. This clearly militates against the theory that the rate was fixed in perpetuity, specially when we find that the settlement was intended to be operative for a term of thirty years only. In such circumstances the principle of the decision in *Bamapada Roy v. Midnapore Zemindari Co., Limited* (1) applies, namely, that where the original nature of the tenancy is not known, the fact that the rent has been altered once, negatives the hypothesis that the rent had been fixed in perpetuity. This does not conflict with the view taken in *Ramanuj Mahanta v. Midnapore Zemindary Co., Limited* (5), where, as pointed out in *Priyanath Ghose v. Surendra Nath Das* (6), the nature of the tenancy was known and could not be altered by enhancement of rent by consent of parties on one occasion. The cases before us are, in fact, stronger, in so far as the landlord is concerned, than the cases mentioned in the books. Here the history of the Settlement of 1846 has been unravelled in detail; it has been ascertained beyond doubt that the rate then taken as the basis was adopted as the rate fair and equitable at that time; and there was no intention to fix that rate in perpetuity. We hold accordingly that the Special Judge was right in his conclusion that the tenures are not held on the condition that the rate of rent was perpetually fixed at Rs. 3-15-6 in 1846 and that fair and equitable rent may accordingly be settled now, notwithstanding the fact that the rate of rent has not been altered since that period.

(4) 29 I. A. 178; 29 C. 828; 4 Bom. L. R. 664;

7 C. W. N. 57; 8 Sar. F. C. J. 351 (P. C.).

(5) 14 Ind. Cas. 729; 16 C. W. N. 725.

(6) 69 Ind. Cas. 992; 26 C. W. N. 657; 35 C. L. J. 440; (1922) A. I. R. (C.) 511.

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As regards the second point, namely, whether the Special Judge has settled fair and equitable rent on the correct principles, we are of opinion that his decision cannot be supported. The Special Judge has not considered all the elements specified in section 7 of the Bengal Tenancy Act, and his judgment upon the question of the allowance to be made for improvements, in particular ignores relevant materials on the record. The matter requires close and careful examination, as the enhancements decrees are very substantial and seriously affect the position of the tenure-holders. We are convinced that the problem of the nature of the tenures engrossed the attention of the parties and of the Court, and that the question of the extent of the enhancement permissible has not been adequately investigated.

The result is that the finding of the Special Judge that the disputed tenures are not held at fixed rates of rent is affirmed, but subject to this, the appeals are allowed, the decrees of the Special Judge set aside, and the cases remitted to the Settlement Officer for determination of the enhancement to be allowed in accordance with the principles enunciated in section 7 of the Bengal Tenancy Act. The landlord as also the tenants will be at liberty to adduce fresh evidence upon all points which may require investigation in connection with the question of the settlement of fair and equitable rent.

As the victory has been a divided one, the parties will bear their own costs in all the Courts up to this stage. The costs in the primary Court after remand will be in the discretion of that Court.

B. N.

Appeals allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 78 OF 1922.

October 30, 1922.

Present:—Sir Walter Schwabe, Kt.,
Chief Justice, and Mr. Justice Wallace.

P. J. PARAMESWARA PATTAR—

PLAINTIFF—APPELLANT

versus

VIYATHAN MAHADEVI alias VAHA
THAMBURATTI AVERGAL OF
KOZHICKOT KISHAKKA KOVILAGAM,
SOUTH MALABAR—DEFENDANT—
RESPONDENT.

Letters Patent (Mad.), cl. 12—Leave to sue—Balance of convenience—Civil Procedure Code (Act V of 1908), ss. 20, 120—S. 20, whether applicable to Original Side of High Court—Fraud—Suit to set aside decree—Discovery of fraud—Cause of action.

In an application to grant leave to sue under clause 12 of the Letters Patent, the Court has to exercise its discretion and the real question to be considered is the balance of convenience. [p. 984, col. 1].

The application of section 20 of the Code of Civil Procedure to the High Court in the exercise of its original jurisdiction is expressly excluded by section 120 of the Code. [p. 984, col. 2.]

Per *Schwabe, C. J.*—In a suit to set aside a decree as having been obtained by fraud, the cause of action is the fraud itself and the discovery of fraud constitutes no part of the cause of action. [p. 983, col. 1.]

Obiter:—Clause 12 of the Letters Patent does not confer jurisdiction on the High Court when some only of the defendants reside or carry on business within the limits of its Original Civil Jurisdiction. [p. 984, col. 2.]

Hadjee Ismael Hadjee Hubeeb v. Hadjee Mahomed Hadjee Joosib, 13 B. L. R. 91; 21 W. R. 303, relied on.

Appeal against an order, dated the 30th January 1922, of Mr. Justice Kumaraswami Sastri, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 1000 of 1921.

Mr. P. G. Krishna Iyer, for the Appellant.
Messrs. T. Narasimha Iyengar and K. P. Ramakrishna Iyer, for the Respondents.

JUDGMENT.

Schwabe, C. J.—This case comes by way of interlocutory appeal from an order of Kumaraswami Sastri, J., in which he set aside leave to sue which had been granted in the suit.

The plaintiff in the suit is a surety for the due performance of his duties and the due accounting by the agent of the Kizhakke Kovilagam. Some years ago, proceedings were taken in Malabar against the agent by the then head of the Kovilagam, it being

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alleged that he had not properly accounted for monies that he had received, and the present plaintiff was brought into that suit as a surety. A decree having been obtained, and the then agent, who was the first defendant in those proceedings, having been found to be indebted to the Kovilagam and being a person of no means, the present plaintiff as surety had to pay. In this suit the surety wishes to set aside the decree in the earlier suit. He makes as parties the present representatives of the agent and the present Ranee who is the representative of the then principal and is now the head of the Kovilagam. The defendants other than the Ranee reside in Madras. They are not British subjects but are subjects of the State of Cochin. In order to bring this suit within the Ordinary Original Civil Jurisdiction of this Court, an application was made and granted for leave to sue this lady who lives in Malabar. That application was necessary under section 12 of the Amended Letters Patent which provides that the Court should have jurisdiction "If the cause of action shall have arisen, either wholly or in case the leave of the Court shall have been first obtained, in part, within the local limits of the Ordinary Original Civil Jurisdiction of the High Court." It was then alleged that the cause of action arose in part in Madras. In order to ascertain whether that is correct or not, the learned Judge having held that no part did arise within the jurisdiction, I must look at the plaint. There in paragraph 12 it is stated that the cause of action arose partly in Madras in September 1919 when the plaintiff came to know of the existence of the securities and of the fact of the concealment of certain documents. If that paragraph stood alone, I should have no hesitation in saying that that does not show the arising of any part of the cause of action in Madras, for, in my judgment, the discovery of the fraud is no part of the cause of action. The cause of action is the fraud. But we are referred also to paragraph 8. In paragraph 8, it is stated that "neither the 5th defendant's predecessor (the 5th defendant being the Ranee) or her agent the said Appu Pattar, nor his legal representative brought to light in the previous litigation, though repeatedly called upon to produce by the Court and by the sureties, the collec-

tion papers including certain accounts and ledgers and thus effectively keeping it beyond the reach of the sureties and no one being in a position then to expose the frauds committed by them, the Courts had to pass a decree." It is said that what happened was this. That decree having been obtained in Malabar by false evidence and concealment of these very documents, he appealed to this Court, and that the guardian of certain minor respondents and the 5th defendant's predecessor conspired together to prevent the Court from ascertaining, as was a fact, that these documents said to be material were in the possession of one or another of those parties. The guardian put in an application to this Court supported by an affidavit alleging that he was unable to advise his minors whether they should go on with the case or not, as those documents had been concealed and without those documents he could not judge their position properly. The 5th defendant's predecessor answered that by an affidavit saying "Those documents might be of considerable use to me; possibly to you, I have not got them. You, as the representative of the then first defendant the agent, have got them." It is alleged that that was all done by both parties in conspiracy and that really the agent and his representatives after his death and his then principal had said to each other in effect, "we will confuse everybody about those documents. You say, I have got them, I say you have got them, nobody knows where they are. Then judgment will go on against you the agent and you the agent have no money. I the principal will get it unjustly from your surety." I must confess that, if it had been the intention of the Pleader to have made out that case, it could and should have been done in very much clearer language than is employed in paragraph 8. But I think the words of paragraph 8 referring to the previous litigation and frauds committed by them on the Courts are wide enough to cover such a charge and I think, therefore, that it is right to say that there is in this suit an allegation that "fraud" was committed before the High Court here and, in my judgment, such fraud does form part of that cause of action. I am not surprised that the learned Judge did not appreciate that because I am fairly sure that he was

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not told of that view and no one would read it out of paragraph 8 without the clearer explanation of the true inward meaning of paragraph 8 which has been made to us in this Court. That being so, in my judgment, this Court has jurisdiction to grant the leave.

It is then said that it really does not give a cause of action at all and if the fact alleged to have taken place in Madras does not give a cause of action, it follows that no part of the cause of action arose in Madras, because it must be an admissible cause of action. That contention is put on the ground that it has been decided by the Full Bench of this Court in *Kadirvelu Nainar v. Kuppuswami Naicker* (1) that no action lies to set aside a decree obtained by a fraud committed before the Court in the sense of production of false perjured evidence or the suppression before the Court of the truth. Whether that applies to the case now suggested, namely, two defendants conspiring outside the Court but going into the Court and both giving false evidence there, with the intention that the defendant party of those two should have a decree made against him which it was known he could not satisfy, with a view to make the surety pay an amount which was not really due by anybody is a very difficult question and is one about which I do not desire to express an opinion, obiter.

Turning to the question whether this Court, assuming it has power, ought to grant the leave under section 12 of the Amended Letters Patent, I agree that the learned Judge was really not exercising the discretion, because he held that no part of the cause of action arose within jurisdiction; so I do not think it right to say we should be interfering with his discretion, because I think it is more correct to say that this discretion has not been exercised. We have to exercise ours. On the whole, I think we should refuse.

The real question to be considered is the balance of convenience. Nearly the whole of this alleged cause of action arose in Malabar. There would be no ground at all in my judgment for bringing it here if it did

not happen that two of the defendants reside here who, it is alleged, have in their power here a very material document. I do not think that some difficulty which is anticipated in getting this document produced in Malabar is a sufficient ground for saying that this suit, which is essentially a Malabar suit, not a Madras suit should be brought in Madras and not in Malabar. That being our view, it is unnecessary to express an opinion as to whether *Kadirvelu Nainar v. Kuppuswami Naicker* (1) applies or not.

A second point is taken and it is this: It is urged that, as some of the defendants are within jurisdiction, this Court has a right to bring before it in this suit defendants not within jurisdiction. That is a right which, under section 20 of the Civil Procedure Code, is possessed by Courts in the *mufussil*. The application of section 20 to this Court in the exercise of its Original Jurisdiction is expressly excluded by section 120, Civil Procedure Code, and if we have the power it must be found within the four corners of section 12 of the Amended Letters Patent. The words are "or if the defendant at the time of the commencement of the suit shall dwell or carry on business within such limits." The principal defendant does not dwell here. The section does not say "if the defendant or if there are more than one defendant any of them shall dwell or carry on business within such limits" and I cannot read the provision of the Amended Letters Patent as conferring jurisdiction upon the Court in case where one or more of the several defendants reside within the jurisdiction. The point is free from authority except the case in *Hadjee Ismael Hadjee Hubeeb v. Hadjee Mahomed Hadjee Joosub* (2) which I read as affirming the view I am now expressing, although it has been read by a learned author, Mr. Broughton, as giving the High Court power to grant leave to sue in such cases. However on the view I have expressed in this case, viz., that on the balance of convenience the case should be brought in Malabar and not here, that point, too, does not directly arise for decision. On these grounds this appeal must be dismissed with costs and we must

(1) 45 Ind. Cas. 774; 41 M. 743; 34 M. L. J. 590; 23 M. L. T. 372; 8 L. W. 103; (1918) M. W. N. 514 (F. B.).

(2) 13 B. L. R. 91; 21 W. R. 303.

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order the plaintiff to pay the Court-fee which he should have paid if he had not been permitted to sue as a pauper.

Wallace, J.—The plaint on a perusal of which we are expected to express our minds in this case is culpably vague in not clearly setting out the cause of action in Madras, *i.e.*, the specific fraud alleged to have taken place in Madras nor the date when it arose. But as the plaintiff's real case has been put before us, it resolves itself into three main points.

First, fraud by way of collusion between the predecessor of defendants Nos. 1 to 4 and the predecessor of the 5th defendant in that they colluded to defraud and so got a decree against the plaintiff for an amount not really due.

Second, for damages for conspiracy between the above-mentioned persons who are all now dead and these damages are now sought to be recovered from the Kovilagam which the defendant now represents; and

Third, for the accounting for and recovery from the fifth defendant of certain securities or concealed properties. The whole of the reliefs Nos. 2 and 3 is; therefore, sought against the 5th defendant or her estate; and as regards relief No. 1 most of the collusion alleged was prior to the suit in the original Court and in connection with the proceedings in that Court. Whether the plaintiff has any cause of action at all on the ground of fraud on the High Court is open to grave doubt under the ruling in *Kadirvelu Nair v. Kuppusami Naicker* (1). But it is a matter which, in the view I take, may be left for the Trying Court to decide and I would not say anything which would hamper it in trying that point. But assuming that a small portion of the relief which plaintiff seeks is based on any cause of action arising in this Court, I do not think we should exercise our discretion under clause 12 of the Letters Patent considering that that portion of the plaintiff's relief which arises in the Court was not clearly set out by plaintiff until it was put forward in argument in this Court and that by far the major portion of the relief which he wishes was to be recovered from the 5th defendant who resides in Malabar or from her estate which is situated in Malabar.

As to the question whether we should give leave to bring the whole action in this

Court merely because most of the defendants reside here while the 5th defendant does not, the bearing and interpretation of clause 12 of the Letters Patent on this point is a matter of some difficulty, and I consider that it would be better not to say more on a point which is not necessary for the decision of the case, since I hold, even if the Court has the power, we should not in this case exercise it or give leave to the plaintiff to sue. On the merits I agree that our discretion should not be used in the plaintiff's favour.

V. N. V.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1653 OF 1920.

August 3, 1922.

Present:—Sir Asutosh Mookerjee, Kt., Chief Justice, and Mr. Justice Rankin.

SAYERUDDIN AKONDA—DEFENDANT

—APPELLANT

versus

SAMIRUDDIN AKOND AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 11 (2), 21 (3), 32 (5), 159—*Statement in document not inter partes, admissibility of—Pleadings—Omission to object to admissibility of document in Trial Court—Objection, whether may be taken in appeal.*

The plaintiff brought a suit against his son for recovery of possession of a land which stood in the name of the latter, alleging that the same was acquired *benami* by him. The defendant alleged that the land was purchased for him by his paternal grandfather. The plaintiff answered that his father had died before the property was acquired, and he produced a mortgage-bond executed by him long before the date of the purchase in which he described his father as dead.

Held, that the statement made by the plaintiff in the mortgage-bond to which the defendant was not a party might be admissible in evidence as against the latter either under section 21, clause (3), read with section 11, clause (2) of the Evidence Act, or under section 32, clause (5), or under section 159 of the Act. [p. 987, col. 2.]

Mahomed Syedool Ariffin v. Yeoh Ooi Gark, 39 Ind. Cas. 401; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678.

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43 I. A. 256 (P. C.) and *Gyanmessa v. Mobarak-anmessa*, 25 C. 210; 2 C. W. N. 91; 13 Ind. Dec. (N. S.) 142, relied on.

Although an erroneous omission in the Trial Court to object to an admission which is irrelevant does not make it relevant and admissible in evidence, still an objection that a document, which *per se* is not admissible in evidence, has been improperly admitted in evidence, cannot be entertained in the Court of Appeal, when, if the objection had been taken in the Trial Court, it might have been met and the proceedings regularised.

Miller, Official Assignee of the Estate of Ram-kishen Das v. Babu Madho Das, 23 I. A. 106; 19 A. 76; 7 Sar. P. C. J. 73; 9 Ind. Dec. (N. S.) 50 (P. C.) and *Girindra Chandra Ganguli v. Rajendra Nath Chatterjee*, 1 C. W. N. 530, relied on.

Appeal against a decree of the Subordinate Judge, Bogra, in Pabna and Bogra, dated the 22nd of March 1920, affirming that of the Munsif, First Court, Bogra, dated the 13th September 1919.

Babu Sasadhar Roy II, for the Appellant.—I beg to submit that the judgment of the learned Subordinate Judge cannot stand as admitted evidence which is clearly inadmissible under the law. The mortgage-bond which purports to prove that my paternal grandfather was not living when the property was purchased cannot be evidence against me. How can the learned Subordinate Judge admit it under section 32, clause (2) of the Indian Evidence Act, which provides that when the statement was made by *such person*, i.e., by a person who is dead or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without unreasonable expense or delay? This bond is not admissible as against me.

Refers to *Abdullah v. Kunja Behari Lal* (1).

Babu Jogesh Chandra Roy, (with him Babu Gopal Chandra Chakravarty), for the Respondents.—Section 35, clause (5) is sufficient for my purpose to make the mortgage-bond admissible. Here the relationship is between father and son. If date of birth is admissible, why should not the date of death be admissible? Refer to section 21 of the Evidence Act. No objection was taken when the document, i.e., the mortgage-bond was tendered.

Refers to *Dhanmull v. Ram Chunder Ghose* (2), *Mahomed Syedool Ariffin v. Yeoh Ooi Gark* (3).

Babu Sasadhar Roy, briefly replied.

JUDGMENT.—This is an appeal by the defendant in a suit for recovery of possession of land commenced against him by his father. The disputed property stands in the name of the appellant and the question in controversy was, whether he was the beneficial owner or whether it had been acquired by his father in his name. The Courts below have decided against the appellant and it is now contended that the decision of the Subordinate Judge is erroneous inasmuch as he has acted upon evidence inadmissible in law.

The defendant alleged that, although he was a boy, thirteen years old at the time when the property was acquired, the consideration was provided by his paternal grand-father. The plaintiff answered that his father died before the property had been acquired, and he produced a mortgage-bond which had been executed by him on the 28th October 1892 in which he is described as the son of Khan Mahomed Akonda, deceased. The Courts were, thereupon required to consider, whether the mortgage-bond was admissible in evidence as against the appellant. The Subordinate Judge has held that it was admissible by virtue of section 32, clause (2) of the Indian Evidence Act, read with section 21 clause (1). The appellant has contended that this view cannot be supported. The respondent has not placed reliance upon section 32, clause (2), but has invoked the assistance of section 32, clause (5). We are of opinion that the statement made by the plaintiff in the mortgage-bond executed by him on the 28th October 1892, namely, that his father had died previously may be made admissible in more than one way.

It is clear that section 159 might have been utilized for the purpose. The plaintiff went into the witness-box and stated that his father died in 1892. At a subsequent

(2) 24 C. 265; 1 C. W. N. 270; 12 Ind. Dec. (N. S.) 844.

(3) 39 Ind. Cas. 401; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T.L.R. 678; 43 I. A. 256 (P. C.).

(1) 12 Ind. Cas. 149; 14 C. L. J. 467; 16 C. W. N. 252.

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stage, when he was asked whether his father had died before the disputed property was acquired, he answered that he did not remember. He might then have been permitted to refresh his memory by reference to the mortgage-deed. This, however, was not done for the obvious reason that no exception was taken to the reception of the mortgage-bond in evidence. We may here point out that, although, as ruled by the Judicial Committee in *Miller, Official Assignee of the Estate of Ramkishan Das v. Babu Madho Das* (4), an erroneous omission in the Trial Court to object to an admission which was irrelevant did not make it relevant and admissible in evidence; still, as explained in *Girindra Chandra Ganguli v. Rajendra Nath Chatterjee* (5), an objection that a document, which *per se* is not admissible in evidence, has been improperly admitted in evidence, cannot be entertained in the Court of Appeal, when, if the objection had been taken in the Trial Court it might have been met and the proceeding regularised.

Apart from section 159, we are of opinion that the document might have been made admissible under section 21, clause (3), read with section 11, clause (2) of the Indian Evidence Act. Section 21, clause (3), provides that an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission. Section 11, clause (2), provides that facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. The question in issue was whether the father of the plaintiff had died in 1892. The existence of the fact in issue was made highly probable by the fact that the plaintiff had made an assertion to that effect immediately after his alleged death in 1892 when there was no controversy on the subject. In such circumstances, the document may be admissible, as was ruled in *Gyannessa v. Mobayakannessa* (6).

Finally, the respondent has relied upon section 32, clause (5), which, read with

Illustrations (b) and (e), points to the same conclusion. That section as interpreted by the Judicial Committee in the case of *Mahomed Syedool Ariffin v. Yeoh Ooi Gark* (3) clearly admits of use against the appellant.

Whichever of these views is taken, it is plain that the document is admissible in evidence. It is consequently needless for us to consider whether the conclusion of the Subordinate Judge was in fact based on the admission by the plaintiff.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs.

N. H.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL, SIDE APPEAL, No. 109 OF 1921.

August 2, 1922.

Present:—Sir Walter Schwabe, Kt., Chief Justice, and Mr. Justice Wallace.

BYSANI MADHAVA CHETTIAR,
CHARITY FUND, REPRESENTED BY ITS
SECRETARY K. NAMMALVAR
CHETTY—DEFENDANT—APPELLANT

versus

G. R. KRISHNASWAMY CHETTY.

PLAINTIFF—RESPONDENT.

Construction of document—Mortgage—Interest and public charges—Charge on property—Transfer of Property Act (IV of 1882), s. 72, applicability of.

Under the terms of a mortgage with possession the rents and profits were to be set off against the interest stipulated and any deficiencies were to be recovered by the mortgagee from the mortgagors "month by month." The mortgagee was also entitled to recover any public charges he may have to pay and the document ended with the recital, "we shall pay the aforesaid principal to you or to your order, redeem this mortgaged property and take back the document."

Held, (1) that the remedy which the mortgagee had for any interest not discharged by the rents and profits, was a personal remedy and that such interest was not a charge on the mortgaged property; [p. 988, col. 2.]

(2) that in the absence of any evidence of refusal by the mortgagors to pay the public charges when they occurred, which compelled the mortgagee to discharge them to save the mortgaged property from sale, section 72 of the Transfer of Property Act did not create a charge on the properties for the sums paid by the mortgagee and that the

(4) 23 I. A. 106; 19 A. 76; 7 Sar. P. C. J. 73; 9 Ind. Dec. (N. S.), 50 (P. C.).

(5) 1 C. W. N. 530.

(6) 25 C. 210; 2 C. W. N. 91; 13 Ind. Dec. (N. S.) 142.

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covenant as to payment of charges in the document was also a personal one. [p. 989, col. 1.]

Appeal against the judgment and decree of the Hon'ble Mr. Justice Phillips, dated the 1st September 1921 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 868 of 1919.

Messrs. A. Krishnaswami Iyer and S. Rangaswami Iyer, for the Appellants.

Messrs. K. Rajah Iyer and R. Ganapathi Iyer, for the Respondents.

JUDGMENT.

Wallace, J.—The chief point in this appeal is whether the terms of the suit mortgage document imply and impose a charge on the mortgaged property. The mortgage is not one which will come under the definition of any of the ordinary kinds of mortgage. It is not a simple mortgage because possession of the mortgaged property is given; hence the usual principle that in a simple mortgage interest as well as principal is secured on the property will not *prima facie* apply. It is not a usufructuary mortgage because the rents and profits are not given *in lieu of interest*; but there is a separate provision fixing the rate of interest and the method by which it is to be recovered, namely, that the rents and profits are to be set off, as far as available, towards the payment of interest. The contingency of an excess of rents and profits over interest or *vice versa* is specifically contemplated and for the case of deficit, where the whole of the interest is not met from rents and profits, it is provided that the mortgagee may recover "from us" (that is the mortgagors) "month after month." This, to my mind, means that the remedy which the parties secured by the mortgage for any interest not discharged by the rents and profits was a personal remedy, and that such deficiency was not to be added to the principal mortgage sum. This view is strengthened by a further sentence in the mortgage-deed: "we shall pay the aforesaid principal of Rs. 10,000 to you or your order, redeem this mortgaged property and take back the document," which seems to me to indicate further that the sum to be re-paid, prior to the redemption, and for the purpose of redemption was merely the original principal sum, I therefore hold that this docu-

ment means that interest was not to be a charge on the mortgaged property, but was left to be recovered under the personal covenant of the mortgagors.

Several reported cases have been put before us. With regard to these it is essential to say, first, that the meaning and the legal effect of a document is to be determined on its own terms alone. The two cases most akin to the present one are *Phul Kuar v. Murli Dhar* (1) and *Chintaman v. Dulari* (2). In the former case the chief point for decision was whether there was a mortgage at all, but it was incidentally decided that where there was a recital in the document that interest should be paid by the mortgagor "from his own pocket" there was not a charge created on the property for interest. Such a recital is similar to the recital now before us that interest shall be recoverable "from us month after month". In *Chintaman v. Dulari* (2) it was held that, where the document provided that the rents and profits were to be appropriated by the mortgagee "on account of interest" and that for any deficiency to recover the whole amount due for interest, the mortgagor would meet that deficiency with interest at 2 per cent. per mensem this deficiency was realisable from the mortgaged property. With reference to this case I would point out that the exact terms of the document are not given in the judgment, and that the exact terms are obviously of peculiar importance, since, although the resume of the document given in the judgment seems to show that the stipulation regarding the payment of interest on the deficiency of interest itself, the learned Judges held that while there was a charge on the property for the latter there was no charge on it for the former. Therefore, in the absence of the exact terms of the document in that case I am not prepared to adopt the ruling to the present case. In *Ali Ahmad v. Kalka Prasad* (3) the mortgagee took the annual profits in lieu of interest and therefore there was a usufructuary mortgage under which no question of a charge on the property for interest can arise, and the covenant was to pay "from

(1) 2 A. 527; 1 Ind. Dec. (N. S.) 905.

(2) 8 Ind. Cas. 570; 33 A. 107; 7 A. L. J. 1087.

(3) 37 Ind. Cas. 95; 14 A. L. J. 986.

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my own pocket" the deficiency not of interest, but of profits—obviously a personal covenant. The other cases quoted before us do not seem to have any useful bearing on the present case.

I would, therefore, hold that there is no sufficient reason for disturbing the finding of the lower Court that there was no provision in this mortgage charging the property with payments of the interest.

As to the other point argued it is sufficient to say that I agree with the original Court that there is no evidence that there was any refusal by the mortgagors to pay the assessment, quit rent, etc., which compelled the mortgagee to find money for these charges in order to preserve the property from sale, and that, therefore, section 72 of the Transfer of Property Act cannot be called in aid to charge the property with these payments. The document clearly says that if the mortgagors do not pay the charges the mortgagee shall recover "from us" that is, the covenant is a personal one.

I would, therefore, dismiss the appeal with costs.

Schwabe, C. J.—I agree and have nothing to add. The appeal will be dismissed with costs:

V. N. V.
N. H.

Appeal dismissed.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FURTHER CIVIL APPEAL No. 116-49 OF 1922.
April 10, 1923.

Present:—Mr. Pilon, J. C.

GHULAM HAIDAR SHAH AND OTHERS
—DEFENDANTS—APPELLANTS

versus

BAZID SHAH SON OF AMIR SHAH AND
OTHERS—PLAINIFFS—RESPONDENTS.

Hazara Settlement Rules (Regulation I of 1872), s. 60—N.-W. F. P. Regulation (VI of 1901), s. 3, effect of—Settlement of 1871, entries in, value of—Adverse possession—Mortgagor and mortgagee.

It is straining language to speak of rights as having become vested or claims having become barred merely by reason of the existence of a law which invests certain evidence with a character

different from that which attaches to similar evidence in other cases. [p. 991, col. 1.]

Section 60 of the Hazara Settlement Rules of 1872 did not lay down any thing more than a rule of evidence, and it was open to the Legislature to abrogate that rule and prescribe a fresh rule for the guidance of Courts. [p. 991, col. 1.]

The Legislature has unrestricted power to revive even a lapsed title, if it makes a special law which distinctly allows such a revival. [p. 991, col. 2.]

Section 3 of Regulation VI of 1901 has the full force of law and the Courts are bound to comply with its provisions and to regard the records of the Hazara Settlement of 1871 in exactly the same manner and as having exactly the same value as the records of any other Settlement in the Punjab or the N.-W. F. Province. [p. 991, col. 2.]

A mortgagee who comes into possession as a mortgagee, cannot force the mortgagor to come into Court and to sue for redemption merely by asserting a proprietary title. [p. 993, col. 1.]

Teju Mal v. Zulfikar Shah, 49 P. R. 1882, *Indar v. Asa Singh*, 63 P. R. 1908; 90 P. L. R. 1908; 113 P. W. R. 1908; *Lehma Singh v. Santa Singh*, 13 Ind. Cas. 852; 138 P. L. R. 1912; 9 P. W. R. 1912, *Shah Nawaz v. Sheikh Ahmad*, 59 Ind. Cas. 478; 1 L. 549; 2 L. L. J. 583, referred to.

No unilateral act by either party to a mortgage can prejudice the title of the other. [p. 993, col. 2.]

Further appeal from the order of the Additional Divisional Judge, Peshawar, dated the 15th August 1922, whereby the order of the Munsif, First Class, Mansehra, dated the 31st May 1922, was set aside.

Mr. Saad-ul-din Khan, K. S., and Mr. Madan Gopal, for the Appellant.

Mr. Diwan Chand, R. S., and L. Gobind Sahai, for the Respondents.

JUDGMENT.—This is a suit for redemption of an area of 3438 *kanals* 6 *marlas* on payment of Rs. 440. It is resisted on the ground that the defendants, who have been impleaded as mortgagees, are owners by purchase from the mortgagors, or that they have at least established a proprietary title by adverse possession. The land in suit is situated in the village of Jabbar, an inaccessible tract at the head of the Bhoganmang Valley, in the Hazara District, and adjoining the trans-border territory of Allai. The original owners of the land were admittedly the ancestors of the present plaintiffs. A registered mortgage-deed was produced, dated the 9th of August 1869, by which this land was mortgaged by the owners, Shah Sharaf, Akbar Shah, Amir Shah, Haidar Shah and Haibat Shah for Rs. 440 for a term of 16 years to two persons

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Muhammad Shah and Ghulam Hussain. The mortgagors were residents of Allai in independent territory and the mortgagees residents of Jabbar. Only three of the descendants of the original mortgagors have come forward as plaintiffs in the present suit, the remainder being impleaded as defendants. These latter have put in no appearance during the hearing of the case. In the *surat dehi* prepared in 1870 a statement was recorded by the mortgagees to the effect that the land was mortgaged to them for Rs. 500 for a term of 8 years. Neither the mortgage-debt nor the period for the mortgage were in accordance with the terms of the registered deed which was stated at the time by the mortgagees to have been lost. In the Settlement Record, however, of 1871 the mortgagees were recorded no longer as mortgagees, but as proprietors with a full title. There is nothing to show what enquiry, if any, was made on the question of title, and for what reason this change in the record was effected. The entry recording Muhammad Shah and Ghulam Hussain and their descendants as full proprietors of the land has continued unchallenged up to the present time. The contention that the mortgagees acquired a proprietary title by purchase from the mortgagors is set up only by the descendants of Muhammad Shah in the present case. Those of the descendants of Ghulam Hussain, the other mortgagee, who contested the suit have done so only on the ground that they are entitled to improvements.

The Trial Court held that the defendants had succeeded in proving a full proprietary title and dismissed the suit. The Divisional Judge on appeal held that the defendants' possession began as mortgagees and that there was no evidence to show that it had ever been converted into that of proprietors, and that such possession could not be adverse to the mortgagors by reason of any statement or assertion of proprietary title made by the mortgagees during the continuance of their possession. He, therefore, decreed redemption of the land in suit on payment of Rs. 440. The question of improvements was left to the decision of the Revenue Authorities whenever proceedings for ejectment of the defendants from cultivating possession

should be taken. The three sons of Muhammad Shah, who are defendants Nos. 1, 2 and 3 in this case, appeal to this Court.

The first position taken up by the appellants' Counsel is one which was not argued before the Divisional Court. It is that the proprietary title of the appellants has become vested by reason of the operation of section 60 of the Hazara Settlement Rules published as Regulation I of 1872 by the Governor-General in Council. The effect of section 60 of those rules was to give entries of the Settlement of 1871 an entirely different position from that which revenue entries ordinarily occupy. It laid down that the Revenue Record was to be considered a final settlement of all matters treated by it and that no suit could lie to enforce a right contrary to that record. The Punjab Chief Court, while Regulation No. I of 1872 was in force, treated the entries in the Settlement of 1871 as a bar to any suit which challenged the correctness of those entries except in so far as it conformed to the proviso to section 60 which allowed a suit to be brought to show that the entry was contrary to the Settlement award made in respect of the title in suit. It was held that the limitation for a suit of this nature was 6 years from the date of the entry. Civil Appeal No. 1190 of 1897 has been quoted by the Counsel for the appellants as illustrative of this view. The case related to redemption of land in the Hazara District and was very parallel to the present case. It was one which challenged the correctness of an entry made recording the alleged mortgagee as a full proprietor and it was held that section 60 was fatal to the suit, the entry recording the defendants proprietors being final. Regulation No. I of 1872 was, however, repealed by Regulation VI of 1901 and section 3 of the Amending Regulation further enacted that no entry made in the Record of Rights of the first Regular Settlement of the Hazara District shall have or to be deemed to have, any greater or less force than that which attaches under section 44 of the Punjab Land Revenue Act of 1887 to an entry duly made in a Record of Rights in accordance with law. The learned Counsel for the appellants argues that the repeal of a law cannot revive a cause of action which has become extinct,

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or take away any title which has become perfect. Authorities for this view are given on page 6 of Rustomji's Law of Limitation (third Edition) where it is laid down that a new Statute cannot revive barred rights when the rights of parties have become vested, and that this proposition is one which has been accepted by all High Courts in India. Now, there is not the least doubt that the present suit for redemption would have been defeated by section 60 of the old Hazara Settlement Rules if it had been brought before those rules were amended. This position cannot be denied and is not even contested by the learned Counsel for the respondents. It appears to me, however, that it is straining language to speak of rights as having become vested or claims having become barred merely by reason of the existence of a law which invests certain evidence with a character different from that which attaches to similar evidence in other cases. It seems to me difficult to regard section 60 of the Hazara Settlement Rules of 1872 as laying down anything more than a rule of evidence. It is argued by the appellants' Counsel that no act of the Legislature is retrospective unless the Act itself clearly prescribes that it shall be so retrospective. It is further contended that it is beyond the power of the Legislature to affect rights which have already accrued. Both these arguments, however, though they have considerable weight, appear to me fallacious, if examined closely. So far as the word "retrospective" can be used at all in this connection, it is perfectly clear that the Legislature intended that Regulation VI of 1901 should be retrospective. It must be remembered that this Regulation goes beyond a mere repeal of the Regulation of 1872 and adds in section 3 a very definite pronouncement that entries made in the Regular Settlement of 1871 shall be regarded as having no more force than entries made in any other Settlement. It would be difficult perhaps to describe this provision as having a retrospective effect, as its object is to prescribe a rule of evidence for Courts adjudicating upon cases which arise after its enactment. It could only be regarded as retrospective if it be assumed that Regulation I of 1872 not only prescribed a rule of evidence

for the guidance of Courts, but also conferred an absolute title irrespective of the evidence upon which such a title was based. If this latter view of Regulation I of 1872 be accepted, it is clear that the Legislature in putting into law Regulation VI of 1901 deliberately intended a retrospective effect, *i.e.*, that even if a valid title had been conferred by Regulation I of 1872, such a title should no longer be considered valid by the Courts and should be open to challenge exactly as any other title recorded in the Settlement is so open. I have been shown no authority for the view that the powers of the Legislature are restricted with regard to a definite pronouncement upon questions of title. If we take the view that Regulation I of 1872 lays down nothing more than a rule of evidence, it was open to the Legislature to abrogate that rule and to prescribe a fresh rule for the guidance of Courts. If, on the other hand, we consider that Regulation I of 1872 had the effect of conferring titles the object of the Legislature in passing Regulation VI of 1901 was clearly and unmistakeably to invalidate such titles. The principle put forward by the learned Counsel for the appellants that a Statute does not revive a lapsed title, primarily refers to amendments in the Law of Limitation. I can see nothing to support the extreme view that the Legislature has not an unrestricted power to revive even a lapsed title if it makes a special law which distinctly allows such a revival. The question is not one of the morality or advisability of a Statute of this nature, but its legal binding force. I may add that I have been shown no precedent in which the validity of section 3 of Regulation VI of 1901 has as yet even been challenged in any Court in this Province. I can only regard that section as having the full force of law, as was clearly intended by the Legislature, and I consider that Courts are bound to comply with its provisions and to regard the records of the Hazara Settlement of 1871 in exactly the same manner and as having exactly the same value as the records of any other Settlement in the Punjab or N.-W. F. Province.

It remains then to consider whether there is evidence to show that the mortgage which admittedly subsisted in 1870,

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has been converted into a sale. We have in the first place, of course the Settlement Record of 1871 and, as in the case of other Revenue Records, it is entitled to a presumption of truth unless rebutted. I cannot concede the argument which has been put forward by the Counsel for the respondents, that the registered mortgage-deed of 1869 cannot be rebutted by oral evidence. It is not the *factum* of the original mortgage which is in issue at all, but the allegation that there was a subsequent sale. It is clearly open to the appellants to prove such a subsequent sale if they can. The evidence as to this subsequent sale falls into two parts, one is the presumption to be derived from the revenue entries recording them as full proprietors, and the other is the conduct of the parties during a civil suit which was lodged in 1893 by one of the mortgagors Muhammad Shah against another mortgagor Dilawar Shah. The presumption to be derived from the Revenue Record is weakened by the fact that the mortgagors are residents of independent territory, and that, therefore, there was more than a possibility that they were not present when the Settlement Record of 1871 was drawn up, and that they may have been unaware of the extent to which their title had been prejudiced by the entries. There is, further, the fact that no kind of proceedings have come to light to show that any special investigation of the title of the parties was made in the Settlement of 1871 or any award was drawn up such as appears to have been drawn up in all disputed cases, as referred to in section 60 of the Hazara Settlement Rules. As regards the conduct of the parties in the litigation which arose in 1893, I have been through the record of the case in question. The dispute was between Muhammad Shah and Dilawar Shah and both very naturally started by assuming that they were full owners. Muhammad Shah alleged that he owned a three-quarters share in the estate and Dilawar Shah set up a title to the whole, though it appears that he hoped only to establish a claim to one half. Muhammad Shah was successful in the suit. In order to establish their respective claims, these two parties put forward conflicting versions of how their proprietary rights had been

obtained. Muhammad Shah alleged that they had been obtained prior to the preparation of the Settlement Record in 1871. This was no doubt in order to strengthen his contention that he was the owner of three-quarters as the Settlement entries recorded the shares in that way. Dilawar Shah, on the other hand, in setting up a title to the whole, tried to make out that the sale had occurred in 1885, or, in other words, just at the time when the period for the mortgage expired. Dilawar Shah produced as evidence three of the mortgagors Bazid Shah, Kalandar Shah and Qudrat Ali Shah. These men in their evidence supported Dilawar Shah to a certain extent. They admitted that he had purchased $\frac{1}{4}$ th of the property, but they denied that the remaining $\frac{5}{6}$ th had ever been sold. The learned Divisional Judge has, I think, made an error in saying that they only admitted a proposal to sell, but it is tolerably clear that they spoke of an actual sale to Dilawar Shah, but one which only covered $\frac{1}{4}$ th of the property. As a matter of fact, the subject-matter of the suit was a comparatively small portion of the land originally mortgaged, *viz.*, only 41 *kanals* 11 *marlas*. Now, the mortgagors were not themselves parties to the suit, and it would be difficult to say that their own rights were being very materially affected by it. As a matter of fact, in view of the Settlement entries and the existence of Regulation I of 1872, it would have been useless for them at the time to have come forward with a suit for redemption. There was also no particular reason why they should wish to redeem, and the land then in dispute between Muhammad Shah and Dilawar Shah was a comparatively small portion of the estate. Their object seems to have primarily been to defeat Muhammad Shah's contention that the sale was made in 1871 and to support Dilawar Shah who set up the position that the mortgage had subsisted for a full 16 years after its commencement. Now, in spite of the finding of the Court in 1894 in favour of Muhammad Shah as against Dilawar Shah, there seems to me every thing to show that no sale had occurred in 1871. The registered mortgage-deed was in existence then and is still in existence and is in possession

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of the mortgagors. It is difficult to understand how a mortgagee who holds under a registered mortgage-deed would be content with any thing less than a registered deed when he converts his title into that of a vendee. The mortgagees in question are residents of British Territory and there is no reason why they should have been so careless in respect of their title-deeds. Further, in the 1893 litigation the sole evidence as against this that there was any sale in 1871, was the statement of Muhammad Shah himself and the existence of the revenue entries the strength of which is considerably weakened by the considerations I have alluded to above. There is everything to show, therefore, that the mortgage was still subsisting at least up to 1885. The only possible evidence which we have of any negotiations or any transaction of sale between the parties relates to the year 1885. If this position be conceded, the value of the entries of the Settlement of 1871 disappears altogether, for it is clear that they must have been wrong. Whether or not the mortgage was converted into a sale in 1885, it had clearly not been converted when the Record of 1871 was prepared. I hold, therefore, agreeing with the Divisional Judge, that there is no evidence to show that the mortgage was ever converted into a sale.

The law regarding adverse possession has been dealt with by the learned Divisional Judge, and I do not think that it requires further discussion. There is a consensus of rulings to the effect that a mortgagee who comes into possession as a mortgagee, cannot force the mortgagor to come into Court and to sue for redemption merely by asserting a proprietary title. The mortgagor is perfectly entitled to sleep upon his rights until the 60 years allowed for redemption by the Limitation Act have expired. Authorities for this view are *Teju Mal v. Zulfikar Shah* (1), *Indar Singh v. Asa Singh* (2), *Lehna Singh v. Santa Singh* (3) and *Shah Nawaz v. Sheikh Ahmad* (4). No unilateral act by

either party to a mortgage can prejudice the title of the other. Again, I cannot hold that the evidence given by the mortgagors in the litigation of 1893 amounts either to a bilateral act asserting the sale to any estoppel. Their evidence was directed solely to supporting Dilawar Shah in the contention regarding the shares of Muhammad Shah and Dilawar Shah *inter se*. It would be impossible to argue from this either adverse possession by the mortgagees or estoppel. It may further be remarked that the omission of the majority of the mortgagees to support three of their number in asserting a sale may not be very important, but must tell at least to some extent in favour of the plaintiff's position.

On the above findings, I must agree with the conclusions arrived at by the learned Divisional Judge and uphold his order. I, therefore, dismiss this appeal with costs.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 704 OF 1920.

September 28, 1922.

Present:—Mr. Justice Marten and
Mr. Justice Pratt.

SHRIDHAR LAXMAN DHEKNE AND

OTHERS—DEFENDANTS NOS. 2 to 4—

APPELLANTS

versus

JANARDHANBAPUJI KURAWDE—

PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 32—Document, registration of—Presentation by person signing on behalf of executant, validity of—Pleadings—Second appeal—Point of law, necessitating additional evidence, admissibility of.

Whether a person signs a document expressly as agent or whether he is expressed to sign on some other person's behalf, that makes no substantial difference. In each case he signs *prima facie* as agent and has a right to present the document for registration. [p. 994, col. 2.]

(1) 49 P. R. 1882.

(2) 65 P. R. 1908; 90 P. L. R. 1908; 113 P. W. R. 1908.

(3) 13 Ind. Cas. 852; 138 P. L. R. 1912; 9 P. W. R. 1912.

(4) 59 Ind. Cas. 478; 1 L. 549; 2 L. L. J. 583.

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Per *Pratt, J.*—An appellant cannot, in second appeal, take a point of law which involves the taking of additional evidence. [p. 995, col. 2.]

Second appeal against the Additional Judge at Poona, in Appeal No. 16 of 1919.

Mr. *Nilkant Atmaram*, for the Appellants.

Mr. *B. V. Virkar* for Mr. *D. C. Virkar*, for the Respondents.

JUDGMENT.

Marten, J.—We are hearing this case in second appeal, and two points have been argued before us. The first is as to the effect of the conveyance by Krishnaji to the plaintiff of 23rd September 1915. (Exhibit 71). Counsel for the defendants Nos. 2 to 4, who are the appellants, contends that on the true construction of the document, merely one-third of Ramachandra's one-quarter share passed, and not the whole of that one-quarter share. We have carefully considered this document, and we are of opinion that the decision in the Court below as to the effect of this document is correct, namely, that the entirety of that one-quarter passed to the plaintiff.

Originally, undoubtedly, Ramachandra had conveyed this quarter to Kashinath in 1883 by Exhibit 66. Kashinath had conveyed it by Exhibit 83 to Krishnaji in 1896. But by a document of 1904 (Exhibit 72) one Govind as survivor of himself and Gopal had purported to convey a two-thirds share in this quarter to the plaintiff on the hypothesis that Krishnaji acquired this quarter share for the benefit of himself and his joint brothers, Govind and Gopal. Turning next to Exhibit 71 under which the plaintiff also claims, this document refers to the conveyance by Govind (Exhibit 72,) and in the view I take it really confirms it. The effect of Exhibit 71 is, in my opinion, that there is an absolute conveyance of one-third of one-fourth, and a confirmation and conveyance of the remaining two-thirds which had previously been conveyed by Exhibit 72 by Govind to the plaintiff. I am quite satisfied that the intention of the parties was that the entirety of the quarter should vest in the plaintiff. That, in my opinion, is the effect of this document, and accordingly this point will be decided in favour of the respondent.

Then, the next point is this that the defendants contend that the conveyance

of 1896 by Kashinath to Krishnaji (Exhibit 83) was not duly registered in accordance with the requirements of the Registration Act. From the endorsement it appears that this document was presented at the office of the Sub-Registrar on the 3rd September 1896, and it is signed as "Krishnaji Ramchandra on his behalf Ramchandra Vithal." In other words, Ramchandra, the father of Krishnaji, presented the document for registration. Now, no doubt, the Indian Law is very strict, and rightly so, having regard to the danger of forgery, in seeing that the requirements of the Indian Registration Act are strictly complied with and nothing in what I am going to say is intended in any way to depart from the well-established authorities on these points. Counsel for the appellants conceded, and I think rightly so, that if the document had been signed by Ramchandra as agent for his son Krishnaji, then the Act would *prima facie* have been complied with and it would then be for the defendants to establish if they could, that the requirements of the Act were not in fact complied with. But, in my opinion, there is no substance in that point. Whether a man signs expressly as agent or whether he is expressed to sign on some other person's behalf, that, in my opinion, makes no substantial difference. In each case he signs *prima facie* as agent. Accordingly, in the view I take, *prima facie* the document complied with the requirements of the Indian Registration Act, and, therefore, it was rightly admitted in evidence. It appears that in fact no objection whatever was taken to this document until after the evidence was closed and indeed until after Counsel's arguments were finished. The result was that no evidence was led by the defendants to negative the *prima facie* conclusion as to the validity of registration. Under these circumstances, I agree with the learned Judges in the Courts below that this document was duly registered and that it was rightly relied on in the lower Courts. This disposes of the two points raised by the defendants in Second Appeal No. 704 of 1920.

Then there is a cross-appeal, Letters Patent Appeal No. 13 of 1921. This raised two small points. The one is for mesne profits for the plaintiff for three years

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before suit and for three years after suit. The other is that the defendants were wrongly allowed to go into the matter of certain improvements which they effected during the suit and to have inquiries made for that purpose. *Prima facie*, it sounds plausible that if a person is kept out of possession he should be allowed mesne profits for some time before suit, or, at any rate, from the institution of the suit. But the facts here are peculiar. The defendants were admittedly rightfully in possession of three-fourths of the house in their own right. The house was also, on the evidence before us, in a very dilapidated condition. On the facts then of this case, it seems to me extremely difficult to establish, within the meaning of O. XX, r. 12, and section 2, sub-section 12, of the Civil Procedure Code, that the defendants actually received any profits of the remaining one-quarter, or might, with ordinary diligence, have received such profits. There was no evidence that they actually received any, and on the facts stated I cannot disagree with the view taken in the Court below that there was no proof that they would, with ordinary diligence, have received such profits. Nor can I see that the position after suit was any different to what it was before. We are not concerned with the future because we are told by Counsel that the house was acquired by the Municipality last year for Rs. 8,000. Under these circumstances, I think that the appeal as to mesne profits fails.

Similarly, defendants have not, I think, been damaged as regards the repairs. That will be a matter to be gone into on the inquiry in the suit as directed by the Trial Judge. If the defendants can show by proper evidence that they ought fairly to be compensated for certain improvements which they can prove they have effected to the property, then they can be allowed those expenses in working out the partition although they have not yet proved them in this case. If, on the other hand, the inquiry results in favour of the plaintiff, he will not have to contribute to these alleged improvements, and so will not be prejudiced.

In the result, therefore, I am of opinion that the lower Courts have arrived at the

correct result and both the appeals will be dismissed with costs.

It is suggested that we ought to interfere with the order for costs in the Courts below, and in particular in the Court of first instance. It is a hardship, it is said, on the plaintiff that he should be ordered to bear his own costs. But I cannot see that the learned Judge proceeded on any wrong principle. He gave his reasons for ordering each side to bear its own costs. Whether I personally should have arrived at the same decision is really immaterial. The discretion was his. I see nothing unreasonable in his exercise of that discretion, and in my judgment we ought not to interfere with it. The result is that the orders as to costs in the Courts below will stand.

Pratt, J.—I agree. I only desire to add one word on the point of registration. The deed of sale (Exhibit 83) was presented for registration by Ramchandra on behalf of Krishnaji and the endorsement of presentation was signed by Ramchandra under section 52 of the Indian Registration Act. The objection raised by the defendants is that Ramchandra had no authority to present the deed on behalf of his son because he did not hold a power-of-attorney recognizable under section 32 of the Act. But this want of authority does not appear on the Sub-Registrar's endorsements. So far as they go, the deed had been properly registered. If, as a matter of fact, Ramchandra had not authority to present the deed for registration, that was a fact which ought to have been established by evidence in the lower Court. The appellant cannot in second appeal take a point of law which involves the taking of additional evidence. See *Gavdappa v. Girimallappa* (1).

N. K.

(1) 19 B. 331; 10 Ind. & Dec. (N.S.) 224.

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PESHAWAR JUDICIAL COMMISSIONER'S COURT.

FURTHER CIVIL APPEAL No. 137-84 OF 1922.

January 18, 1923.

Present:—Mr. Pipon, J. C.

MIR AHMAD SHAH AND ANOTHER—
DEFENDANTS—PLAINTIFF—APPELLANTS

versus

Khan Bahadur Mian MUSHARRIF SHAH
AND ANOTHER—RESPONDENTS.

Contract Act (IX of 1872), ss. 247, 248—Partnership—Minor member—Benefit to minor—Repudiation—N.W. F. P. Law and Justice Regulation, s. 79—Further appeal—Finding of fact, whether can be questioned.

In order to decide whether the admission of a minor to a partnership was for his benefit, the Court has to consider not the benefit to the minor of an isolated clause of the partnership agreement, but the total benefit which would result to him. [p. 999, col. 1.]

A clause in a partnership agreement restraining a minor partner from starting a business in competition with the business of the firm does not amount to making the minor personally liable for any obligation of the firm within the meaning of section 247 of the Contract Act.

Section 248 of the Contract Act is directed primarily to the protection of the creditors of a firm. Where, however, one set of partners is indebted to another for the provision of capital, it is for a minor member liable under the deed of partnership to repudiate his membership if he is to escape liability to the other partners. [p. 999, col. 2.]

The mere omission by a minor partner to take part in the execution of an agreement by certain members of the firm does not amount to a public notice of repudiation as contemplated by section 248 of the Contract Act. [p. 999, col. 2.]

Although it is the practice of the Judicial Commissioner N.W. F. P. to be slow in disturbing the concurrent findings of fact of the lower Courts, there is no legal bar in that Province to the reopening of an issue of fact on further appeal. [p. 1000, col. 1.]

Further appeal from an order of the Divisional Judge, Peshawar, dated the 30th August 1921, reversing that of the Sub-Judge, Nowshera, dated the 3rd of March 1921.

Mr. Hukam Chand, for the Defendants.

Mr. Saaduddin Khan, K. S., for the Respondents.

JUDGMENT.—The facts of this case are these. Of the four defendants Mehr Shah, defendant No. 1, and Madad Shah, defendant No. 4, are brothers. Mir Ahmad Shah and Hamayun Shah, defendants Nos. 2 and 3, are the sons of Mehr Shah, defendant No. 1. They are Mians of Ziarat Kaka Sahib and have been engaged in

the timber trade in the trans-frontier territory of Kohistan. The plaintiffs, K. S. Mian Feroze Shah and K. B. Mian Musharrif Shah, are the sons of late K. B. Mian Rahim Shah and are prominent capitalists connected with similar trade. Prior to 1913, the defendants Mehr Shah and Madad Shah had been engaged in certain transactions in a tract known as Jandro Khwar in Kohistan, which they were unable to carry on owing to want of capital. On the 28th of October 1913 they entered into an agreement with Mian Feroze Shah under which he and his brother were to supply the necessary capital and the defendants to act as managing partners. The profits were ultimately to be shared between the parties in the proportion of annas 10 in the rupee to Mian Feroze Shah and K. B. Mian Musharrif Shah and annas 6 in the rupee to the defendants. The agreement was executed in counter-part and contained various other provisions which are material to the present suit. At the time of the execution of this agreement the two sons of Mehr Shah, Mir Ahmad Shah and Hamayun Shah, defendants Nos. 2 and 3, were minors. It was shown, however, that certain timber, which was the subject-matter of the transactions in Jandro Khwar had been registered with the Forest Department in their names. Under the agreement they were included as partners and it purported to be executed in their interests by their father. The business continued upon the lines laid down in the agreement up to 1917 when it appears that disputes arose. The capitalists were not satisfied that their money was being properly expended, but the managing partners were anxious that the business should continue. It was, however, before these disputes had come to an end that a second agreement was drawn up on the 11th of June 1917 by which the partnership business was extended by the inclusion of timber transactions at a place called Kundal Khwar in which, formerly, the capitalists alone had been interested. It was provided in the agreement of the 11th of June 1917 that the defendants should act also as managing partners of the Kundal Khwar business. This latter agreement was executed by K. B. Mian Musharrif Shah on one side and by Mehr Shah and Madad Shah only on the other. At

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the time when this agreement was executed, Mir Ahmad Shah, defendant No. 2, had already attained majority. One of the most important clauses (clause 6) of the 1913 agreement was, that the defendants were obliged, so long as the partnership continued, to throw into it any other timber business in Kohistan in which they might engage. After 1917, however, Mir Ahmad Shah, defendant No. 2, began floating down the Indus timber bearing a certain mark in the form of a bottle and alluded to as the "bottle mark." This mark was registered with the Forest Department as denoting his exclusive property. On the 16th of October 1919 the plaintiffs K. S. Mian Feroze Shah and K. B. Mian Musharraf Shah instituted the present suit, which, in its final form, prayed:—

(1) for a declaration that all timber bearing the bottle mark was the property of the firm established between the parties by the agreement of the 28th of October 1913, (2) that a permanent injunction be issued restraining the defendants from alienating or otherwise disposing of the said timber, and (3) that possession be given to the plaintiffs of 28 logs bearing the bottle mark which had already been floated down, or, in the alternative, for the recovery of Rs. 300 as their price.

The suit was based on the contention that, under the agreement of the 28th of October 1913, the defendants were obliged to put into the partnership any timber business on which they might embark in Kohistan, and that the timber bearing the bottle mark was the subject of business on which they had so embarked during the currency of the partnership. The suit was resisted on the ground that Mir Ahmad Shah, defendant No. 2, was not bound by the agreement of 1913 made during his minority, and that he was the sole proprietor of "bottle-mark timber" which, it is alleged, had been purchased by funds owned exclusively by him and not acquired from the capital of the firm. The Trial Court found that defendants Nos. 2 and 3 were not bound by the agreement of 1913 as it was one made during their minority and not for their benefit; that defendant No. 2 had not acted upon or ratified that agreement after attaining majority, and that the "bottle mark timber" was acquired by him from funds which were

his own property and not that of the firm. The suit on these findings was dismissed. The Divisional Judge, on appeal, held that defendants Nos. 2 and 3 were bound by the agreement of 1913, and that, therefore, under the provisions of that agreement, the "bottle mark timber" was the property of the firm. He, therefore, granted the plaintiffs the declaration and injunction sued for. Possession of the logs received by defendant No. 2 was not decreed, nor was any sum decreed on account of their price as it was held that their value should be accounted for on dissolution of partnership. Although the plaintiffs were granted the declaration sued for, the Divisional Judge upheld the finding of the First Court that the "bottle mark timber" had been acquired with funds which were the exclusive property of defendant No. 2.

Two appeals have been lodged in this Court. Defendants Nos. 2 and 3 appealed against the declaration granted and the finding that the "bottle mark timber" is the property of the firm. Plaintiffs appeal against the finding of the Trial Court, as confirmed by the Divisional Judge, that the timber in question was acquired from funds owned by defendant No. 2 alone.

I deal first with the more important appeal which is that by the defendants. The learned Divisional Judge has held that section 247 of the Contract Act applies to defendants Nos. 2 and 3 in respect of the agreement of 1913 entered into by their guardians during their minority. This finding is challenged by the defendants on the same grounds as were argued in the Divisional Court. Strictly speaking, a minor can make no contract, and it is more correct to refer to the transaction in question as one in which the minors were admitted to the benefits of a partnership within the meaning of section 247 of the Contract Act. The argument of the defendants-appellants may be treated as falling into two parts. The first is, that the defendants were not in actual fact admitted to the partnership under the agreement of 1913, and the second, that, even if they were, their admission was invalid in law on the ground that such admission was not for their benefit. The learned Divisional Judge has dealt with five points put forward by the defendants to support their contention that

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they were not made members of the firm by the agreement of 1913. These points are argued also on appeal. I agree with the Divisional Judge that three at least of these points are not worth very serious consideration. One is the admission made in the plaint that the major defendants were the real owners of certain timber which was registered in the name of the minor defendants at the time of the execution of the agreement. The admission is not in any way material. It may be a fact that the registration of certain timber in the name of the minor defendants was a purely *bénami* transaction, as alleged in the plaint, and that the major defendants were the real owners. I fail to see, however, how this affects the case. The fact that this timber was registered in a Government Office in the name of the minor defendants no doubt was one of the reasons that the minor defendants were admitted to the partnership. The plaint itself, however, is perfectly clear. It goes on to recite very definitely that the minor defendants were also made members of the firm, and that the object of this was to benefit them. Another argument is that Mir Ahmad Shah, defendant No. 2, was for a time in receipt of a salary from the firm for his services as agent in Kohistan. There is nothing incompatible with partnership in the receipt of a salary by a partner from the firm in respect of specific services. It is argued that the agreement itself deals with the question of payment to be made to the managing agents. The agreement prescribes that Mehr Shah and Madad Shah shall receive from the plaintiffs a sum of Rs. 60 per mensem for their expenses. It is also clearly laid down, however, that this sum is to be treated as a loan to them personally, and that it will be re-paid by them on the final taking of account. It does not appear to me in any way to affect the question of remuneration for particular services. Again, the fact that in a letter Mir Ahmad Shah alluded to himself as an employee of the firm has little importance. The two most important arguments, according to the Divisional Judge, are that the counter-part executed by the plaintiff Feroze Shah in 1913 was silent as regards the minor defendants; and that the latter were not parties to the agreement of 1917. The omission of their

names in the counter-part cannot be regarded as very material. The agreement and the counter-part were executed simultaneously, and the important document, so far as regards the position of the defendants, was that executed by them and under which they agreed to be bound by certain terms. The agreement of 1917 is regarded by the Divisional Judge as one which falls under the provisions of section 351 of the Contract Act. As against this, it is argued by the learned Counsel for the appellants that an entirely new contract was created by the agreement of 1917. I am unable to accept this view. The agreement of 1917 did not in any way affect the terms of the partnership or the mutual rights and obligations of members of the firm. It simply extended the business of the firm. Regarded in this aspect, it can be legitimately treated as embodying action necessary for carrying on the business of the partnership. I agree, therefore, with the Divisional Judge in holding that the minor defendants were clearly admitted to the partnership within the meaning of section 247 of the Contract Act.

The validity of the admission of the minor defendants as members of the firm is also attacked on the ground that, in any case, such admission was not for their benefit. It is argued that clause 6 which prohibited them from entering into competition with the partnership business, was one which restrained their activities and which was prejudicial to them. It is argued that defendant No. 2 on attaining majority was precluded by this agreement from spending capital and skill in a manner which he would otherwise have been legitimately entitled to do. It is contended that personal liability by a minor is specifically excluded by section 247, and that any restraint upon the minor's future activities represent a personal liability. This argument does not appear to me to carry great force. There is not the least doubt that unless the father of the minors had succeeded in coming to terms with the capitalists, who were ready to finance the operations, he would have had to have shut down his timber business altogether and would have incurred a very heavy loss. His minor sons had obviously no capital of any kind at the time, and were dependent entirely

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upon their father. Mehr Shah and Madad Shah are shown by the agreement itself to have incurred an expenditure of over Rs. 23,000, only Rs. 5,500, of which they had found from their own funds. The remainder of the sum represents borrowed capital which they would have to re-pay. It was, therefore, very greatly for the benefit of the minors themselves that the business should continue. Now, it is perfectly clear that no capitalist would finance a business of this kind unless he were protected by an undertaking that the managing partners of the business would not, after being financed, start a rival business in their own names independently of the capitalist, which would enter into competition with the business in which he acquired an interest. Such an undertaking in these cases would invariably be insisted upon, and would be a *sine qua non* for the advance of capital and the floating of a partnership business. At the time Mir Ahmad Shah was not far off majority, and it would have been impossible to allow him a free hand to enter into competition with his father's firm by starting a rival business, which he could only hope to do by the mere fact that his father had been relieved from financial straits and had been saved from the necessity of closing down altogether. What we have to consider is, not the benefit to the minor of an isolated clause of the partnership agreement but the total benefit which would result to him. There cannot be the least doubt that the rescue of the business from its perilous financial situation was a benefit to the minor which far outweighed any restriction which might be placed upon his activities. It appears to me, further, that it is straining language to call the restriction upon competitive business a personal liability to an obligation of the firm. There can be no question that the father of the minors was acting in perfect good faith in making the agreement, and it would be absurd to argue that he was in any way hostile to, or careless of, their interests at the time. There is not the least reason to suppose that any of the parties in 1913 imagined that Mir Ahmad Shah would be anxious to set up a business of his own, or that he would ever have the means or opportunity of doing so. In fact, there was every probability that he could not

have done so if the agreement of 1913 had not been concluded.

It has again been found by the Divisional Judge that Mir Ahmad Shah, defendant No. 2, has since attaining majority, become liable to all obligations incurred by the partnership under section 248 of the Contract Act by reason of his omission to give public notice within a reasonable time of his repudiation of the partnership. As against this, it is argued by his Counsel that his exclusion from the agreement of the 11th of June 1917 amounted in itself to a public notice. I cannot agree with this view. I have already pointed out that the agreement of 1917 can be regarded as an act which a single partner was entitled to perform within the meaning of section 251 of the Contract Act. Further, it is clear from the evidence on the record that Mir Ahmad Shah, when the agreement of the 11th of June 1917 was executed, was absent in Kohistan and was not accessible. In any case, the mere omission to take part in the execution of an agreement by certain members of the firm could not amount to a public notice of repudiation contemplated by section 248 of the Contract Act. It is also argued by the appellants that section 248 only applies to obligations of the firm to third parties, and not to the relations of the partners *inter se*. Section 248 undoubtedly is directed primarily to the protection of creditors of the firm. Where, however, one set of partners is indebted to another for the provision of capital, it must be clearly for a minor liable under the deed of a partnership, to repudiate his membership if he is to escape liability to the other partners. I agree with the finding of the Divisional Court that the defendant Mir Ahmad Shah is now debarred by section 248 of the Contract Act from repudiating his membership.

The question of jurisdiction raised in paragraph 5 of grounds of appeal by the defendants has not been pressed. On the above findings, therefore, the appeal of the defendants fails.

I now turn to the appeal of the plaintiffs. It has been argued by the learned Counsel for the defendants that we have a concurrent finding of fact which cannot be disturbed by this Court on further appeal. There is, however, no legal bar in this Province to

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the re-opening of an issue of fact on further appeal. The law of further appeals in this Province is contained in section 79 of the N.-W. F. Province Law and Justice Regulation and is not that obtaining in other parts of India. Although it is the practice of this Court to be slow in disturbing the concurrent findings of facts of two lower Courts. It is nothing more than a practice. In the present case there appears to me good ground for re-opening the question. The finding of the Trial Court that the "bottle mark" timber was acquired from funds owned exclusively by Mir Ahmad Shah, can certainly be challenged on many grounds. I do not propose, for reasons which appear below, to enter in detail into these. It is impossible, however, to overlook the fact that Mir Ahmad Shah was in possession of no funds of any kind during his minority, and that it is extremely difficult to see how he could have obtained such extended credit immediately on attaining majority as would have covered the expenditure of nearly Rs. 13,000. We have also the facts that the plaintiffs have supplied capital amounting to Rs. 1,38,000 to the defendants for the purpose of the timber trade. This sum has not yet been accounted for, and it is clear that the accounts of this expenditure, which must ultimately be gone into on dissolution of partnership, will have an important bearing upon the issue as to whether, as alleged by the plaintiffs, Mir Ahmad Shah was utilizing this capital for the purchase of timber in his own name. Indeed, it would be extremely difficult to decide the present issue at all without going into the whole accounts of the partnership. It appears to me that the learned Divisional Judge was himself somewhat sceptical as to the finding of the First Court on this issue, and that he did not enter into it in detail simply because it was not relevant to the actual decision of the present suit. He says in his judgment:—"There are certainly strong indications that defendant No. 2 was not in fact in command of separate capital and that, whatever bottle mark operations were carried on by him, were from funds provided by the plaintiffs for the partnership operations, but after perusing the evidence on the record I am not prepared to hold that the presumption is sufficiently strong to warrant the conclusion

that the lower Court's finding in favour of defendant No. 2 is incorrect. I decide the case in favour of the plaintiffs solely upon my interpretation of the law with regard to the agreements." It appears to me that, as this issue is not material to the decision of the present suit and as it is one the decision on which will be largely influenced by the eventual examination of accounts, it is not one which should have been decided at all in the present suit. Indeed, it is not seriously contested by either side that a finding on this issue should be reserved for the dissolution of the partnership. I, therefore, accept the appeal of the plaintiffs to the extent that the finding of the Courts below to the effect that the "bottle mark" timber was acquired by defendant No. 2 from funds owned exclusively by him, be set aside and that this issue be treated as undecided in the present suit.

The appeal of the defendants is dismissed with costs. The appeal of the plaintiffs is accepted to the extent detailed above. On the appeal by the plaintiffs the parties will bear their own costs.

Z. K.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL, APPEAL NO. 47 OF 1921.

December 19, 1922.

Present.—Mr. Daniels, A. J. C.

Babu SHAMSHER DATT SINGH

AND OTHERS—DEFENDANTS—APPELLANTS

versus

**LALTA SINGH AND OTHERS—PLAINTIFFS
—RESPONDENTS.**

Hindu Law—Joint family—Loan raised by adult members—Necessity, presumption of—Pre-emption decree, amount due under—Debt, nature of.
Where all the adult members of a joint Hindu family join in raising a loan on the security of the joint property of the family, that is sufficient to raise a presumption of necessity. [p. 1002, col. 1.]

The amount payable under a pre-emption decree is a debt for which the manager of a joint Hindu family is justified in borrowing money on the security of the family property. [p. 1002, col. 2.]

SHAMSHER DATT SINGH v. LAITA SINGH.

Appeal against a decree of the Additional Subordinate Judge, Fyzabad, dated the 22nd April 1921.

Messrs. *Niamat Ullah* and *Ghulam Hasan*, for the Appellants.

Mr. *J. N. Misra*, for Respondents Nos. 1, 2 and 3.

JUDGMENT.—This is a first appeal in a suit in which the plaintiffs challenge a sale-deed executed by their respective fathers. The sale-deed in question was executed by,

Chedi Singh, defendant No. 8, father of plaintiff No. 3;

Kamta Singh, defendant No. 9, father of plaintiff No. 1;

Chandka Singh, defendant No. 10, father of plaintiff No. 2;

Onkar Singh deceased, father of defendants Nos. 3 to 7.

Kamta Singh, Chandka Singh and Onkar Singh were brothers and Chedi Singh is their cousin. The deed in question is Exhibit A-8 on the record and was executed on 21st September 1907. By it the four vendors sold entire Mouza of Karanpur to Babu Baldeo Prasad, a Pleader of Fyzabad, for Rs. 13,300. Babu Baldeo Prasad has since transferred his interest to the appellants. It is important to note that the vendors were the heads of the different branches of the family and comprised all the adult members of the family as it stood at the execution of the deed. This is not disputed. Out of the consideration of Exhibit A-8, the learned Subordinate Judge finds that items amounting to Rs. 7,098-1-6 were for legal necessity. The amount is stated in the judgment as Rs. 6,498 but it is admitted that there has been an arithmetical error of Rs. 600 in adding up the items which comprise this amount. The plaintiffs confined their suit to a 9-annas 9-pies 8-*krants* share of the village. The learned Subordinate Judge finds that the proportionate price payable in respect of this share was Rs. 8,300. On these findings he has set aside the sale subject to payment by the plaintiffs to the appellants of Rs. 6,498-1-6 (the amount should be Rs. 600 more) found to be for legal necessity. Against this decree the defendants-purchasers appeal.

The item on the decision of which the appeal mainly turns is an item of Rs. 5,430-3-4

paid to satisfy a mortgage executed for the purpose of paying up the amount due under a pre-emption decree. In order to understand the controversy regarding this amount it is necessary to enter to some extent into the history of the property. The original ancestral share of the family was 6-annas 8-pies. In addition to this Debi Singh, the uncle of Chedi Singh, acquired by pre-emption a share of 3-annas 1 pie 8 *krants* in the year 1882 making up the total of 9-annas 9-pies 8 *krants* in suit in the present litigation. The pre-emption suit was brought in the name of Debi Singh alone but it is plaintiff's case, and is not disputed, that the property was acquired for the benefit of the family. Another pre-emption suit was instituted in the year 1906 in the name of Onkar Singh, deceased, who obtained on 27th August 1906 a pre-emption decree for 6-annas 2-pies 16-*krants* making up with the share already possessed the entire 16-annas of the village. Twelve *bighas* of *sir* and certain *sayar* income was excepted but this was subsequently acquired by a private transfer. The appellants' case is that this pre-emption suit, like the earlier one, was really brought on behalf of the family. The plaintiffs have cunningly omitted it from their claim in order to show as small a proportion as possible of the purchase-money as being for legal necessity. If this property is taken into account then, instead of only Rs. 7,000 out of Rs. 13,300 (or taking the proportional share of the sale price on 9-annas odd shares, Rs. 8,300) being for legal necessity, in reality Rs. 12,430 out of Rs. 13,300 was for legal necessity, without taking into account some other items as to which the appellants dispute the learned Subordinate Judge's finding. If Rs. 12,430 out of Rs. 13,300 was for legal necessity it could hardly be contended on the facts of this case that the sale should be set aside.

The pre-emption decree in favour of Onkar Singh was passed on 27th August 1906. It was conditional on payment of a sum of Rs. 4,816 into Court. The family owed considerable debts and had not the money to satisfy this decree. In order to pay this amount the four adult members of the family executed a simple mortgage on 27th September 1906 for Rs. 5,000 in favour of Pandit Suraj Kishan and Pandit

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Daya Kishan. According to the evidence of Chandka Singh, which the Subordinate Judge has accepted, they at first wanted to borrow the money from Baldeo Prasad. He could not let them have it at the time but agreed to arrange a loan for them and to pay off the mortgage on their executing a sale-deed of the property to him. On 27th September 1907 the sale-deed in suit was executed by the three brothers and their cousin and this amount of Rs. 5,430 out of the consideration was applied in payment of the mortgage. The learned Subordinate Judge has not really considered this aspect of the case. He remarks briefly that the interest on the mortgage-deed was higher than the profits of the pre-empted share and that the loan contracted could not have been for the benefit of the family because it resulted in the whole family property having to be sold. The last remark overlooks the fact that this alienation alone would not have led to the sale of the entire family property. It was only one item in a large number of liabilities which the family had incurred. The learned Subordinate Judge has not discussed the question whether Onkar Singh's pre-emption decree was obtained on behalf of the family or not. There appears to be no doubt on the evidence that it was. In the first place, the fact that the transaction was entered into by all the adult members of the family is sufficient to raise a presumption of necessity as was held in *Balvant Santaram v. Babaji* (1). In the second place, there is the direct evidence of Chandka Singh that this was the case. He says, "we pre-empted this share to remove *pattidari* disputes and to manage the entire property." There is no reason to doubt that the pre-emption suit was an advantageous transaction. It put the entire village into the hands of the family and, as Chandka Singh himself says, avoided *pattidari* disputes. An entire village can usually be sold on much more advantageous terms than a fractional share. The interest on the mortgage-deed may have been high but the mortgage was for a very short period, and the property was certainly acquired at a very low rate in proportion to the profits. It works out at less than eighteen years purchase. Fur-

ther, the creditor had only to consider the state of things as existing when the necessity for the alienation arose. He was not concerned with whether the pre-emption suit should have been embarked upon. The pre-emption decree had already been passed and the liability to pay the amount of the decree had arisen. The question, therefore, was whether the family should fail to comply with the decree and thereby not only lose the property but have to pay all the costs of the litigation, or whether they should secure the property by paying the decretal debt. The latter was clearly, under the circumstances, the more advantageous course to take. It has been held in more than one case that an amount payable under a pre-emption decree is a debt for which the manager is justified in borrowing money on the security of the family property, *Nathu v. Kundan Lal* (2) and *Pitambar Lal v. Sital* (3). I find, therefore, that this amount was borrowed for legal necessity.

There are one or two other items allowed in payment of old debts as to which it is not possible to prove after this lapse of time by direct evidence that they were debts binding on the family. As to these also the fact that all the adult members of the family, including the fathers of the present plaintiffs, admitted these to be binding debts and executed the sale-deed to pay them off is sufficient to raise a presumption that they were for legal necessity.

The result of these findings is that all but an insignificant amount of the sale-price was for legal necessity or antecedent debt and these debts could not possibly have been paid off without sale of the family property. The sale may, therefore, be upheld.

I, accordingly, allow the appeal, reverse the decree of the Court below and dismiss the suit of the plaintiffs with costs in both Courts.

W. C. A.

Appeal allowed.

- (2) 8 Ind. Cas. 836; 7 A. L. J. 1182; 33 A. 242.
 (3) 25 Ind. Cas. 263; 12 A. L. J. 641.

(1) 8 B. 602; 9 Ind. Jur. 227; 4 Ind. Dec. (N. S.) 778.

ACHUT SITARAM V. TARACHAND.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 142 OF 1921.

August 24, 1922.

Present:—Sir Lalubhai Shah, Kt., Chief Justice, and Mr. Justice Crump.

ACHUT SITARAM PATWARDHAN
AND OTHERS—PLAINTIFFS—APPELLANTS
versusTARACHAND CHIMNIRAMSHET MAR-
WARI—DEFENDANT—RESPONDENT.*Civil Procedure Code (Act V of 1908), O. III,
r. 2 (a), as altered by Bombay High Court Rule—
Recognised agent, appearance by.*

O. III, r. 2 (a) of the Civil Procedure Code, as altered by the rule made by the Bombay High Court, enables a person holding a general power-of-attorney from a party not resident within the local limits of the jurisdiction of the Court within which limits the appearance is made, authorising him to appear and act on behalf of the party, to so appear and act.

First appeal against the decision of the Sub-Judge, Poona, in Darkhast No. 645 of 1919.

Mr. D. R. Patwardhan, for the Appellant.

Mr. S. R. Gokhale, for the Respondent.

JUDGMENT.—This appeal is not resited by the respondent. It appears that the power-of-attorney has been given by the guardian of the minor Achut Sitaram Patwardhan. The guardian resides at Nagar and there is no objection as to the validity of the power-of-attorney. O. III, r. 2, clause (a), as altered by the rule made by this Court, enables a person holding a general power-of-attorney from a party not resident within the local limits of the jurisdiction of the Court within which limits the appearance is made, authorising him to appear and act on behalf of the party, to so appear and act. We think that the order made by the learned Judge rejecting the darkhast is wrong. We, therefore, set that aside and remit the darkhast for disposal according to law.

We are informed by the Pleaders here that the parties have arrived at some compromise. That, however, is a matter which will be dealt with by the learned Judge below if it is put before him. He will have to consider the question whether the proposed compromise is for the benefit of the minor. Costs to be costs in the darkhast.

N. K.

Order accordingly.

PURAN MALL V. DILWA:

PATNA HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 59
OF 1922.

December 22, 1922.

Present:—Justice Sir B. K. Mullick, Kt.,
and Mr. Justice Kulwant Sahay.PURAN MALL AND OTHERS—
DECREE-HOLDERS—APPELLANTS
versus

Mussammatt DILWA—

JUDGMENT-DEBTOR—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)
—Application for execution naming dead person
as guardian of minor judgment-debtor, whether
step-in-aid of execution—Benami transaction—Bur-
den of proof.*

An application for execution of a decree in which a dead person is, under a *bona fide* mistake, named as the guardian of the minor judgment-debtor amounts to a step-in-aid of execution and operates to save limitation under clause (5) of Art. 182 of Schedule I to the Limitation Act. [p. 1004, col. 2.]

Samia Pillai v. Chockalinga Chettiar, 17 M. 76; 4 M. L. J. 8; 6 Ind. Dec. (N. S.) 52 and *Bipin Behari Mitter v. Bibi Zohra*, 35 C. 1047, relied on. *Rashid-un-nisa v. Muhammad Ismail Khan*, 3 Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.), distinguished.

Where a person alleges a transaction to be a *benami* one the onus is on him to prove that the apparent state of things is not the real state of things. [p. 1005, col. 2.]

Courts in India should not approach *benami* transactions with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property is a trustee for or holds the same for the interest of another. Even a slight quantity of evidence to show that the transaction was a sham one will suffice for the purpose. Still such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a *benami* or a sham transaction. Suspicion, however, does not amount to proof, and a transaction cannot be held to be *benami* on mere suspicion. [p. 1005, col. 2; p. 1006, col. 1.]

Muhammad Mahbub Ali Khan v. Bharat Indu, 53 Ind. Cas. 54; 23 C. W. N. 21; (1919) M. W. N. 507 (P. C.) and *Uman Parshad v. Gandharb Singh*, 14 I. A. 127; 15 C. 20; 5 Sar. P. C. J. 71; Rafique and Jackson's P. C. No. 89; 11 Ind. Jur. 474; 7 Ind. Dec. (N. S.) 599 (P. C.), relied upon.

Appeal against an order passed on the 3rd December 1921 by the Sub-Judge, Gaya.

Messrs. Purnendu Narayan Singh and
Nitai Chandra Ghosh, for the Appellants.
Mr. Kailashpati, for the Respondent.

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JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the decree-holders against an order of the Subordinate Judge of Gaya, dated the 3rd December 1921, dismissing their application for execution of a decree.

The decree is sought to be executed against *Musammat Dilwa*, a minor daughter of one Ritu Ram, who objected to the execution on various grounds, and the learned Subordinate Judge has upheld her objections on the ground that the application for execution was barred by limitation, that *Musammat Lachminia*, the widow of Ritu Ram, was dead at the time the decree was passed against her, and that property attached was the personal property of *Musammat Lachminia* and it could not be sold in execution of the decree. The learned Vakil for the appellants has challenged the correctness of these findings.

* * * * *

The question of limitation is raised on the ground that the third application for execution, which was filed on the 24th of March 1919 against *Musammat Dilwa*, Begu Sao was named as her guardian, whereas, as a matter of fact, Begu Sao was then dead, and therefore, that application was not an application in accordance with law and it did not save the present application from limitation. Reliance has been placed on behalf of objector-respondent upon paragraph 6 of her petition of objection filed on the 19th of April 1919 wherein it was stated that the decree-holders had out of evil and cunning motive taken execution proceedings by treating one Begu Sao, deceased, as guardian, hence all the proceedings relating to the attachment, etc., were defective and irregular, and upon the order of the Subordinate Judge in the execution case passed on the 23rd of May 1919 in which it was stated that "the objection regarding the death of the guardian *ad litem* is allowed."

The learned Subordinate Judge has held that this order of the 23rd of May 1919 amounts to a finding that Begu Sao was dead before the third application for execution was filed; but, in my opinion, this is not a correct view of the order. What was stated in the objection petition was that Begu Sao being dead all proceedings relating to attachment, etc., were defective.

There was not a clear allegation that Begu Sao had died before the third application for execution was filed, and the learned Subordinate Judge is clearly wrong in saying that there was such an allegation in the objection petition. There was no adjudication of the fact as to whether Begu Sao had died before or after filing of the third execution petition. All that was held in that execution case was that Begu Sao was dead. In the present case no evidence has been given as regards the date of death of Begu Sao, and the order of the 23rd of May 1919 is, in my opinion, not sufficient to hold that he was dead at the time the third application for execution was filed, and it cannot be said that the application was not in accordance with law. It has been contended by the learned Vakil for the appellants that, even assuming that Begu Sao was dead at the time the third application for execution was filed, still that application should in law be treated as a step-in-aid of execution so as to save the present application from the bar of limitation, and reliance has been placed on the cases of *Samia Pillai v. Chockalinga Chettiar* (1) and *Bipin Behari Mitter v. Bibi Zohra* (2). In the first case it was held that

"An application for execution was to be regarded as a step-in-aid of execution within the meaning of the Limitation Act although by mistake a deceased judgment-debtor was named as the person against whom the execution was sought."

In the second case noted above it was held that

"If an application for execution of a decree be made under the influence of bona fide mistake against a dead person, though that application cannot be acted upon, still it is an application in aid of execution within the meaning of Art. 179 (4) of the Limitation Act (XV of 1877) which saves the execution of the decree from being time-barred."

I am in full agreement with the principles laid down in these two cases, and upon the facts of the present case there can be no doubt that Begu Sao, even if he was

(1) 17 M. 76; 4 M. L. J. 8; 6 Ind. Dec. (17, S) 52.

(2) 35 C. 1047.

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dead, at the time when the third application for execution was filed, was named as the guardian of *Musammat Dilwa* under a *bona fide* mistake and that application must be treated as a step-in-aid of execution. The learned Subordinate Judge has relied on the Privy Council case of *Rashid-un-nisa v. Muhammad Ismail Khan* (3) as an authority for the proposition that when an improper guardian is appointed for a minor he is not a party in the proper sense of the term and a suit on his behalf for a declaration that decrees and sales in execution thereof were invalid as against him was maintainable. This case, however, is no authority for the proposition that the application for execution in which a minor judgment-debtor was not properly represented cannot be treated as a step-in-aid of execution. I am, therefore, of opinion that the first objection as regards the application being barred by limitation cannot be sustained, and the present application is not so barred.

The second objection taken on behalf of the objector is that *Musammat Lachminia* was dead at the time the decree under execution was passed, and, therefore, the decree was a nullity and it was incapable of execution.

* * * * *

I am, therefore of opinion that, having regard to the contradictory statements made by the objectors as regards the time and place of death, and the very unsatisfactory evidence adduced by her in this case, it cannot be held that *Musammat Lachminia* was dead at the time the decree under execution was passed. This objection, therefore, must also be disallowed.

As regards the third objection the case of the objector is that the two houses sought to be attached and sold for realization of the decretal amount do not form a part of the estate of Ritu Ram, and as the decree was obtained against *Musammat Lachminia* not in her personal capacity, but in her representative capacity as the heir of Ritu Ram, the decree-holders are not entitled to sell the said properties in her hands. In

support of her objection the objector has produced a deed of sale, dated the 15th of October 1906, executed by Ritu Ram in favour of his wife *Musammat Lachminia* for a consideration of Rs. 500. It is urged on behalf of the decree-holders appellants that this transaction was merely a *benami* transaction and that Ritu Ram's title and possession continued up to his death and after his death *Musammat Lachminia* came into possession of the property as his legal representative and that on her death her daughter the present objector came in possession of the property as an heir. The *onus* is clearly upon the decree-holders to prove that the apparent state of things is not the real state of things but they have adduced no evidence in support of this allegation. They were content with cross-examining the witnesses called by the objector to prove the passing of consideration and possession of *Musammat Lachminia* and they rely on certain circumstances which go to show that Ritu Ram continued to live in the house up to his death, and that Ritu Ram was in debts and, therefore, had some motives in entering into a *benami* transaction; this, in my opinion, is not sufficient to establish the *benami* character of the transaction. Having regard to the relationship between the parties no conclusion can be drawn in favour of the appellants from the fact of Ritu Ram continuing to live in the house even after the execution of the deed. As regards his indebtedness, there is absolutely no evidence to show that in the year 1906 when the deed of sale was executed he was so much involved that he was unable to pay his debts. Now, the very fact of the appellants continuing to advance money and grains to Ritu Ram up to the year 1913, and even afterwards, shows that his condition was not so involved in 1906 as to induce him to enter into a *benami* transaction. Reliance has been placed by the learned *Vakil* for the appellants on the Privy Council case of *Muhammad Mahub Ali Khan v. Bharat Indu* (4) where their Lordships have observed:—"In regard to *benami* transactions, Courts of Law should not approach them with that scrupulous rigour which in other systems of

(3) 3 Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168. (P. C.).

(4) 53 Ind. Cas. 54; 23 C. W. N. 321; (1919) M. W. N. 507 (P. C.).

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jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property is a trustee for or holds the same for the interest of another."

But in that case there was some evidence adduced to show the *benami* nature of the transaction, and their Lordships, after laying down the proposition relied upon by the learned Vakil for the appellants, go on to observe:—"Benami transactions are very familiar in Indian practice and as Lord Hobhouse said in *Uman Parshad v. Gandharp Singh* (5) 'even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose.'... 'Still such a transfer cannot be considered as nothing; the person who impugns its apparent character must show something or other to establish that it is *benami* or sham transaction.'"

In the present case there is absolutely nothing to show that the transaction was a *benami* or a sham one. The utmost that can be said is that the decree-holders have created some suspicion by the facts elicited in the cross-examination of the judgment-debtor's witnesses; but suspicion does not amount to proof, and it would not be safe, in my opinion, upon the scanty material placed before the Court by the decree-holders, to hold that the transaction was a *benami* one. It is urged that there is no satisfactory evidence as regards the payment of consideration money under the deed of sale. That may be so; but the production of the deed of sale from the custody of the objector is, in my opinion, sufficient to prove her title unless and until some evidence is given by the appellants to disprove the same. In this case there is a total absence of such evidence and I am not prepared to hold that the transaction was a *benami* one. The third objection of the judgment-debtor must prevail and it must be held that the decree-holders are not entitled to attach and sell the property sought to be sold.

In this view of the case the appeal must be dismissed and it is declared that the properties sought to be attached and sold cannot be attached and sold in execution

of the decree. Each party will bear his own costs throughout.

Mullick, J.—I agree.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 119 OF 1920.

February 21, 1923.

Present.—Sir Dawson Miller, Kt.,

Chief Justice, and Mr. Justice Foster.

TARINI PRASHAD SINGH AND ANOTHER

—PLAINTIFFS—APPELLANTS

versus

NUNU PRASHAD SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Separation, whether should be formally proved—Residence in same house and common purse—Inference.

It is not necessary that definite evidence should be given of a formal agreement between the members of a joint Hindu family to enable a Court to hold that a separation has taken place. An inference of separation having taken place may be drawn from the acts of the members without any proof of a formal agreement. But where they are found living together in the same house and meeting their expenses out of a common fund it would require very strong evidence to lead to the conclusion that they had put an end to their state of jointness. [p. 1001, col. 1.]

Appeal from a decision of the Subordinate Judge, First Court, Monghyr, dated the 31st January 1920.

Messrs. C. C. Das and J. Prasad, for the Appellants.

Messrs. N. N. Sinha and B. P. Sinha, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal by the defendants from a decree of the Subordinate Judge of Monghyr, dated the 31st January 1920.

The plaintiffs and the defendants are, respectively, the members of two different branches of the family of Nawab Singh who died many years ago leaving two sons, Ram Singh and Harakh Narain Singh. The first plaintiff Nunu Prashad Singh is the son of Ram Singh, the other plaintiffs are the

(5) 14 I. A. 127; 15 C. 20; 5 Sar. P. C. J. 711
Raque and Jackson's P. C. No. 98; 11 Ind. Jur.
474; 7 Ind. Dec. (N. S.) 599 (P.C.).

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sons and grandsons of Nunu Prashad Singh. The defendants were originally the widow of Harakh Narain Singh and his two grandsons (sons of his deceased daughter). The widow, *Musammāt* Mulko Kumari, died during the pendency of the suit leaving her two grandsons, Tarini Prasad and Tirbeni Prasad Singh, the sole defendants representing Harakh's branch of the family.

Ram Singh died in or before the year 1877 but his brother Harakh Narain Singh lived until 1917. If at the date of Harakh Narain's death in 1917 the families of the two brothers were joint in estate which is the plaintiff's case it would follow that on the death of Harakh Narain, leaving no male issue, the descendants of Ram Singh would succeed by survivorship to the whole of the joint family property, to the exclusion of the defendants, the sons of Harakh Narain's daughter. If, however, there was a separation of interest in the lifetime of the two brothers Ram Singh and Harakh Narain, which is the defendants' case, then the half share which Harakh Narain acquired by partition would descend by inheritance to his daughter's sons.

The question for determination in this appeal is whether such a separation in fact took place.

Shortly after the death of Harakh Narain in 1917, his widow, Mulko Kumari, alleging that her late husband had been living separately from his *gotias* during his lifetime, got her name entered in the Collectorate register as proprietor, in place of her deceased husband, of a half share in the family property which consists mainly of a 2¹/₂ annas 5 *gandas* odd proprietary share in *Mahal Bakhri* and *Mauza Bahorichak* and certain *bakasht* lands therein. When the plaintiff, Nunu Prashad Singh, on the 13th October 1917 applied, as *karta* of the family, for registration of his name in respect to the whole property, in place of his deceased uncle, he found that *Musammāt* Mulko Kumari had forestalled him and that her name was already registered in respect of a half share. His application for registration in respect to this half share was accordingly rejected and he was referred to the Civil Courts for any remedy he might have in respect thereto. *Musammāt* Mulko Kumari having got her name registered, as already stated, by an *ekvārnāma* dated the

17th October 1917 relinquished her interest in the property in favour of the next reversioners, namely, her two grandsons the defendants Tarini Prasad and Tirbeni Prasad Singh, and shortly afterwards, on the 10th November, they also applied for registration of their names in place of their grand-mother as proprietors of a half share. Nunu Prashad Singh filed an objection but was again referred to the Civil Courts and the names of Tarini and Tirbeni were duly recorded as proprietors of the half share. The plaintiffs, accordingly, on the 5th January 1918, instituted the suit out of which this appeal arises alleging that Harakh Narain died whilst living jointly with them, and claiming declaration of their title to the whole of the property by survivorship and consequential reliefs.

The learned Subordinate Judge, before whom the case came for trial, found, upon the evidence, that no separation as alleged by the defendants had taken place and that the families remained joint up to the date of Harakh Narain's death in 1917. He accordingly passed a decree in favour of the plaintiffs declaring their title and granting them possession over the whole property.

From that decision the defendants have appealed and contend that the evidence establishes that a partition took place between their grandfather and his brother Ram Singh and that the two families have been living in a state of separation ever since.

There is no direct evidence of any partition having taken place between Ram Singh and Harakh Narain Singh nor is any date assigned to this event. It must, however, have taken place, if at all, sometime before the 10th March 1877 as the evidence shews that Ram Singh was not at that date alive. It is also proved that the two families lived together in the same house and were joint in mess up to the time of Harakh Narain's death. But the appellants contend that there were certain dealings with the property beginning in the year 1877 which are only consistent with a separation in interest having taken place at some earlier date although no actual division of the proprietary interest in the *Mauzas* into separate *pattis* was made nor was a division of the *bakasht* lands by metes and bounds ever carried out. It is admitted also that

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the collection of rents was joint throughout and the *jama kharach* accounts which have been produced for a period of 23 years before the date of the suit show no division of the profits. The defendants' witnesses allege, however, that the two families used to divide the collections equally between them and that a *phatbandi* account used to be kept during Harakh Narain's lifetime showing the division of the profits. No such account, however, was produced by the defendants, but as some accounts belonging to Harakh Narain were stolen after his death they rely upon this as accounting for the non-production of the *phatbandis*. The plaintiffs, on the other hand, deny that there was any equal division of the profits between the two families and, although it was admitted that some papers of Harakh Narain's had been stolen, it does not appear that any of the plaintiffs' witnesses were cross-examined as to the separate *phatbandi* account having been kept. Evidence as to this fact was disclosed for the first time by the defendant Tarini Prasad Singh in cross-examination, although he did not mention it in his examination-in-chief. The learned Subordinate Judge accepted the oral evidence of the plaintiff's witnesses in preference to that of the defendants but does not specially mention the evidence relating to the *phatbandi* account, and I am not satisfied, having regard to what I have already said, that the evidence, such as it is, of a separate *phatbandi* account having been kept is accurate.

The first transaction upon which the appellants rely as evidence of a partition is an application to the Collectorate for registration and mutation of names made by Harakh Narain Singh on the 10th March 1877. Although the date of his brother's death is not definitely stated in the evidence it appears from this document that he was dead at that time, and I think it may, without much doubt, be inferred from the document itself and the fact that Harakh Narain, the younger brother, applied for mutation of names, that Ram Singh, whose name had been previously registered, had died shortly before the date of the application. The application requires certain information to be given. In filling up the application under the heading of "Name of applicant and residence" the following

entry appears "Harakh Narain Singh for self and as manager on behalf of Nunu Prashad Singh, son of Ram Narain Singh, deceased resident and shareholding proprietor of *Mauza Bakhri*" etc. Under the heading "Character of applicant's interest whether by purchase, inheritance, gift or otherwise and whether proprietor, joint-proprietor-in-charge, manager or mortgagee" is entered "Name having stood recorded from before and by inheritance." If the applicant is joint proprietor-in-charge or manager, he is required to give the names of the persons on behalf of whom he is in such charge or manager. Under this heading is the entry "Harakh Narain Singh self and as manager on behalf of Nunu Prashad Singh" and the extent of each person's interest is entered thus:

"Harakh Narain Singh, 1 anna.

Nunu Prasad Singh, 1 anna."

The last entry which refers to any other particulars which the applicant desires to mention is as follows:

"In the said *mahal* the applicant, Harakh Narain Singh possesses one anna proprietary share and his name stands recorded in the revenue office and Ram Narain Singh, who is dead now, possesses one anna proprietary interest and his son and heir Nunu Prashad Singh is alive and holds possession over the said share and this applicant is his manager. Therefore, this application is submitted and the applicant prays that the name of this applicant Harakh Narain Singh for self and as manager of Nunu Prashad Singh, son and heir of Ram Narain Singh, deceased, the landlord, may be recorded in respect of the said shares under the provisions of Act VII of 1876 after realizing Court-fees for transfer."

The appellants contend that the wording of this document shows that the two families were separate each having a half interest in the property which at that time was 2-annas only, the 5-gandas odd share having been acquired later. No doubt, the document is consistent with the defendant's case that the property had already been divided between Harakh Narain Singh and his brother, and great reliance is placed upon the fact that the interest of each party is stated to be 1-anna and there is no mention of the property being held jointly. In 1877 Nunu Prasad Singh was a minor and

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his uncle Harakh Narain was, no doubt, acting on his behalf. The fact that Harakh Narain describes himself as the manager on behalf of his nephew is, I think, consistent either with a state of jointness or separation. Nor does the fact that the extent of each person's interest is given as 1-anna in the estate necessarily indicate that a partition had taken place. Where the application is made not merely on behalf of the applicant but also on behalf of other persons for whom he is acting the form provides that the extent of such person's interest shall be given and as there were then only two male members of the family in existence the applicant may well have thought that he was required to state the extent of the interest of each even though they were jointly and not separately interested. This document in itself is not to my mind sufficiently clear and unambiguous to point positively to the conclusion that a separation had taken place.

The next transaction relied upon occurred ten years later, when Nunu Prashad Singh on the 28th January 1887, having borrowed a sum of Rs. 400 from Gunoo Singh and Lalji Singh, executed a mortgage in their favour hypothecating a 1-anna share of *Mauza* Bakhri and Bahorichak as security for the loan. A suit was afterwards brought by the mortgagees to enforce the mortgage and Harakh Narain Singh was not made a party to the suit, nor does it appear from the written statement of Nunu Prashad that any point was taken that the property was joint family property and incapable of being mortgaged without the consent of all the co-sharers. A plea of payment was raised and, eventually, after giving credit for certain sums paid on account, a decree was passed against Nunu Prashad for Rs. 190-12-0 and costs. This transaction is relied upon as showing that the interest of the plaintiffs was separate from that of the defendants at that time. I do not think that any necessary inference can be drawn in favour of separation from the fact that Nunu Prashad mortgaged a half share only of the property. Instances frequently occurred in the past, although rarely found now in consequence of later decisions, where one of two or more co-parceners purported to mortgage the share of the family property to which he would be entitled on a partition although no actual partition had taken place,

and in some instances the Courts in India had given the mortgagees the right to step into the shoes of the co-sharer mortgagor and claim a partition of the property to the extent of his share, and I do not think that this dealing with the property can be said to afford conclusive evidence from which a separation should be inferred.

The next document is a petition of compromise dated the 20th June 1891 in a suit brought by one *Mahant* Lachmi Das against Nunu Prashad Singh and others in the previous year. It would appear from the petition of compromise that Nunu Prashad Singh had entered into some agreement with the plaintiff to execute a lease over the whole 2-annas share of the property and the plaintiff had sued for specific performance. The verbal evidence of Nunu Prashad about this matter is unsatisfactory as he denies all recollection of what took place. From the compromise petition it appears, however, that he agreed to execute a lease for a period of ten years from 1298 to 1307 F. in respect of his one-anna share and the plaintiff agreed to relinquish his claim over the one-anna share of Harakh Narain which was to remain in the possession of Harakh Narain. The lease agreed to in the compromise appears to have been carried out as Bhagwat Prasad Singh, one of the plaintiff's witnesses, states that Nunu's share in *Mauza* Bahorichak was in lease to *Mahant* Lachmi Das up to 1307 F. but he adds that the other one-anna share remained in the *khas* possession of the plaintiffs and Harakh Narain. Again, I do not think this transaction necessarily shows that the parties were not joint in estate at that time.

Another compromise petition dated the 8th August 1904 executed by both Harakh Narain and Nunu Prashad as well as other parties is also relied upon on behalf of the defendants. It appears that Ram Singh and Harakh Narain Singh had a cousin named Tirpur Singh, a son of their father's brother. Tirpur's branch of the family was separate from that of the plaintiffs and defendants. He died leaving a widow Mahtabo Kuer who herself died childless in 1902. Disputes appear to have arisen as to the right of succession to her late husband's property after the death of Mahtabo. One Bhaglu Singh and others claimed

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to be the reversioners and brought a suit against Harakh Narain, Nunu Prashad Singh and two other persons named Harihar Singh and Sukumar Singh to establish that right. In the compromise petition relied upon it is admitted by the plaintiffs that only Harihar Singh, Sukumar Singh, Harakh Narain and Nunu Prashad Singh are the heirs of *Musammāt* Mahtabo Kuer. How this document assists the defendants' case I have some difficulty in appreciating. Harakh Narain as a full cousin to Tirpur Singh would be nearer in degree to the latter than Nunu Prashad, who was his cousin's son. Harakh Narain would, therefore, succeed by inheritance to the estate of his cousin Tirpur to the exclusion of Nunu, who was more remote, and it seems to me that only upon the assumption that Harakh and Nunu were joint would Nunu have been allowed by Harakh to take any share in the inheritance of Tirpur. Mahtabo Kuer appears to have executed some deed during her lifetime in favour of Sukumar Singh and others but we are not in possession of all the facts which led up to the compromise decree of 1904 and I do not think it would be safe to draw any reliable inference from that document in favour of either party.

The next two documents of any importance are a compromise petition and a decree in a mortgage suit in the year 1909. It would appear that the 5-ganda odd share of Tirpur Singh in the villages in question had been mortgaged to the plaintiffs in that suit and after the death of Mahtabo Kuer they instituted a suit on the mortgage against Sukumar Singh, Harihar Singh, Harakh Narain, Nunu Prashad Singh who had inherited that portion of her husband's property. The compromise which was signed by both Harakh and Nunu is significant. The material portion reads as follows:—

"In this suit an amicable settlement between the parties has been arrived at in the manner following:—

"The defendants Sukumar Singh, Harihar Singh and others members of the joint family shall pay Rs. 300 and the defendants Harku Singh" (that is, Harakh Narain Singh) "and Nunu Prashad Singh, i.e., all the members of their joint family shall

pay Rs. 200 to the plaintiffs. Thus, in all Rs. 500 shall be paid to the plaintiffs and the plaintiffs have made remission of the remaining amount in claim and of the costs in Court in favour of the defendants."

The decree drawn up in pursuance of the compromise incorporates the terms of the compromise in the same words. If Harakh and Nunu were not at that time joint in estate it is difficult to understand why they should have allowed themselves to be described in that document as members of a joint family and undertaken to pay a joint sum of Rs. 200. Had they been separate one would have expected that the compromise would provide for a separate payment by each of them just as a separate payment of Rs. 300 was undertaken by Sukumar and Harihar Singh who belonged to another joint family.

Turning to the verbal evidence in the case it appears to me clearly to preponderate in favour of the story told on behalf of the plaintiffs. The learned Judge of the Trial Court has considered the evidence at length and points out that no *gotia* or any other relation of Harakh Narain Singh has come forward to prove the story of separation as put forward by the defendants; whilst the plaintiffs, on the other hand, have examined their *gotias* and the family *Purohit* who all proved that Harakh Singh and the plaintiffs were joint in mess, property and worship until the death of Harakh Narain Singh and I see no reason to differ from the conclusion at which he arrives when he says that the oral evidence is overwhelming to prove jointness. There are also other facts in the case which seem to me to point to the same conclusion. The accounts produced and not challenged which show the collections and expenditure of this family show payment of the decretal amount and costs due to Ganoo Singh under the mortgage executed by Nunu which was relied on by the defendants. In fact, all the expenses of the family appear to have been paid out of this joint account and, so far as the documentary evidence goes, there is nothing to show any subsequent settlement or division between the two branches of the family. It appears that an account with a tradesman named Chamal Lal was opened in the name of Harakh Singh whilst he was the head of the family

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and that account shows purchases made by members of both branches of the family and payments made from time to time through the plaintiffs and the defendants. Again, it appears that in 1884 an orchard was purchased from one *Musammal Raghu Koeri* in the name of *Harakh Narain* but in the Record of Rights published in 1902 this property appears in the name of *Nunu Prashad* as tenant. Again, the *bakasht* lands of the family in the villages in which they have a proprietary share are entered in the name of *Harku Singh* and others and are not divided between the two branches of the family as one would expect had a partition previously taken place.

No doubt, it is not necessary that definite evidence should be given of a formal agreement between the parties to enable a Court to hold that a separation has taken place. An inference of separation having previously taken place may be drawn from the subsequent acts of the parties without any proof of a formal agreement. But where the parties are found living together in the same house and meeting their expenses out of a common fund, I consider that it would require very much stronger evidence than anything which has been produced in this case to lead to the conclusion that they had put an end to their state of jointness. There is some evidence, no doubt, of dealings with the property which are consistent with a state of separation but there is no evidence which, to my mind, shows actual separate enjoyment and apart altogether from the fact that they were living together and messing together there are documents and admitted facts in the case which point clearly to a state of jointness and I can see no valid reason for differing from the conclusion arrived at by the Trial Court.

In my opinion this appeal should be dismissed with costs.

Foster, J.—I agree.

R. D.

Appeal dismissed.

OUDE JUDICIAL COMMISSIONER'S COURT.

APPLICATION NO. 8 OF 1923.

February 20, 1923.

Present:—Mr. Kanhaiya Lal, J. C.

Th. RATAN SINGH—DEFENDANT—

APPLICANT

versus

Haji HAFIZULLAH—PLAINTIFF—

OPPOSITE PARTY.

Contract Act (IX of 1872), s. 235—Purchases by agent on behalf of principal—Repudiation by principal—Agent's liability.

Where an agent as representing his principal purchases goods on his behalf and the latter repudiates his liability to pay therefor, the law will hold the agent liable for the price.

Application against a decree of the Sub-Judge, Kheri, sitting as Small Cause Court Judge, dated 16th November 1922.

Mr. Ram Das Chaturvedi, for the Applicant.

Mr. Ali Muhammad, for the Opposite Party.

JUDGMENT.—This was a suit for the recovery of money on account of goods said to have been supplied by the plaintiff to the junior Rani of Bijwa through the defendant, Ratan Singh, the manager of her estate, in August 1917, May 1918 and August 1919. The suit was filed on the 10th April 1922, and was sought to be brought within limitation by certain acknowledgment or promises of payment in writing alleged to have been made by Ratan Singh. The defendant denied the correctness of the amount claimed by the plaintiff and pleaded that whatever had been purchased by him was purchased for the junior Rani of Bijwa, and that he was not personally liable for the same.

The Court below found that the purchases in question had been made by the defendant on behalf of the junior Rani of Bijwa by representing himself as her agent; but as the Rani had repudiated her liability in a letter sent by her to the Court of Wards, which had assumed the superintendence of her estate in 1920, the plaintiff was entitled to recover the amount due from the defendant under section 135 of the Indian Contract Act (IX of 1872).

It appears that the junior Rani was examined as a witness on behalf of the defendant on commission. In her evidence she stated

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that she had purchased the articles noted in the list filed by the plaintiff through the defendant, Ratan Singh, that the plaintiff had come to demand the price of those articles and that she had desired him to approach the Manager of the Court of Wards for its payment. She further admitted, that she used to send for articles from different places through Ratan Singh, and that the latter never brought anything which she had not ordered. The letter which the junior Rani wrote to the Court of Wards on the 31st July 1920, wherein she repudiated her liability for the amount claimed and questioned the correctness to the account presented by the plaintiff of the Court of Wards, was not shown to her during her examination, and it is not possible to say whether any satisfactory explanation or reconciliation of the two statements is possible. There is no reason, moreover, why the plaintiff should suffer for the conduct of the Rani in repudiating her liability before the Court of Wards, and admitting it during the progress of this suit when she found that she could no longer be touched.

The suit is within time as against the defendant from the letters containing acknowledgments or promises of payment which he sent to the plaintiff. The plaintiff can make the agent liable, if the principal repudiates the act of the agent. There is no reason, therefore, for interference in revision.

The application is dismissed with costs.

G. H.

Application dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

[SECOND CIVIL APPEAL NO. 556 OF 1921.

July 25, 1922.

Present:—Mr. Batten, J. C.

Chowdhary MANOHARLAL—

PLAINTIFF—APPELLANT

versus

RAMRATAN—DEFENDANT—RESPONDENT.

Landlord and tenant—Person paying rent, whether necessarily tenant.

The question whether a person is a tenant depends on the original agreement between him and the landlord. The mere fact that he pays rent like an ordinary tenant does not necessarily show that he is a tenant.

Wasudeo Gharpure v. Ganu Kunbi, 3 N. L. R. 185, relied on.

Appeal from a decree of the District Judge, Hoshangabad, dated the 28th July 1921, in Civil Appeal No. 50 of 1921.

Messrs. G. L. Subhedar and J. Sen, for the Appellant.

Mr. K. K. Gandhe, for the Respondent.

JUDGMENT.—I am afraid this case must be remanded to the District Judge for a fresh decision as there are no clear findings binding on this Court. I will first deal with the point decided by the District Judge in favour of the plaintiff, but as to which the learned Counsel for the respondent-defendant supports the decree by objecting to the finding, namely, the finding that the plaintiff is entitled to sue. There is no force in the respondent's contention on this point as the plaintiff is admittedly a *lambar-dar* and under section 188 (2) (a) and (d) of the Land Revenue Act of 1917, the *lambar-dar* represents the proprietary body in suits of this kind.

The first ground of appeal and the second part of the sixth ground of appeal are given up, that is to say, the first ground of appeal is given up as a point of law though remand is pressed for.

The second, third and fourth grounds of appeal relate to the question whether or not Lachmanshah was a tenant or not, that is to say whether the contract between the landlord and him was a contract of service or a contract of tenancy. The District Judge has held that the contract was one of tenancy merely because Lachmanshah paid rent like an ordinary tenant, although the rent was credited towards the defendant's wages. It does not necessarily follow from these facts that the defendant is a tenant. As pointed out in *Wasudeo Gharpure v. Ganu Kunbi* (1) the question depends upon the original agreement between the parties. The District Judge does not discuss the evidence on the subject, but if the plaintiff's evidence were accepted then it

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would appear that the contract was one of service and not one of tenancy; but, on the other hand, we have the fact that Lachmanshah was given a *parcha* by the Settlement Officer and was recorded as a tenant before his death. The question of tenancy or otherwise must be decided on the evidence in consideration of the law on the subject as discussed in the above quoted case.

The fifth ground contests the lower Appellate Court's finding as to the defendant's natural relationship with Lachmanshah. I am of opinion that this is not a finding liable to be contested in this Court as the District Judge has fully discussed the evidence on the subject.

With reference to the first part of ground No. 6 and ground No. 7 there is no definite finding on the part of the lower Appellate Court. If the defendant's father Nawal Kishore was adopted by Nanhelal then the defendant as a collateral was not entitled to succeed to the tenancy unless the adoption was of the particular kind alleged by the defendant, that is to say, an adoption by two fathers, as to which there is no finding. Then, again, it is not apparent why, while the defendant's father is alive, the defendant should succeed to the tenancy in lieu of his father, and as to this the District Judge has made no observations.

The appeal is remanded for further trial with reference to the above remarks.

N. K.

*Case remanded.***CALCUTTA HIGH COURT.**

APPEAL FROM ORDER NO. 34 OF 1921.

December 12, 1922.

Present:—Mr. Justice C. C. Ghose and Mr. Justice Chotzner.

DEBI PROSAD BHAKAT—DEFENDANT—
APPELLANT

versus

OFFICIAL TRUSTEE OF BENGAL, EXECUTOR (TRUSTEE IN *Vakalatnama*) TO THE ESTATE OF LATE MANIK LAL SEAL—

RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), s. 105—
Remand—Appeal—Tenant, dispossession of, from*

portion of tenancy—Rent, suit for—Suspension of rent, doctrine of—Fixation of fair and equitable rent—Res judicata.

No appeal lies against an order of remand passed by the Special Judge under the provisions of the Bengal Tenancy Act. [p. 1016, col. 1.]

In execution of a decree for arrears of rent seven *jotes* were put up for sale in this manner, namely, they were divided into two *jotes*, one of 68 *bighas* and odd *cottas* with one rental and the other of 111 *bighas* and odd *cottas* with another rental. The sale of the *jote* of 111 *bighas* and odd *cottas* was set aside and the tenants remained in possession without payment of any rent. The sale of the other *jote* was confirmed and the landlord auction-purchaser took delivery of possession of the 68 *bighas* and odd *cottas* of land. The landlord then brought rent suits in respect of the seven *jotes* in which it was held that as there had been a wrongful eviction or ouster from a portion of the lands of the original seven *jotes* there followed a complete suspension of rent and no claim for arrears of rent could be sustained. Upon this the landlord brought the present proceedings under section 115 of the Bengal Tenancy Act for settlement of fair and equitable rent of the 111 *bighas* and odd *cottas* of land in the possession of the tenants. The Revenue Officer passed the order accordingly but on appeal to the Special Judge it was held that instead of one consolidated rent the Revenue Officer should fix 7 *jamas* for 7 *jotes* and directed a remand. In appeal to the High Court the doctrine of suspension of rent was again urged and it was contended that the landlord was bound by the decisions in rent suits which operated as *res judicata*:

Held, (1) that there was as a matter of fact no wrongful eviction, as the rent-decree in execution of which the sale followed was binding on the tenants who were, therefore, not entitled to urge the doctrine of suspension of rent, and [p. 1015, col. 2.]

(2) that inasmuch as the rent suits were in respect of payment of rent of 7 *jotes* and the present suit was for fixation of a fair and equitable rent in respect of one *jote*, the doctrine of *res judicata* could not be invoked. [p. 1016, col. 1.]

Appeal against an order of the Additional Special Judge, First Court, Midnapore, dated the 5th of August 1920, reversing the order of the Revenue Officer, Midnapore, dated the 28th June 1919.

Babu Dwarkanath Chakravarty (with him Babu Santosh Kumar Bose), for the Respondent, took the preliminary objection that the appeal being directed against an order of remand passed by the Special Judge under the provisions of the Bengal Tenancy Act, the appeal was incompetent. Refers to *Mothur Chandra Majumdar v. Tara Sunkar Ghose* (1) and

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Mathura Nath Roy v. Basanta Kumar Chakravarti (2).

Babu Panchanon Ghose, for the Appellant.—As to the competency of the appeal refers to *Manmotha Nath Dey v. Gadadhar Manna* (3).

On the merits submitted that as there had been a wrongful eviction or ouster from a portion of the lands of the tenancy there should be a complete suspension of rent. Refers to *Annada Prosad v. Mathura Lal* (4), *Kali Prasanna Khasnabish v. Mathura Nath Sen* (5), *Rai Charan Sar Mazumdar v. Administrator-General of Bengal* (6), *Saroda Prosad Bhattacharjee v. Manmotha Nath Mitter* (7), *Chandra Kanta Das v. Ramanath Barman* (8) and *Ashutosh Dhar v. Joy Lal Sardar* (9).

In any event the decision on the question of suspension of rent in the previous rent suits must be regarded as *res judicata*. Having regard to the decision in those rent suits, it is not open to the landlord in the present proceedings to oppose the invocation of the doctrine of suspension of rent. See *Purna Chandra v. Rasik Chandra* (10).

Babu Dwarkanath Chakraverty, for the Respondent, was not called upon to reply.

JUDGMENT.—The hearing of this appeal has taken considerable time, a fact which, however, need not be regretted by any body for we have had the pleasure of listening to an elaborate and earnest argument on behalf of the defendants-tenants and nothing which the ingenuity and industry of the learned Vakil for the appellant could discover in support of the position taken up in the grounds of appeal has been omitted. But, notwithstanding his forcible argument, we have come to the conclusion that this second appeal must fail on all the points that have been urged before us. At the

outset, it may be remarked that there are no merits in this appeal and the questions argued before us really turn upon discussion of points of law which are well-understood. The facts, shortly stated, are as follows. The tenants-defendants were *putnidars* of a village under the plaintiff's predecessor up to the year 1291. In execution of a rent-decree against the defendants, the *putni* right was sold and purchased by a person whom we will describe as "A." The *putni* was again put up for sale for arrears of rent and another person, whom we will describe as "B," purchased it at the sale. It was sold for the third time for arrears of rent and purchased by a person, whom we will describe as "C." There was a fourth sale for arrears of rent and it was purchased by the predecessor-in-interest of the present plaintiff. At the time when B was the *putnidar* the tenants-defendants made default in payment of rent. Thereupon, B instituted a suit for arrears of rent in respect of the holdings in the possession of the tenants-defendants which consisted of 7 *jotes*. The predecessor-in-interest of the present plaintiff having succeeded, as stated above, to the interest of the *putnidar* executed a decree for arrears of rent obtained by "B" and caused the 7 *jotes* to be put up for sale in this manner; that is to say, they were divided into two *jotes*, one of 68 *bighas*, 3 *cottas* with a rent of Rs. 163-12-annas 12-gandas and another of 111 *bighas* 4 *cottas* with a rent of Rs. 139-4 annas. At the sale of these two *jotes*, the predecessor-in-interest of the present plaintiff was declared to be the purchaser. This sale was, however, set aside and a fresh sale took place at which again the predecessor-in-interest of the present plaintiff was declared to be the purchaser. Thereupon, on an application by the tenants-defendants, the sale in respect of the *jote* of 111 *bighas* and 5 *cottas* was set aside and the tenants-defendants remained in possession thereof. (See Exhibit "J"). With reference to the second sale in respect of the *jote* of 68 *bighas* and 3 *cottas*, it appears from the judgment of the learned Subordinate Judge dated the 22nd March 1907 that no application for setting aside that sale was made by the tenants-defendants. The result, therefore, was that the proprietor, that is to say, the predecessor-in-interest of the present plaintiff took delivery of

(2) 2 Ind. Cas. 572; 36 C. 512.

(3) 41 Ind. Cas. 751; 45 C. 638; 28 C. L. J. 155.

(4) 2 Ind. Cas. 123; 13 C. W. N. 702; 9 C. L. J. 585.

(5) 34 C. 191.

(6) 2 Ind. Cas. 169; 36 C. 856; 9 C. L. J. 578; 13 C. W. N. 853.

(7) 28 Ind. Cas. 371; 19 C. W. N. 870.

(8) 6 Ind. Cas. 478; 11 C. L. J. 591.

(9) 18 Ind. Cas. 621; 17 C. L. J. 50.

(10) 9 Ind. Cas. 568; 13 C. L. J. 119.

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possession of an area of 68 *bighas* and 3 *cottas* after the sale in execution of the decree for arrears of rent and in satisfaction of the decree for arrears of rent. The tenants-defendants, on the other hand, remained in possession of 111 *bighas* and 5 *cottas*, an area which formed the balance of the lands comprised in the original 7 *jotes*. This was sometime in 1903 and it appears that thereafter the tenants-defendants had remained in possession of the last mentioned area without payment of any rent. The landlord sometime in 1906-1907 instituted two suits for arrears of rent in respect of the lands comprised in the original 7 *jotes*. The tenants replied that they were not bound to pay any rent for the lands of the original 7 *jotes* for the simple reason that they were not in possession of a portion of those lands, namely, 68 *bighas* 3 *cottas*, possession of which had been taken delivery of by the landlord after the sale in execution of the decree for arrears of rent. It was contended on behalf of the tenants in the said two suits for arrears of rent that there had been a wrongful eviction or ouster from a portion of the lands of the original *jote* at the instance of the landlord and that in law there followed a complete suspension of rent, this view was given effect to by the Courts and the result was that the landlord was met with the answer that, in the circumstances, no claim for arrears of rent could be sustained. It is, however, to be observed that in the rent-suits it was not brought to the notice of the Courts by either side that 68 *bighas* and 3 *cottas* had been sold in execution of a decree for arrears of rent and that the landlord had purchased the same, and had taken delivery of possession thereof in satisfaction of the decree for arrears of rent. Be that as it may, it appears from the proceedings in the Record of Rights cases that in respect of 111 *bighas* and 5 *cottas* the defendants were recorded as non-*mokarari* permanent tenure-holders under the plaintiff with a rent of Rs. 133-14-1½ pies. Thereupon the present plaintiff applied for settlement of fair and equitable rents under the provisions of section 105 of the Bengal Tenancy Act. He alleged that the defendants-tenants were not tenure-holders but merely occupancy *raiyyats* and he claimed an enhancement of rent under the provisions of the Bengal Tenancy Act.

The defendants-tenants, being encouraged by the result of the litigation in the previous rent-suits, put forward the contention that, inasmuch as they had been evicted from a portion of the lands of the original 7 *jotes*, the landlord was not competent to ask the Revenue Officer to settle fair and equitable rents in respect of what may be called the balance area. The Revenue Officer declared that the defendants held a certain plot free of rent and he settled a certain sum as a fair and equitable rent in respect of the area of 111 *bighas* and 5 *cottas* being interest No. 138 in the Record of Rights. The matter was carried on appeal by the tenants-defendants to the learned Special Judge and it was held that, instead of one consolidated rent for the area of 111 *bighas* and 5 *cottas* referred to above, the Revenue Officer ought to fix seven *jamas* in respect of 7 *jotes* and for that purpose he directed a remand to the Revenue Officer. Against that order the present appeal has been laid and it has been, as remarked above, very strenuously argued by the learned Vakils for the appellant that, in the circumstances to which reference has already been made, there should follow a complete suspension of rent and that the landlord was not entitled to ask the Revenue Officer to settle fair and equitable rents under section 105 of the Bengal Tenancy Act. Now to that, the short answer is that there was, as a matter of fact, no wrongful eviction whatsoever at the instance of the plaintiff-landlord. The rent-decree in executing whereof the sale followed was binding on the tenants-defendants and, in the circumstances of this particular case, the long catena of cases dealing with the question of suspension of rent has no application whatsoever and the tenants-defendants were not entitled to invoke the doctrine of suspension of rent in this case. It is argued, however, that whether the tenants-defendants had any merits or not, or whether the circumstances disclosed in the case attracted the doctrine of suspension of rent or not, it must nevertheless be held, having regard to the result of the decision in the previous rent suits in 1906-07, that the plaintiff-landlord cannot in this proceeding oppose the invocation of the doctrine of suspension of rent. In other words, it is said that he is bound by the decisions in the rent suits,

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which operated as *res judicata*. If this were the law it would, indeed, be very strange but having regard to the facts of this case and having regard to the way in which the rent-suits were disposed of, we are of opinion that this is not the law. In the first place, the rent suits were in respect of payments of rent of 7 *jotes*. The present suit is for fixation of a fair and equitable rent in respect of one *jote* of 111 *bighas* and 5 *cottas*. In the second place, it is by no means clear on the materials before us that the original 7 *jotes* did not cease to exist after 1903. In the third place, it may be remarked that if, as a matter of fact, the 7 *jotes* had already ceased to exist before the rent suits were disposed of and if, as a matter of fact, in the facts of this particular case, there was no wrongful ouster at the instance of the landlord, the decision in the rent-suits could not have, in any view of the matter, been correct. We need not go into the question as to whether or not the decisions in the rent suits can operate in these circumstances as *res judicata*, a question in respect of which there is a conflict of judicial authorities. But we prefer to rest our decision on the simple ground that on the facts as disclosed in the present proceedings the doctrine of *res judicata* cannot be invoked. We have thus far proceeded on the footing that an appeal lay to this Court and that such appeal has been rightly preferred; we think, however, having regard to the decisions reported as *Mothur Chandra Majumdar v. Tara Sunkar Ghose* (1) and *Mathura Nath Roy v. Basanta Kumar Chakravarti* (2), that the appeal to this Court at the instance of the tenants-defendants is an incompetent appeal, because this appeal is really an appeal against an order of remand passed by the Special Judge under the provisions of the Bengal Tenancy Act. Our attention has been drawn to the case reported as *Manmotha Nath Dey v. Gadadhar Manna* (3), but we think that the present case is covered by the cases reported as *Mothur Chandra Majumdar v. Tara Sunkar Ghose* (1) and *Mathura Nath Dey v. Basanta Kumar Chakravarti* (2), rather than by the case reported as *Manmotha Nath Dey v. Gadadhar Manna* (3). We might have disposed of this appeal on the short ground that no appeal lay to this Court, as we have just indicated, but out of respect

to the argument which has been addressed to us, we have preferred to dispose of the appeal after considering all the points that had been addressed to us.

The result is, that this appeal fails and is dismissed with costs hearing fee, three gold *mohurs*.

B. N. & N. K.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 53-B OF 1921.

September 29, 1922.

Present.—Mr. Kotwal, A. J. C. and Mr. Prideaux, A. J. C.

GANOBA AND OTHERS—PLAINTIFFS—
APPELLANTS
versus

NARAYEN AND OTHERS—DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V. of 1908), s. 92, suit under, nature of—Dispute, whether can be referred to arbitration—C. P. Courts Act (I. of 1917), s. 26—Trial of suits under s. 92, *Civil Procedure Code*—Additional District Judge, jurisdiction of—Trials by other Tribunals, validity of—Jurisdiction to try suits under s. 92.

Matters in dispute between the parties to a litigation, which affect private rights can only be referred to arbitration. [p. 1018, col. 1.]

Mahadeo Prasad v. Bindeshri Prasad, 30 A. 137; 5 A. L. J. 101; A. W. N. (1908) 51; 3 M. L. T. 208 and *Mohammad Ibrahim Khan v. Ahmad Said Khan*, 6 Ind. Cas. 219; 32 A. 503; 7 A. L. J. 761, followed.

A suit under section 92 of the Civil Procedure Code is not a suit for the determination of private rights and matters in difference in such a suit cannot be referred to arbitration. [p. 1018, col. 1.]

Where the law has given jurisdiction to determine a matter to specific Tribunals only, determination of the matter by the other Tribunals, for instance, arbitrators, a Tribunal chosen by consent of parties, is excluded. [p. 1018, cols. 1 & 2.]

Under section 26 of the C. P. Courts Act, an Additional District Judge is empowered to try suits under section 92 of the Civil Procedure Code unless there is an order or direction to the contrary by the Local Government or the District Judge. [p. 1018, col. 2.]

Appeal from a decree of the Additional District Judge, Amraoti, dated the 9th May 1921, in Civil Suit No. 16 of 1920.

Mr. N. G. Sarkar, R. B. for the Appellants.

Messrs. M. R. Dixit, and J. K. R. Kama, K. B. for the Respondents.

JUDGMENT.—One Amritrao Balaji bequeathed certain property to the Bendoji Boa Sansthan of Ghuikhed by a Will dated

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the 9th September 1910 and appointed ten trustees to manage the property. Two of the trustees have died and one never took part in the management. The remaining seven are defendants in this case. The plaintiffs filed the present suit under section 92, Civil Procedure Code. They alleged that the defendants were quarrelling amongst themselves, had assumed separate management of parts of the property and had mismanaged the property, committed breaches of trust and caused loss to the temple. They prayed that the defendant-trustees be removed, new ones appointed and the defendants directed to render accounts and deliver possession of the trust estate to the new trustees.

After issues had been framed and the evidence was about to be taken the parties agreed to refer the matter to arbitration. On the 26th January 1921 they filed the following application for reference:—

"We the plaintiffs and defendants pray that the said suit may be sent for decision to the following *Panchas*:—

1. Mr. Bhaskar Waman alias Pandit Rao Joshi, Pleader, Amraoti;
2. Mr. Shripad Balwant alias Tatya Saheb Tambe, Pleader, Amraoti;
3. Mr. Babasaheb Dixit, Pleader.

The issues to be decided by the above *Panchas* are:—

(1) Whether the temple of the said Shri Bendoji Boa is public or private?

(2) Whether all or some of the *Panchas* appointed by Amritrao's Will should be allowed to continue, or whether those *Panchas* should be removed and others appointed to manage the estate bequeathed to the temple under that Will?

(3) In what manner should the *Panchas* who may be retained or appointed newly, manage the Deosthan? Broad principles may be settled about that.

(4) To take all accounts up to this day and to make settlement."

This application is signed by all the plaintiffs and defendants. Mr. Joshi was the plaintiffs' Pleader in the case and Mr. Tambe was the Pleader for defendants Nos. 1, 4 and 5 and 7. The Court ordered the reference as desired. It directed in the reference that, in case of difference of opinion among the arbitrators, the decision of the majority was to prevail.

The arbitrators submitted their award on the 30th April 1921. They decided that the Will created a trust of a public nature for religious and charitable purposes and that the persons appointed by the Will were trustees subject to the jurisdiction of the Court. They held that the trustees had committed breach of trust and should be removed. The arbitrators remarked that the defendants formed two sets, one consisting of defendants Nos. 2 and 3 and the other of the rest, the second set denying that the trust was a public one. As regards accounts they remarked in paragraph 7 of the award that, although each set objected to items in the other's account-books, neither gave any evidence or made any attempt to substantiate their allegations. After going through the account-books of both sides they accepted as correct the balance-sheets put in by the two sets. They thought that the new trustees should not re-open the question of accounts. They then gave the following award:—

(i) The present trustees defendants Nos. 1 to 7 be removed,

(ii) The following gentlemen be appointed as trustees;

1. Ganoba Ramji Mirchapure of Ghuikhed.

2. Ramji Gunaji of Ghuikhed,

3. Trimbak Shankerbhat of Ghuikhed,

4. Tukaram Niloji Patil of Ghuikhed,

5. Basvantrao Deorao of Ghuikhed.

(iii) The following be the scheme for the administration of the trust:—

(Details given).

(iv) The costs of the case should come out of the estate.

Mr. B. W. Joshi made a note saying that he agreed with the award except as regards paragraph 7. He stated that the suit was not and could not be for taking accounts and as matters in suit only could be referred, the finding of the majority of the arbitrators about the correctness of the account was *ultra vires*, and that the statement that the new Committee should not re-open the accounts could not be treated as an award, the point whether the new Committee should or should not take accounts not being referred to the arbitrators. This objection was repeated at the hearing before the lower Court but was overruled. The plaintiffs had taken no other objection.

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to the award, and the Court passed a decree in terms of the award. In this Court the plaintiffs urge the following objections:—

(1) That matters in difference between the parties in a suit under section 92, Civil Procedure Code, cannot be referred to arbitration; the reference and the arbitration were therefore invalid;

(2) That the old *Panchas* should have been required to render accounts to the new *Panchas*;

(3) That Mr. Bhagade who tried the case was never appointed an Additional District Judge; that even if he was an Additional District Judge his Court was not one in which section 92, Civil Procedure Code, authorises suits under that section to be filed;

(4) That the decree is not in accordance with the award in so far as it decrees Rs. 22-8 against the *Panchas*.

(5) That the award, so far as the question of taking accounts was concerned, was not unanimous and must be deleted.

The Counsel for defendant No. 2 Ramji supported the appeal.

We are of opinion that the first of the above contentions must succeed. It has been held that matters in difference between parties to litigation which affects private rights only may be referred to arbitration; *Mahadeo Prasad v. Bindeshri Prasad* (1) and *Mohammad Ibrahim Khan v. Ahmad Said Khan* (2). A suit under section 92 is not a suit for the determination of private rights as between the plaintiffs and the defendants and matters in difference in such a suit cannot be referred to arbitration. Apart from this, jurisdiction to try a suit under section 92 is confined to the District Court or any other Court empowered in that behalf by the Local Government within the limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate. In our opinion, where the law has given jurisdiction to determine a matter to specific Tribunals only, determination of the matter by other Tribunals is excluded. The determination of questions arising in

a suit under section 92 cannot, therefore, be referred to arbitrators—a Tribunal chosen by the consent of the parties.

As regards the third of the points noted above, Mr. Bhagade is a Judge of the Court of the First Subordinate Judge, Amraoti; *Vide* Notification No. 276-672 C. V., dated the 21st July 1920, published in the *Central Provinces Gazette* dated the 24th July 1920, and by Notification No. 366 Z-4, dated the 7th May 1917 published in the *Central Provinces Gazette* dated the 12th May 1917, the Judge of the Court of the First Subordinate Judge, Amraoti, is appointed Additional Judge of the District Court, Amraoti. Under section 26 (1), Central Provinces Courts Act, the Additional District Judge exercises the jurisdiction of the District Court and the powers of a Judge thereof subject to any general or special orders of the Local Government as to the class or value of suits and appeals which he may try, hear and determine, and subject also in respect of the distribution of the business of the Court, to the control of the Judge thereof. Under section 17 (1) (c) of the same Act, the District Court is the principal Civil Court of original jurisdiction and as such is empowered under section 92 to try suits brought under that section. It is not contended that there is any order of the Local Government which prohibits Mr. Bhagade from trying a suit of the class or value of the present suit or that he cannot try the present suit by reason of any distribution order of the District Judge. We hold that Mr. Bhagade as Additional District Judge was competent to try the present suit.

As we hold that reference to arbitrators was not permissible in this case it is unnecessary to go into the other points raised by the appellants. We set aside the reference and award and the decree of the lower Court based upon the award and remand the case for further trial by the Court itself from the stage it was at when it was referred to arbitrators.

We think that it is competent to the plaintiffs to take exception to the reference and the award on the grounds discussed above, although they were themselves parties to them. Still, looking to their conduct

(1) 30 A. 137; 5 A. L. J. 101; A. W. N. (1908) 51; 3 M. L. T. 208.

(2) 6 Ind. Cas. 219; 32 A. 503; 7 A. L. J. 761.

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we consider it right to order that they bear their own costs incurred up to date and pay those of the defendants except defendant No. 2, Ramji, in this and the lower Courts. Defendant No. 2, Ramji, will pay his own costs in both Courts. Pleader's fee in this Court Rs. 100.

N. H.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO.
894 OF 1920.

August 14, 1922.

Present:—Sir Asutosh Mookerjee, Kt.,
Chief Justice, and Mr. Justice
Chotzner.

JATINDRA MOHAN MONDAL AND
ANOTHER—PLAINTIFFS—APPELLANTS
versus

GHANESYAM CHAUDHURY AND

ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Bequest.—Annuity charged in favour of daughter and then her son—Annuity, whether operative in favour of son born after testator's death—Annuity made payable out of estate—Charge, creation of.

An annuity charged on his estate by a testator and made payable to his daughter and after her death to her son, is operative under Hindu Law even though the son might be born after the death of the testator; a grant of this description does not violate the rule against remoteness. [p. 1023, col. 1.] (Case-law reviewed.)

A grant such as the above is a right of property, and as it is an incorporeal right, the test of validity in each case is whether, under the circumstances, the donor has sufficiently indicated an intention that the transfer should take effect as a corody and with that intention has done all that is practicable by way of transferring such indicia of property as may be in existence. [p. 1021, col. 2.]

Where under a Will an annuity is made payable out of the estate of the testator, it shows an intention to create a charge on the property.

Appeal against the decree of the Additional Subordinate Judge, Maldah, dated the 10th of February 1920, reversing the decree of the Munsif 2nd Court, at Maldah, dated the 30th of September 1918.

Babu Brojolal Chakravarty (with him Babu Jatindra Mohan Chaudhury), for the Appellants.—The view taken by the Subordinate Judge is erroneous in law. The suit was for recovery of an annuity payable out of the testator's estate. It was a charge

on the estate. Annuities of this character are not repugnant to any principle of Hindu Law. They are distinguishable from cases of gifts pure and simple to unborn persons. In such cases there is no room for the applicability of the doctrine enunciated by the Judicial Committee in *Jotendromohun Tagore v. Ganendromohun Tagore* (1) that a gift to an unborn person is invalid. The annuity is really a transfer which should take effect as a corody. See *Chattri Chalamanna v. Pandrangi Subbamma* (2). Refers also to *Balvantrav. v. Purrushotam* (3), *Dinesh Chandra Roy v. Biraj Kamani Dasi* (4) and *Raja Rajeswara Dorai Rajah of Ramnad v. Sundara Pandiyasami Tevar* (5). Here the annuity payable must be regarded as a charge on the estate of the testator. Under such circumstances the grant does not offend the rule against perpetuities.

Babu Mohendra Nath Roy (with him Babu Atul Chandra Gupta), for the Respondents.—Here the donee was not in existence at the time of the death of the testator. That being so, the gift cannot take effect in accordance with the principle that a bequest to a person not in existence is wholly void. See *Jotendromohun Tagore v. Ganendromohun Tagore* (1). In the cases cited, although the persons in whose favour the bequests were made were not in existence at the date when the devise was made, they were born when the gifts took effect. In those cases there was a possibility that the devise might offend the rule against perpetuities. But that contingency never happened. The case before us clearly violates the rule against remoteness. The fact of the annuity being a charge really makes no difference. If it were otherwise, by a clever devise of this character the rule forbidding the creation of perpetuities might be easily evaded. The Court has to look into the

(1) 18 W. R. 359; 9 B. L. R. 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.).
(2) 7 M. 23; 7 Ind. Jur. 465; 2 Ind. Dec. (N. S.) 601.

(3) 9 B. H. C. R. 99.

(4) 11 Ind. Cas. 67; 39 C. 87; 14 C. L. J. 20; 15 C. W. N. 945.

(5) 49 Ind. Cas. 704; 42 M. 581; 17 A. L. J. 153; 36 M. L. J. 164; 23 C. W. N. 549; 29 C. J. J. 551; 25 M. L. T. 400; 21 Bom. L. R. 885 (1919); M. W. N. 511; 10 L. W. 322; 46 I. A. 64 (P. C.).

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substance of the transaction and not to its mere form.

Babu Brojolal Chakraverty, replied.

JUDGMENT.

Mookerjee, J.—This is an appeal by the plaintiffs in a suit for recovery of money claimed as annuity against the first defendant, one of the representatives of the estate of their maternal grandfather. The Court of first instance decreed the suit. Upon appeal, the Subordinate Judge has reversed that decision on the ground that the claim was not enforceable in law.

Radhakanta Chaudhury, the maternal grandfather of the plaintiffs, took three wives in succession. By his first wife, Achalmam, he had no issue, and on the 5th December 1860, he took the first defendant Ghanasyam as his adopted son. By his second wife, Jadabmam, he had two daughters, Samasundari and Kamini Sundari; the plaintiffs are the two sons of Kamini Sundari. By his third wife, Monomohini he had a daughter Brojogopini, and a son Madan Gopal, who was born in 1876 and is the second defendant in this litigation. On the 19th February 1872, he executed in favour of Kamini Sundari, an *ekrarnama* duly attested and registered, which recited that by a previous testamentary disposition made on the 3rd May 1871 he had provided a monthly grant of Rs. 10 for her maintenance for life after his death, and that as the amount was insufficient, he desired to increase it by Rs. 2-8-0 a month. The *ekrarnama* then proceeded as follows:—

"I promise by this *ekrarnama* that from this date I will go on paying you the aforesaid Rs. 12-8-0 per month during your lifetime. If, at the time of your death any son of yours be alive, then he, being entitled to this allowance in absolute right, will be endowed with the power of gift and sale. But if you die sonless during the lifetime of your husband, then your husband will get the aforesaid allowance during his lifetime. Excepting a son, no daughter of yours will be entitled to the allowance. I, and on my demise my heirs, sons, grandsons and others in succession, that is, those persons, who will in succession come into possession of my moveable

and immoveable properties, will abide by the said provisions of this *ekrarnama*. If I or my successors do not abide by the provisions of this *ekrarnama* then you (or they) will get the allowance by establishment of the said right through Court. And after the expiry of the term of this *ekrarnama*, myself during my life or my successor on my demise will get the allowance mentioned in this *ekrarnama*. Further on payment of the allowance, month by month, I shall obtain a receipt signed by your husband during his lifetime. After the death of your husband, I (or they) shall obtain receipts signed by yourself. Further, if you relinquish the allowance mentioned in this *ekrarnama* without the consent of your husband, then the right of your son will not be destroyed, and from that time, though you be living, the said right will vest in your husband for his life."

On the 2nd July 1877 shortly after the birth of his son, Radha Kanta Chaudhury revoked the Will of the 3rd May 1871 and made a fresh testamentary disposition. This Will recited the *ekrarnama* in favour of Kamini Sundari as also a similar *ekrarnama* in favour of Syma Sundari and directed that the allowance fixed thereby would be received from his natural or adopted son according to the terms of the respective *ekrar*. The Will made similar provision for annuity in favour of the daughter Brojo Gopini and her possible son, and added that a similar allowance would be paid, if any other daughter were born to her as also to her son. The estate was divided between the adopted son and the natural-born son, the former to take a three-annas share and the latter thirteen-annas share. The adopted son was appointed executor and was directed to carry out the provisions of the Will from the estate in his hands. On the death of the testator the adopted son took out Probate on the 6th August 1879. The annuity mentioned appears to have been paid to Kamini Sundari during her lifetime, and since her death, which took place in 1905, it has been realised by her sons by suit. Brojo Gopini also recovered the sums due to her as annuity by suits instituted from time to time. The present action was commenced by the sons of Kamini Sundari on the 15th December 1917 for recovery

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of arrears due for a period of nine years and eleven months from 1907 to 1917. The defendant urged that the claim was not enforceable. The Courts below have disagreed upon the question of the legality of the claim. The Subordinate Judge, reversing the decision of the primary Court, has held that, as the plaintiffs, the sons of Kamini Sundari, were born after the death of their maternal grandfather, the grant of an annuity in their favour was really a gift to unborn persons, and was, consequently, void under the rule recognized by the Judicial Committee in *Jotendromohun Tagore v. Ganendromohun Tagore* (1). This view has been assailed by the appellants as erroneous in law.

Annuities of this character were familiar to Hindu Jurists and do not constitute by any means a novel conception in Hindu Jurisprudence. Mr. Justice Muttusami Ayyar pointed out in the case of *Chetti Chalamanna v. Pandrangi Subbamma* (2) that a solemn and binding promise in this form, equivalent to a declaration of trust, was not unknown to the Hindu Law. Jimutavahana states that corody signifies what is fixed by a promise in this form: "I will give that in every month of *Kartick*" (*Dayabhaga* Chap. II, para. 13). Srikrishna comments on this passage that corody or Nibandha signifies "anything which has been promised, deliverable annually or monthly or at any other fixed periods." A reference to Chapter II, para. 9, shows that a corody, according to the text of *Yajnavalkya*, (book II, 121), is placed in the same category as other classes of property, namely, lands and chattels. Raghunandan quotes this verse of *Yajnavalkya* in his *Dayatattwa*, Chapter. II, para. 20 (Edition Golap Chandra Sarkar, Text page 6 Translation page 12) and cites from the author of the *Kalpataru* the definition—"a corody is what is granted by the King and the like receivable periodically from a mine or similar fund." To the same effect are the comments of *Vijnaneswara* in the *Mitakshara* Chapter I, section 5, para. 4: a corody—so many leaves receivable from a plantation of betel paper or so many nuts from an orchard of areca;" see also the elucidation by the Authors of the *Subodhini* and the *Balambhatti* (*Mitakshara* by Setlur, page 646);

and the explanation of Nibandha taken from the *Dipacalica* in *Jaganinath's Digest*, Tr. Colebrooke 1798, Volume II, page 278, see also *Balvantrav v. Purshotam* (3) where the principal texts are set out in the judgment of Westropp, C. J. The substance of the matter is, that a grant of this character is a right of property, and as it is an incorporeal right, the test of validity in each case is whether, under the circumstances, the donor has sufficiently indicated an intention that the transfer should take effect as a corody and with that intention has done all that is practicable by way of transferring such indicia of property as may be in existence. In the case mentioned a Hindu executed in 1845 a document called a *sanad* attested by witnesses whereby he agreed to pay to his sister and, after her death, to her daughter, Rs. 10 per annum from the produce of an estate inherited by him from his maternal grandmother. It was ruled by Turner, C. J., and Muttusami Ayyar, J., that the grantor, who had full power over his share, intended to create a charge on the produce of the estate he had inherited, and that the charge would be supported under the Hindu Law as a corody and under the English Law as a settlement.

In such circumstances, there is no room for the application of the rule enunciated in *Jotendromohun Tagore v. Ganendromohun Tagore* (1) as to the invalidity of a gift to an unborn person. That rule, it is well-known, has its limitation. The decisions in *Nagar Chandra v. Ratnamala Debi* (6) and *Dinesh Chandra Roy v. Braj Kamant Dasi* (4) laid stress upon an important passage in the judgment of the Judicial Committee where Mr. Justice Willes observed as follows:—

"Their Lordships, adopting and acting upon the clear general principle of Hindu Law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision for which authority may be found in Hindu Law." A passage indicative of such authority may be found in the

(6) 7 Ind. Cas. 921; 13 C. L. J. 82; 15 C. W. 66

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text of Vyasa and the comments thereon by Jagannath in his Digest (translated by Colebrooke, Book II, Chapter IV, section 2, paragraph 30. Reference may also be made to paragraphs 49 to 52 which treat of valid irrevocable gifts").

In the two cases mentioned, a bequest to a would-be daughter-in-law was sustained, though the bequest when made might possibly have to take effect in favour of a girl who might be born after the death of the testator. On the authority of the decisions in *Nafar Chandra v. Ratnamala Debi* (6) and *Dinesh Chandra Roy v. Biraj Kamani Dasi* (4) a bequest for the marriage expenses of great-grandsons and great-granddaughters of the testator who were born long after his death, was upheld without question in *Upendra Nath Nag Chowdhury v. Bhupendra Nath Nag Chowdhury* (7).

The passage from the judgment of the Judicial Committee in *Jotendromohun Tagore v. Ganendramohan Tagore* (1) mentioned above, was again relied upon in the case of *Rajarajeswara Dorai v. Sundarapandiyaswami Thevar* (8) where an annuity in favour of a junior member of a family and his descendants from generation to generation was upheld as not obnoxious to any rule of Hindu or English Law against perpetuities. This view was fortified by reference to the decisions of the Judicial Committee in *Sri Lakshmi Narayana Ananga Garu v. Sri Durga Madhawa Deo Garu* (9), *Ahmad Hossein Khan v. Nihal-ud-Din Khan* (10), *Karim Nensey v. Heinrichs* (11), *Aziz-un-nissa v. Tasaddug Husain Khan* (12). The decision of the Judicial Committee in *Chandi Churn Baru v. Sidheswari* (13) was distinguished on the ground that the

grant in that case imposed a restraint upon alienation contrary to the principles of Hindu Law, the grant was either a present assignment to persons not yet in existence, subject to a suspensive condition which might prevent its taking effect at all or for generations to come, or else the grant was in essence a covenant running with the estate and binding its possessor to give the villages to those persons in the event specified. The Judicial Committee held that, in either view, the grant prevented the owner from alienating his estate discharged of such future interest. No such results follow from recognising the present gift, which, moreover, is not in favour of strangers but of members of the family. The decision of the Madras High Court in *Rajarajeswara Dorai v. Sundarapandiyaswami Thevar* (8) has been affirmed by the Judicial Committee, *Rajarajeswara Dorai v. Sundarapandiyaswami Thevar* (5). In answer to the contention that the grant was a creation of a kind of perpetuity which the law did not allow or an attempt to create a permanent relation which was impossible of creation, Lord Phillimore observed that whatever might be said if the agreement lay in covenant seeing that it lay in charge, there was no difficulty in making it perpetual, as long as there were lineal or collateral heirs. It is worthy of note that it was conceded in course of argument that the contention of the appellants could not prevail, if the decision in *Balvantrav v. Purshotam* (3) was applicable. There can be no doubt that in the case before us, the annuity was directed to be paid out of the estate of the testator, and this shows an intention to create a charge thereon, see the decision of the Judicial Committee in *Solehman Quadir v. Nawab Sir Salimullah Buzdur* (14) which reversed the decision in *Habibullah Saheb v. Khajur Solehman Quader* (15). Viscount Cave stated there that the view taken by the Board was in accordance with the decisions in *Nawab Umjad Ali Khan v. Mohumtee*

(7) 32 Ind. Cas. 267; 21 C. W. N. 280.

(8) 27 Ind. Cas. 283; 27 M. L. J. 694.

(9) 20 I. A. 9; 16 M. 268; 17 Ind. Jur. 106; 6 Sar. P. C. J. 270; 5 Ind. Dec. (N. S.) 893 (P. C.).

(10) 9 C. 945; 13 C. L. R. 330; 10 I. A. 45;

7 Ind. Jur. 443; 4 Sar. P. C. J. 442; Rafique and Jackson's P. C. No. 72; 4 Ind. Dec. (N. S.) 1280 (P. C.).

(11) 25 B. 563; 3 Bom. L. R. 472; 6 C. W. N. 1; 28 I. A. 198; 8 Sar. P. C. J. 79 (P. C.).

(12) 23 A. 324; 11 M. L. J. 160; 28 I. A. 65;

5 C. W. N. 569; 3 Bom. L. R. 307; 8 Sar. P. C. J. 54 (P. C.).

(13) 15 I. A. 159; 16 C. 71; 12 Ind. Jur. 329; 5 Sar. P. C. J. 231; 8 Ind. Dec. (N. S.) 47 (P. C.).

(14) 69 Ind. Cas. 138; 49 I. A. 153; (1922)

A. I. R. (P. C.) 107; 31 M. L. T. 79; 4 U. P. L. R.

(P. C.) 70; 43 M. L. J. 385; 24 Bom. L. R. 1257;

49 C. 820; 27 C. W. N. 101; 21 A. L. J. 1; 37 C. L. J.

56 (P. C.).

(15) 53 Ind. Cas. 764; 30 C. L. J. 102; 24 C. W.

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Begum (16), Sri Lakshmi Narayana Ananga Garu v. Sri Durga Madhawa Doo Garu (9), Muhammad v. Husaini Begum (17) and Rijarajesvara Dorai v. Sundara Pandiyasini Tevar (5). We are, consequently, of opinion that, on principle as well as on the authorities, the annuity payable out of the estate (and consequently charged thereon) to the daughter and after her death to her son was operative in law, even though the son might be born after the death of the testator; a grant of this description does not violate the rule against remoteness.

In the view we take, it is not necessary for us to consider, whether the principle of inapplicability of the doctrine of perpetuities to purely personal covenants recognised by the House of Lords in *Walsh v. Secretary of State for India* (18), and *Witham v. Vane* (19) governs the case before us. Nor need we examine the applicability of the principle that such an annuity is in the nature of a personal estate, but may be made descendible in the same manner as real estate, and that in the case of non-payment, but not otherwise, relief may be sought by administration of the estate of the deceased settlor when provision may be made for it out of the estates of the deceased, in *re Hargreaves*, *Dicks v. Hare* (20), *Turner v. Turner* (21); *Wolaston v. Wolaston* (22).

The result is, that this appeal is allowed, the decree of the Subordinate Judge set aside, and that of the Court of first instance restored, with costs here and in the lower Appellate Court.

B. N.

Appeal allowed.

N. H.

(16) 11 M. I. A. 517; 10 W. R. P. C. 25; 2 Suth. P. C. J. 98; 2 Sar. P. C. J. 115; 20 E. R. 195.

(17) 7 Ind. Cas. 237; 37 I. A. 152; 14 C. W. N. 865; 7 A. L. J. 871; (1910) M. W. N. 313; 8 M. L. T. 147; 12 C. L. J. 205; 12 Bom. L. R. 638; 20 M. L. J. 614; 32 A. 410 (P. C.).

(18) (1863) 10 H. L. C. 367; 32 L. J. Ch. 585; 9 Jur. (N. S.) 757; 11 W. R. 823; 2 N. R. 339; 11 E. R. 1068; 8 L. T. (N. S.) 839, 138 R. R. 194.

(19) (1883) *Challis on Real Property*, App.

(20) (1890) 44 Ch. D. 236; 59 L. J. Ch. 375; 62 L. T. 819.

(21) (1783) 1 Bro. C. C. 317; Amb. 776; 28 E. R. 1155.

(22) (1878) 7 Ch. D. 58; 47 L. J. Ch. 117; 37 L. T. 631; 26 W. R. 77.

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION NO. 157 OF 1922.

March 12, 1923.

Present:—Mr. Kanhaiya Lal, J. C.

KALI BAKHSH SINGH—DEFENDANT—

APPLICANT

versus

BHAGWAN DAS AND OTHERS—PLAINTIFFS

—OPPOSITE PARTY.

Oudh Rent Act (XXII of 1886) as amended by U. P. Rent (Amendment) Act (IV of 1921), s. 119 B—Appellate decree by District Judge—Revision.

The power of the Court of the Judicial Commissioner to interfere in appeals from the decrees of Revenue Courts is defined by and limited to the cases provided by section 119 B of Act XXII of 1886 as amended by U. P. Act IV of 1921, and no power of revision from the appellate decrees of the District Judge is reserved to the Court.

Application against a decree of the District Judge, Fyzabad, dated the 17th August 1922, upholding that of the Deputy Commissioner, Fyzabad, dated the 13th December 1921, affirming an order of the Assistant Collector of the Second Class, Bikapur, dated the 26th September 1921.

Mr. J. K. Banerji, for the Applicant.

Mr. M. H. Kidwai, for the Opposite Party.

JUDGMENT.—The plaintiffs filed certain suits for the recovery of arrears of rent against the defendant, which were heard by an Assistant Collector of the Second Class. On appeal his decrees were confirmed by the Collector. There were further appeals to the District Judge which were unsuccessful. The defendant now applies under section 115 of the Code of Civil Procedure for the discharge of the decrees passed by the District Judge, contending that his judgment in each of those appeals was not in accordance with O. XLI, r. 31 of the Code of Civil Procedure.

It is doubtful whether an application for revision in those circumstances is maintainable in this Court, because in hearing an appeal from the appellate decision of a Collector under section 119 of the Oudh Rent Act (XXII of 1886) as amended by U. P. Act IV of 1921, the District Judge, exercises the functions of a Revenue Court. Section 119B gives a right of appeal to this Court from the appellate decree of the District Judge and section 119C declares, that for the purpose of deciding appeals

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under the Act, a District Judge and the Judicial Commissioner shall have the powers conferred on a Court by that Act. A Court is defined by section 3 as meaning any Judicial Officer presiding in a Court of Revenue for the disposal of matters under the Act. The power of this Court to interfere in appeals from the decrees of Revenue Courts is defined by and limited to the cases provided by section 119B; and no power of revision from the appellate decrees of the District Judge is reserved to this Court.

The learned Counsel for the applicant relies on section 135, which makes the Code of Civil Procedure applicable to all suits and other proceedings under the Oudh Rent Act, so far as the provisions of the former are not inconsistent with the provisions of the latter: but, apart from the limited authority given by sections 119B and 119C of the Oudh Rent Act, a reference to section 4 of the Code of Civil Procedure shows that, in the absence of any specific provision to the contrary, nothing in the Code shall be deemed to affect any special or local law now in force, or any special jurisdiction or power conferred by or under any other law for the time being in force. The decision of the District Judge, moreover, proceeds on a refusal to interfere with findings of fact in a second appeal.

The applications are, therefore, dismissed with costs.

G. H.

Applications dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 121 OF 1921.

November 24, 1922.

Present:—Mr. Justice Gokal Prasad.

BHAGWANT—PLAINTIFF—APPELLANT

versus

MARE AND OTHERS—DEPENDANTS—

RESPONDENTS.

Agre. Tenancy Act (II of 1901), s. 10—Ex-proprietary tenant—Relinquishment of sir rights

—Fraud—Landlord in actual possession as sub-tenant—Delivery of possession.

The mere execution of a deed of relinquishment of his *sir* rights by an ex-proprietary tenant in favour of the landlord does not amount to constructive fraud on behalf of the latter. [p. 1025, col. 2.]

Where in the case of a relinquishment of his *sir* rights by an ex-proprietary tenant in favour of his landlord, the latter is already in actual physical possession of the land as a sub-tenant, there is no necessity of a formal delivery of possession. [p. 1026, col. 1.]

Second appeal from the decision of the District Judge, Meerut, dated the 8th September 1920.

Mr. Gulzari Lal, for the Appellant.

Mr. K. C. Mithal, for the Respondents.

JUDGMENT.—This appeal has arisen under the following circumstances:—The plaintiff brought the suit for actual possession of plots Nos. 393, 394 and 166-1 against the defendants under the following circumstances. The plaintiff owned several plots of *sir* land. He sold some of those to one Umrao. The defendant, Mare, obtained those plots by pre-emption. It is now admitted before me that the plots sold were plots in dispute. The plaintiff now says that the defendants were his sub-tenants of plots in suit and the plaintiff got a decree against them for ejectment and obtained possession through the Court *Amin* on the 17th of February 1919, but that when the *dakhlanama* was being executed the defendants, somehow or other, got it recorded therein that there were some crops of theirs standing on the plots; that he, the plaintiff, was the ex-proprietary tenant of the land in suit and sometime ago Mare, defendant, got the thumb impression of the plaintiff on a piece of paper and now says that it is a deed of relinquishment of the plaintiff's *sir* rights; that notwithstanding the delivery of possession through the Court *Amin* on the 17th of February 1919, in execution of the decree for ejectment passed by this Court, the defendants are interfering with the lawful possession of the plaintiff; hence this suit for actual possession. The defence of Mare, defendant,

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was that the plaintiff has no ex-proprietary rights in the land, that the plaintiff had relinquished his ex-proprietary rights, and that the contesting defendant was cultivating the land in dispute as owner and not as sub-tenant. He further alleges that the relation of landlord and tenant does not exist between the parties.

The First Court came to the conclusion that the plaintiff's ex-proprietary rights were in existence as to plot No. 166-1 but they were extinguished in respect of plots Nos. 393 and 394 because of relinquishment by the plaintiff. It held further that the relationship of landlord and tenant was admitted between the parties, that the relinquishment took place on the 4th of February 1918, and as this suit was not brought till the 13th of August 1919, it was barred by time and that the delivery of possession to the plaintiff on the 17th of February 1919 was ineffectual because his rights as an ex-proprietary tenant had ceased to exist on that date. It, therefore, decreed the claim as to plot No. 166-1 and dismissed it as to plots Nos. 393 and 394. The plaintiff went up in appeal and the learned District Judge came to the conclusion that, as the plaintiff's name had been struck out of the revenue papers, his suit was bound to fail. He, therefore, dismissed the appeal. The plaintiff comes here in second appeal.

By my order dated the 12th of July 1922 I referred the following issue to the Court below for trial as it was the point on which the decision of the case hinged, namely, "Did the plaintiff-appellant execute the deed of relinquishment dated the 4th of February 1918, of his ex-proprietary right of his own free-will or was it obtained by Mare, defendant, from the plaintiff by exercise of fraud?"

The learned Judge of the Court below has sent a finding which it is not very easy to understand. He holds that, while there is nothing on the record to prove that there has been any direct fraud exercised upon the plaintiff-appellant, nevertheless, the execution of the deed of relinquishment involves an act of constructive fraud. This is no finding on the evidence, and, as the District Judge admits that there was no evidence of direct fraud exercised upon the plaintiff by Mare, defendant, the

finding on this issue as a question of fact ought to be in the negative. As the District Judge has not recorded a proper finding on this issue, I ignore it and proceed to arrive at a finding myself. There is no evidence on the record on the question of the direct fraud being practised on the plaintiff by Mare. No circumstances have been laid before me to show that there was any indirect fraud. Coming, however, to the legal aspect of the question I do not see on what principle the mere execution of a deed of relinquishment by an ex-proprietary tenant can amount to constructive fraud on behalf of the landlord; I, therefore, decide this issue in the negative.

The next and main argument advanced by the learned Advocate for the appellant is that, in order that the registered deed of relinquishment should operate as a valid surrender it was necessary that actual possession should have been made over by the ex-proprietary tenant to the landlord, and reliance is placed on the cases of *Indar Sen v. Naubat Singh* (1), *Kashi Prasad v. Kedar Nath Sahu* (2), *Nawab Sultan Husain Khan v. Sewak Singh* (3) and *Shiva Tahal Ahir v. Jawahir Lal* (4). As there is no finding that the registered deed of relinquishment was followed by delivery of possession it remained only an executory contract and not an executed contract and could not, therefore, be enforced as being opposed to law. This case has become very difficult and has given me a lot of anxiety. In the view that I take of the case, delivery of possession was not necessary. According to the plaintiff's case itself as put forward in the plaint the defendants were actually in possession but according to the plaintiff as sub-tenants. The fact that they were in actual possession when this deed of relinquishment was executed is nowhere denied so that in this case there was no necessity for delivery of possession because the land-holders were already in actual physical possession. This ground, therefore, must fail.

Another point has, however, struck me

(1) 7 A. 847; A. W. N. (1885) 245; 4 Ind. Dec. (N. S.) 922.

(2) 20 A. 219; A. W. N. (1898) 471 9 Ind. Dec. (N. S.) 502.

(3) 27 Ind. Cas. 586; 2 O. L. J. 11.

(4) 31 Ind. Cas. 794.

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and on which I have heard the arguments of both the parties. It is this. The deed of relinquishment was actually executed during the pendency of the suit for ejectment brought by the plaintiff in the Revenue Court against the defendants as his subtenants. The defendants then, if the deed was valid, became landlords in possession and they raised this question before the Revenue Court. They were given time to have their rights as proprietors declared by the Civil Court but they omitted to do so and, later on, on the 17th of April 1918, the Revenue Court passed a decree for ejectment in favour of the plaintiff and against them. This decree was executed later on and the plaintiff was put in possession on the 17th of February 1919. It is urged that this decision of the question of sub-tenancy against the defendants bars the defendants from contending now that they have been in possession as landlords. The mere fact of the removal of the plaintiff's name from the revenue papers as an ex-proprietary tenants does not effect the question. In my opinion the decision in the ejectment suit was the decision of a competent Court and is as such binding on the defendants and they cannot now be heard to say they are landlords in possession. The delivery of possession whether actual or formal to the plaintiff in the year 1919 (there is nothing on the record to show what it was) amounted to the plaintiff's getting possession as ex-proprietary tenant, the title which he had claimed, and the present suit being within six months from that date, was not barred by six months' rule of limitation. In this view of the case I allow the appeal, set aside the decrees of the Courts below and decree the plaintiff's claim. As the plea on which this appeal succeeds was a poor plea of law and no further facts had to be found I allowed it to be raised in second appeal. The case seems to have been very carelessly fought out in the lower Courts. This was a point on the surface and ought to have been pressed. The parties will bear their own costs of this litigation.

N. K.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

NO. 960 OF 1920.

August 14, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner.

RAMBRAMA CHATTERJEE—DE-

FENDANT—APPELLANT

versus

KEDAR NATH BANERJEE AND

OTHERS—DEFENDANTS—RESPONDENTS.

Charitable endowments, nature of—Founders, powers of—Hindu religious endowment—Direction entitling descendants of founder's daughters to participate in bhog offerings, validity of—Gift to human being and offering to deity, distinction between—Rule of determination—Usage—Founder, intention of, proof of—Dedication—Execution of document, whether essential.

A charitable corporation, in so far as it is charitable, is the creature of the founder, and the latter may provide for the government and administration of his creature and the application in perpetuity of its revenue. This is subject to the reservation that a founder may not, unless special power has been reserved in this behalf, after the constitution of the Corporation, vary the trust or modify the application of the endowment or its revenue. These principles are applicable to religious endowments created in accordance with Hindu Law. [p. 1029, col. 1.]

In the case of religious endowments created according to Hindu Law when the worship of an idol has been founded, the *shebaitship* is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution. There is no reason why the founder, who is competent to provide for the government and administration of the trust, should not be able to give a direction for its management, which is not inconsistent with its character as a religious and charitable trust. Although the grant once made cannot be resumed and is irrevocable, so long as the foundation continues, the *shebait* is bound to carry out all legitimate directions given by the founder at the time of the establishment but is free to manage the trust without interference by him or his representatives. The test in each case is, whether the direction given by the founder is inconsistent with the nature of the endowment as a religious and charitable trust or is a colourable device for the evasion of the law of perpetuities. [p. 1029, cols. 1 & 2.]

It is competent to the founder of a Hindu religious endowment to direct that the descendants of his daughters would be entitled to participate in the *bhog* offerings dedicated to the idols established by him. Such a direction is in no way inconsistent with the purpose of the endowment. [p. 1030, col. 2.]

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There is a fundamental distinction between a gift to a sentient being and an offering or dedication to a deity. Subject to special usages to the contrary, the offerings do not become the property of the officiating priest, but contribute to the maintenance of the shrine with all its rights, ceremonies and charities. [p. 1030, col. 1.]

Where a practice has been observed in a religious endowment for a very long time the inference is that the system must have had its origin in a direction given by the founders of the endowment. A rule of determination is looked for in the case of such institutions in their usage, because it is an index to the intention of the founder. The proof of the intention of the founder becomes almost conclusive where the usage is immemorial, though the intention may be presumed from a number of instances extending over a limited period, provided only that the existence of an invariable practice is made out by clear and unambiguous evidence. [p. 1028, col. 2.]

Venkatachalapati v. Subbarayadu, 13 M. 293; 4 Ind. Dec. (N. S.) 916, *Greedharee Doss v. Nundokishore Doss*, Marsh. 573; 2 Hay 633, *Thackersey Dewraj v. Hurbhum Nursey*, 8 B. 432; 4 Ind. Dec. (N. S.) 664, and *Raghubhushana v. Vidiavarithi*, 34 Ind. Cas. 875, relied on.

A Court should be slow to draw an inference which would defeat a right that has been exercised without question during a very long period, and unless such inference is irresistible the Court should presume everything that is irreasonably possible to presume in favour of such a right. [p. 1029, col. 2.]

The execution of a document is not essential for the purpose of a valid dedication which may be inferred from application of proceeds and family conduct. [p. 1028, col. 1.]

Muddun Lal v. Komul Bibee, 8 W. R. 42 and *Manohar Ganesh Tambekar v. Lakhmiram Govindram*, 12 B. 247; 12 Ind. Jur. 387; 6 Ind. Dec. (N. S.) 650, relied on.

Appeal against a decree of the Subordinate Judge, Asansol, dated the 12th of January 1920, affirming that of the Munsif at Asansol, dated the 23rd of March 1918.

Babu Hiralal Sanyal (with him Babu Bireswar Bagchi), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for declaration that the plaintiffs are entitled to participate in the *bhog* offered to three idols and for consequential relief. The plaintiffs' case is that they and their ancestors who are descendants of the founders of the idols, through their daughters, participated in the cooked rice *bhog* from generation to genera-

tion. I submit there is nothing to show that descendants through females were intended to participate in the *bhog*. We are the *shebait*s and we are entitled to carry on the worship and dispose of the offerings as we think to be best and proper in the interests of *sheba*. In *Gossami Sri Gridhariji v. Romanlalji Gossami* (1); *Mohanlalji v. Gordhan Lalji* (2); *Kunjamani Dasi v. Nikunja Behary Das* (3). The dedication was not in reality for charitable purposes. It was to benefit the direct line of heirs of the founders through males. I submit the Courts below have taken an entirely wrong view of the matter. The suit should have been dismissed.

Babu Mahendra Nath Roy (with him Babu Mohesh Chandra Banerjee), for the Respondents.—The finding of fact is that the founder of the endowment had endowed for meeting the *pūja* expenses and that descendants through females have always participated in the daily *bhog*. They dispute the validity of the said two objects but they have not shown any authorities for the proposition. Then the Courts find that this system must have had its origin in a direction given by the founders. I submit they are perfectly right, see *Venkatachalapati v. Subbarayadu* (4). I submit, therefore, the Courts are right in their decision.

Babu Hira Lal Sanyal, replied in brief.

JUDGMENT.—This is an appeal by the first defendant in a suit for declaration that the plaintiffs are entitled to participate in the *bhog* offered to three idols and for consequential relief. One Gopinath Chatterjee, the common ancestor of the plaintiffs and defendants, more than 200 years ago, consecrated an image of Vishnu. His sons Nandadulal Chatterjee and Durga Charan Chatterjee followed in the

(1) 16 I. A. 137; 17 C. 3; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350; 8 Ind. Dec. (N. S.) 541 (P. C.).

(2) 19 Ind. Cas. 337; 40 I. A. 97; 35 A. 283; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27 (P. C.).

(3) 32 Ind. Cas. 823; 22 C. L. J. 404; 20 C. W. N. 314.

(4) 13 M. 293; 4 Ind. Dec. (N. S.) 916.

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footsteps of their father; each of them consecrated an image of Siva, and Durga Charan Chatterjee consecrated, in addition, an image of Kali. Temples were erected, those now in existence were consecrated in 1792 and 1801 and elaborate arrangements were made for the daily worship. Properties were also dedicated to secure the due performance of the worship, though this is not directly evidenced by a written document. But the execution of a document is not essential for the purpose of a valid dedication which may be inferred from application of proceeds and family conduct; *Muddun Lal v. Komul Bibee* (5), *Moonohar Ganesh Tambekar v. Lakhmiram Govindram* (6). *Abhiram Goswami Mohant v. Shyama Charan Nandi* (7). It is established that from a long time past, service lands have been held by persons who discharge various duties in connection with the temples and the worship, such as the *dome* who beats the drum during the daily *puja* of the *thakurs*, the barber who supplies flowers and *bel* leaves for the *puja* and provides light at dusk in the temples, the gardner who supplies plantain leaves, the woodman who procures fuel, and the fisherman who supplies fish for the *bhog*. There is further evidence of the existence of a *bund* or tank which covers an area of 1100 *bighas*, of gardens and of other lands, the income whereof is regularly appropriated to meet the expenses of the *puja* including the *bhog* offering. It is not necessary to determine here whether the dedication was of the completest kind known to the law; *Jagadindra Nath Roy v. Hemanta Kumari Debi* (8); or whether the property was secular, charged with a religious trust; *Ashutosh Dutt v. Doorga Churn Chatterjee* (9). It is sufficient to hold, as the Courts below have done,

that there is an endowment and that the income thereof has been and is applied for the performance of the daily worship of the idols including the offering of the *bhog*.

The plaintiffs allege that they and their ancestors, who are descendants of the founders through their daughters, participated in the cooked rice *bhog* from generation to generation till the first defendant obstructed them on the 31st December 1914. The Courts below have concurrently found that the descendants of the founders in the male line have been the *shebait*s, and as their number increased they arranged amongst themselves to carry on the worship, as is common, by turns or *palas*. The Courts have further found that the descendants of the founders in the female line have always participated in the *bhog* after it has been duly offered to the idols. From the long continuance of this arrangement, which has been in operation now for several generations, the Courts have come to the conclusion that this system must have had its origin in a direction given by the founders. This was a legitimate inference, for as stated by Muthusami Iyer, J., in *Venkatachalapati v. Subbarayadu* (4), a rule of determination is looked for in the case of such institutions in their usage, because it is an index to the intention of those who founded and endowed them and who have since kept them up; *Greedharee Doss v. Nundokishore Doss* (10); *Thackersey Dewraj v. Hurbhum Nursey* (11). The proof of the intention of the founder becomes almost conclusive where, as here, the usage is immemorial, though intention may be presumed from a number of instances extending over a limited period, provided only that the existence of an invariable practice is made out by clear and unambiguous evidence; *Raghubhushana v. Vidiavaridhi* (12).

The question thus arises, whether it was competent to the founder to direct that the *shebaitship* shall be vested in his descendants through his sons, and that his descendants through his daughters should have the right to participate in the *bhog*

(5) 8 W. R. 42.

(6) 12 B. 247; 12 Ind. Jur. 387; 6 Ind. Dec. (N. S.) 650.

(7) 4 Ind. Cas. 449; 36 I. A. 148 at p. 164; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.).

(8) 31 I. A. 203; 32 C. 129; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.).

(9) 6 I. A. 182; 5 C. 438; 5 C. L. R. 296; 4 Sar. P. C. J. 58; 3 Suth P. C. J. 694; 3 Ind. Jur. 571; 3 Shome L. R. 32; 2 Ind. Dec. (N. S.) 888 (P. C.).

(10) Marsh 573; 2 Hay 633.

(11) 8 B. 432; 4 Ind. Dec. (N. S.) 664.

(12) 34 Ind. Cas. 875.

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offering. The first defendant, who alone amongst the *shebait*s, contests the claim of the plaintiffs to participate in the *bhog* offering, has not been able to invoke any general principle or to cite any authority in support of his contention. In the words of Lord Mansfield in *St. John's College v. Todington* (13), a charitable corporation, in so far as it is charitable, is the creature of the founder. On this view, Lord Hardwicke had ruled in *Green v. Rutherford* (14), that the founder may provide for the Government and administration of his creature and the application in perpetuity of the revenue; see also *Philips v. Bury* (15), which was ultimately decided by the House of Lords, *Philips v. Bury* (16) and contains an elaborate review of the rights of founders of charitable and religious trusts. This is subject to the reservation that a founder may not, unless special power has been reserved in this behalf, after the constitution of the corporation, vary the trusts or modify the application of the endowment or its revenues; *R. v. Vice-Chancellor of Cambridge* (17); *Ex Parte Bolton School* (18) *Attorney General v. Dulwich College* (19). These principles have been applied in the case of religious endowments created in accordance with Hindu Law. According to that law, when the worship of an idol has been founded, the *shebaitship* is vested in the founder and his heirs unless he has disposed of it otherwise, or there has been some usage or course of dealing which points to a different mode of devolution; *Gossami Sri Gridharaji v. Romanlalji Gossami* (1); *Jagadindra Nath Roy v. Hemanta Kumari Debi* (8), *Mohan Lalji v. Gordhan Lalji* (2); *Kunjamani Dasi v. Nikunja Behary Das* (3). There is no reason why the founder, who is competent to provide for the government and administration of the

(13) (1757) 1 Burr. 158 at p. 200; 97 E. R. 245.

(14) (1750) 1 Ves. Sen 462 at pp. 468, 472; 27 E.

R. 1144.

(15) (1694) 1 Ld. Raym 5; Comb. 268; Holt 715; 4 Mod. 106; Skin 447; Carth 180; 1 Shower 360; 2 T. R. 346; 91 E. R. 900.

(16) (1694) Shower P. C. 35; 15 Ld. Jo. 441; 1 Burr. E. L. 442; 2 T. R. 346; 4 Mod. 106; Skin 447; 1 E. R. 24.

(17) (1765) 3 Burr. 1647 at p. 1656; 97 E. R.

1027.

(18) (1789) 2 Bro. C. C. 662; 29 E. R. 367.

(19) (1841) 4 Beav. 255; 5 Jur. 814; 49 E. R. 337.

trust, should not be able to give a direction for its management, which is not inconsistent with its character as a religious and charitable trust. No doubt, as held in *Juggut Mohini Dossee v. Sokheemoney Dossee* (20), the grant once made cannot be resumed and is irrevocable; but so long as the foundation continues, the *shebait* is, on the one hand, bound to carry out all legitimate directions given by the founder at the time of the establishment, and is, on the other hand, free to manage the trust without interference by him or his representatives; *Teertaruppa v. Soonderajien* (21). The test in each case is, whether the direction given by the founder is inconsistent with the nature of the endowment as a religious and charitable trust and is a colourable device for the evasion of the law of perpetuities. There may be room for controversy in a concrete case, whether the dedication is in reality for a charitable purpose or is designed for private aggrandisement; *Fatmabibi v. Advocate General of Bombay* (22) *Limji Nowroji Banaji v. Bapuji Ruttonji* (23); *Yeap Cheah Neo v. Ong Cheng Neo* (24); *Commissioners of Income Tax v. Pemsel* (25). But there is manifestly no room for such doubt in the present case. There is unquestionably a genuine and valid *debutter* which has been in existence for more than two centuries; the *shebaitship* has been enjoyed by the descendants of the sons of the founder, at the same time, after the *bhog* offerings have been made to the idols, the descendants of the daughters of the founder have participated in them. The Court will be slow to draw an inference which would defeat a right that has been exercised without question during so long a period as the present and unless such inference is irresistible the Court will presume everything that is reasonably possible to presume, in favour of such a right. It is now well-settled that, as explained in *Bhupati Nath* (20) 14 M. I. A 289; 17 W. R. 41; 10 B. L. R. 19; 2 Suth. P. C. J. 512; 2 Sar. P. C. J. 23 20 E. R. 795.

(21) (1851) Mad. S. D. A. 57.

(22) 6 B. 42; 6 Ind. Jur. 253; 3 Ind. Dec. (N. S.) 485.

(23) 11 B. 441; 6 Ind. Dec. (N. S.) 289.

(24) (1875) 6 P. C. 381.

(25) (1891) A. C. 531; 61 L. J. Q. B. 265; 65 L. T. 621; 55 J. P. 805.

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v. *Smrititirtho v. Ram Lal Mitra* (26). There is a fundamental distinction between a gift to a sentient being and an offering or dedication to a deity. Subject to special usages to the contrary, the offerings do not become the property of the officiating priest; but contribute to the maintenance of the shrine with all its rights, ceremonies and charities; *Girijanund Datta Jha v. Sailajanund Datta Jha* (27); *Maharanees Shibessouree Debia v. Mothooranath Acharjo* (28); *Chotalal Lakhmiram v. Manohar Ganesh* (29); *Ram Parkash Das v. Anand Das* (30); *Kalyana Venkataramana Aiyangar v. Kasturi Ranga Aiyangar* (31). We need not describe here in detail the normal type of continued worship of a consecrated image, the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy; the vivified image is regaled with the necessities and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest. The dedicated food, known as *bhog*, is, after completion of the worship, distributed in charity amongst members of the family as also among guests invited and uninvited; for in the oldest Brahminical writings hospitality is regarded as the discharge of a common debt to humanity and the guest is honoured as a divi-

nity. In our opinion, a direction that the descendants of the daughters of the founder should participate in such a distribution of consecrated food, is in no way inconsistent with the purpose of the endowment. The pecuniary value of the *bhog* may be and in the present case is insignificant from a secular point of view. But to the pious Hindu, the worth of *prasad* or consecrated food, which has been dedicated to the deity, cannot be measured in money; and the right to participate in its distribution would obviously possess special importance in the eyes of the descendants of the founder. Our conclusion is, that it was competent to the founder, not only to prescribe the line of succession to the *shebaitship* in the descendants of his sons, but also to direct that the descendants of his daughters would be entitled to participate in the *bhog* offerings dedicated to the idols established by him.

The result is, that the decree made by the Subordinate Judge, in concurrence with the Trial Court, is confirmed and this appeal dismissed with costs.

F. N. & N. H.

Appeal dismissed.

(26) 3 Ind. Cas. 642; 37 C. 128; 14 C. W. N. 18; 10 C. L. J. 355.

(27) 23 C. 645; 12 Ind. Dec. (N. S.) 429.

(28) 13 M. I. A. 270; 13 W. R. P. C. 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

(29) 24 B. 50, 2 Bom. L. R. 516; 4 C. W. N. 23; 26 I. A. 199, 199; 7 Sar. P. C. J. 559; 12 Ind. Dec. (N. S.) 570 (P. C.).

(30) 33 Ind. Cas. 583; 43 I. A. 73; 43 C. 707; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. J. 267 (P. C.).

(31) 38 Ind. Cas. 73; 20 M. L. T. 490; 31 M. L. J. 777; 5 L. W. 625; (1917) M. W. N. 400; 40 M. 212.

BENI MADHO v. YUSUF HUSAIN KHAN.

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION NO. 141 OF 1922.

March 12, 1923.

Present.—Mr. Kanhaiya Lal, J. C.

Lala BENI MADHO AND ANOTHER—

PLAINTIFFS—APPLICANTS

versus

MR. YUSUF HUSAIN KHAN AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. I, r. 10.—Suit concluded by preliminary decree for sale—Transferee prior to suit, addition of—Court, jurisdiction of.

A Court cannot direct a transferee prior to the suit to be made a party after the suit has been concluded by the passing of a preliminary decree for sale and allow a suit to be thus re-opened without the decree being set aside in any of the modes provided by law.

Raghunath v. Sheolal, 39 Ind. Cas. 849; 13 N. L. R. 69, followed.

Jotindra Mohan Tagore v. Bejoy Chand, 32 C. 483. *Lakshmichand Rewachand v. Kachubai Gulabchand* 11 Ind. Cas. 559; 35 B. 393; 13 Bom. L. R. 517, *Keith v. Butcher*, (1884) 25 Ch. D. 750; 53 L. J. Ch. 640; 50 L. T. 203; 32 W. R. 378 and *Debendra Narayan Singh v. Narendra Narayan Singh*, 54 Ind. Cas. 636; 24 C. W. N. 110; 39 C. L. J. 417, distinguished.

The law gives a wide discretion to add as a party to a proceeding a person interested in it so as to affect his prospective rights but not with retrospective effect.

Application against an order of the Sub-Judge, Lucknow, dated the 6th November 1922.

Messrs. *Ram Chandra and Parbhu Dayal*, for the Applicants.

Mr. S. N. Roy, for the Opposite Party.

JUDGMENT.—In a suit for sale on the basis of a mortgage effected by Yusuf Husain Khan, a preliminary decree for sale was passed in favour of Beni Madho and Basant Rai against Yusuf Husain Khan and seven other defendants. One of the defendants was Ram Lal, who is said to have purchased the mortgaged property in execution of a simple money-decree, held by the Oudh Commercial Bank, Limited, against Yusuf Husain Khan and Dildar Husain. The decree was afterwards made absolute; but on an application made by three of the defendants it was set aside and the proceeding restored to the file. An application was then made by Beni Madho and Basant Rai to implead Debi Das as a party to the proceeding on the ground, that he had purchased

the rights of Ram Lal on some date prior to the suit; but the plaintiffs were not aware of the said purchase at the time the suit was filed. The Court below refused to implead Debi Das. The correctness of that order is impugned here in revision.

O. I, r. 10 of the Code of Civil Procedure gives wide powers to the Court at any stage of the proceedings to direct that the name of any person who ought to have been joined, or whose presence before the Court may be materially necessary in order to enable the Court to effectively and completely adjudicate upon the questions in issue, may be added. But, as observed in *Raghunath v. Sheolal* (1), that power can ordinarily be exercised only in proceedings not concluded by a decree, unless the person to be added is a subsequent transferee. Debi Das had purchased the rights of Ram Lal prior to the suit, and he ought to have been impleaded before the preliminary decree for sale was passed. The learned Counsel for the decree-holders relies on the decision in *Jotindra Mohan Tagore v. Bejoy Chand* (2) and *Lakshmichand Rewachand v. Kachubai Gulabchand* (3). But both these cases were suits for partition, and the proceedings were continued against the person added from the stage at which he was added. In the present case, Debi Das rightly or wrongly questioned the right of Yusuf Husain Khan to make the mortgage, and the entire proceedings anterior to the passing of the preliminary decree may have to be re-opened.

A reference has also been made to the decisions in *Keith v. Butcher* (4) and *Debendra Narayan Singh v. Narendra Narayan Singh* (5). In the former case certain puisne mortgagees were added to a foreclosure action after the judgment had been pronounced but had not been drawn up and entered: the latter was a suit for accounts, in which a preliminary decree had been passed in favour of the plaintiffs, and after the appeal filed by the principal defendant

(1) 39 Ind. Cas. 849; 13 N. L. R. 69.

(2) 32 C. 483.

(3) 11 Ind. Cas. 559; 35 B. 393; 13 Bom. L. R.

517.
(4) (1884) 25 Ch. D. 750; 53 L. J. Ch. 640; 50 L. T. 203; 32 W. R. 378.

(5) 54 Ind. Cas. 636; 24 C. W. N. 110; 39 C. L. J. 417.

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against that decree had been dismissed, certain *pro forma* defendants, who were also entitled to accounts from the principal defendant, had asked to be transferred to the category of the plaintiffs, in order that such portion of the money as might be then due to them on accounts may be awarded to them. The transposition of those defendants did not in any way disturb the effectiveness of the preliminary decree. In the present case, the suit cannot be re-opened till the preliminary decree for sale is set aside, and it can only be set aside in any of the modes provided by law. Till it is so set aside, Debi Das cannot be added as a new defendant. The law gives a wide discretion to add as a party to a proceeding a person interested in it, so as to affect his prospective rights but not with retrospective effect.

The application is, therefore, dismissed with costs.

G. H.

Application dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No: 2528 OF 1919.

March 28, 1923.

Present.—Mr. Justice Broadway and Mr. Justice Harrison.

INDER SINGH—PLAINTIFF—

APPELLANT

versus

DYAL SINGH—DEFENDANT—

RESPONDENT.

Registration Act (XVI of 1908), s. 17—Construction of document—Agreement to sell—Registration—Contract Act (IX of 1872), s. 16—Undue influence—Distress of mind—Punjab Colonisation of Lands Act (V of 1912), s. 19—Agreement by tenant to sell proprietary rights when acquired, legality of.

In order to decide whether a document requires registration under section 17 of the Registration Act, the document should be considered as a whole and due weight should be given to the general tenor and sense of the document.

A bilateral agreement to sell immoveable property which does not create or declare any rights in the property does not require registration. [p. 1033, col. 2.]

Sardar Partab Singh v. Lala Karm Chand, 184 P. R. 1889, followed.

Hardit Singh v. Behari Lal, 29 Ind. Cas. 305; 9 P. L. R. 1916; 104 P. W. R. 1915, *Mangamma v. Ramamma*, 16 Ind. Cas. 587; 37 M. 480; 12 M. L. T. 262; (1912) M. W. N. 917, and *Jat Mal v. Beli Ram*, 33 Ind. Cas. 948; 35 P. R. 1916; 52 P. W. R. 1916, referred to.

The fact that at the time of executing an agreement to sell the vendor was in a distressed state of mind and was anxious to dispose of the property does not amount to proof of undue influence. [p. 1033, col. 2; p. 1034, col. 1.]

An agreement by a Government tenant to transfer proprietary rights in the lands comprising the tenancy as soon as those rights are acquired does not offend against the provisions of section 19 of the Punjab Colonisation of Lands Act and is in no way illegal. [p. 1034, cols. 1 & 2.]

Hussain Khan v. Jahan Khan, 18 Ind. Cas. 5; 58 P. R. 1913; 48 P. L. R. 1913; 36 P. W. R. 1913 and *Naihu v. Allah Ditta*, 64 Ind. Cas. 18; 3 L. 92; 3 L. L. J. 505; (1922) A. I. R. (L.) 287, followed.

First appeal from the decree of the Senior Subordinate Judge, Lyallpur, dated the 20th October 1919.

Mr. Ram Chand Manchanda, for the Appellant.

Bakhshi Tek Chand, for the Respondent.

JUDGMENT.—The plaintiff in this case sued for specific performance of an agreement to sell $2\frac{1}{2}$ squares of land together with certain rights for Rs. 10,760. The defendant pleaded that this agreement on which the plaintiff relied was inadmissible in evidence for want of registration; that it had been obtained by the exercise of undue influence; that even if it was a valid agreement the subject-matter was a right in the tenancy of which the transfer was void by section 19 of Act V of 1912 and, finally, that this was not a case where specific performance of the contract should be decreed. The Senior Sub-Judge came to the conclusion that the document in question was admissible in evidence as it was an agreement to sell and not a sale and did not transfer or create any rights in immoveable property. He further held that there had been no exercise of undue influence but that the circumstances of the case together with the price fixed for the land which he held to be inadequate though not "grossly inadequate," showed that the parties to the agreement were not on an equal footing and that an unfair advantage had been taken of the defendant. He, therefore refused to give a decree for specific pe-

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formance and awarded Rs. 2,000 as damages. From this decision the plaintiff has appealed and the defendant has presented cross-objections contending that the agreement was inadmissible in evidence; that undue influence had been exercised; that the amount allowed for damages is excessive; and that section 19 of Act V of 1912 bars the suit. The plaintiff, on the other hand, asks for specific performance and in addition for the sum of Rs. 2,000 fixed as a penalty in case of failure to carry out the terms of the agreement. The points for decision are, therefore, (1) whether the document in question is a sale or merely an agreement to sell; (2) whether undue influence has been proved; (3) if not, whether the circumstances surrounding the bargain are such as to justify the withholding of a decree for specific performance and if not, what damages, if any, should be allowed; and (4) whether the suit is barred by section 19 of Act V of 1912.

On the first point we have been referred to many authorities and more especially *Hardit Singh v. Behari Lal* (1), *Sardar Partab Singh v. Lala Karm Chand* (2), and *Mangamma v. Ramamma* (3) and as against these to *Jat Mal v. Beli Ram* (4). The question, however, depends on the interpretation which we place on the actual words used in the document and more especially the concluding words of the main portion of the deed which run as follows:—"The land has, at any rate, been sold and the vendee has become entitled to it. I am simply entitled to receive Rs. 9,000." As against these two sentences the deed throughout speaks of an agreement to sell, for instance, "I have agreed to sell the above mentioned property for Rs. 10,000 and the sum of interest, etc.—to Inder Singh—who has agreed to purchase this land.—I have at present received Rs. 1,000 by way of earnest money. Rs. 9,000 is agreed to be received before the Sub-Registrar, Lyallpur, at the time of the completion of the sale and

registration." And again, "I shall complete the sale in favour of the vendee." The execution, therefore, of a further deed was clearly contemplated but this is immaterial if the present deed actually did transfer any rights. The following sentence also occurs: "The vendee has been put in possession of the land sold" though it is admitted that, as a matter of fact, this has not occurred; and in conclusion the final paragraph runs: "I have, therefore, executed this agreement in favour of Inder Singh, vendee, so that it may serve as an authority. I have secured an agreement to the same effect from Inder Singh, vendee." We have considered the document as a whole and have given due weight to the general tenor of the terms recited, and we are of opinion that the use of the words "the land has, at any rate, been sold" when read together with the remainder of the document, the concluding paragraph of which shows that the document was bilateral, and after taking every thing into account, we find, agreeing with the Trial Court and on the same reasoning as is to be found in *Sardar Partab Singh v. Lala Karm Chand* (2), that the general sense of the document is that it is an agreement to sell and does not create or declare any rights in the immoveable property.

On the point of undue influence, Counsel has laid stress on the fact that the defendant had lost his wife and that there is some oral evidence to the effect that he had lost his head as a result and that he was in a position to be dominated by the Will of the plaintiff. It is in evidence that, soon after the death of the defendant's wife, he found it impossible to carry on the cultivation of the land in suit as well as his other land on the Jhang Branch, which was at some distance, and that he had failed to reclaim one half of the land in suit. It is also in evidence that in October 1918 the defendant had obtained the necessary *Fards* and made the same over to Narinjan Das with the request that he should find a purchaser for the land and it was in accordance with this request that Narinjan Das brought the plaintiff and defendant together in order to enter into this contract. All, therefore, that can be said to have been shown by the evidence led on the subject is, that the defendant was in a distressed

(1) 29 Ind. Cas. 305; 9 P. L. R. 1916; 104 P. W. R. 1915.

(2) 184 P. R. 1889.

(3) 16 Ind. Cas. 587; 37 M. 480; 12 M. L. T. 262; (1912) M. W. N. 917.

(4) 33 Ind. Cas. 948; 35 P. R. 1916; 52 P. W. R. 1916.

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state of mind and was anxious to dispose of this portion of his property. From these facts it is impossible to infer the exercise of any undue influence. As showing that the circumstances were such that the plaintiff, while not exerting any undue influence, took unfair advantage of the defendant's position, the Senior Sub-Judge has relied on the inadequacy of the price paid as found by him and the presence of the petition-writer at the time the bargain was struck. So far as the adequacy of the price goes, the evidence on the record is practically of no value. It is shown that two squares of land were sold in the same *Chak* at about the same time for Rs. 12,000, but it is clear from the sale-deed that the full condition had been fulfilled. The whole of the land had been reclaimed, a well and 8 *kothas* had been constructed while the land in suit had not been fully reclaimed and the buildings had not been completed. Under the circumstances, it is wholly impossible to come at a clear finding as to which property fetched the better price and even if the two squares realized a little more it is impossible in our opinion to hold that the price was not adequate. Five years before the defendant had paid Rs. 133 an acre and the present price is 165 per acre. Undue importance has been attached to the presence of the petition-writer or rather a presumption has been drawn by the Senior Sub-Judge from his presence, and even if he was unduly acting and arrogated to himself the duties of a broker as opposed to a petition-writer it is not shown that he acted in favour of the plaintiff rather than in favour of the defendant who apparently engaged him in the first instance. Having regard more especially to the explanation to section 12 and sub-clause (3) of section 20 of the Specific Relief Act we find that no sort of reason has been shown in this case why specific performance should not be declared as to what was actually sold and whether section 19 of Act V of 1912 acts as a bar to this suit we follow *Nathu v. Allah Ditta* (5) and *Hussain Khan v. Jahan Khan* (6) and hold that the present agreement to transfer the pro-

prietary rights as soon as acquired was in no way illegal. The sale-deed provides for a penalty of Rs. 2,000 which, under the circumstances, is most excessive and we allow Rs. 50 as damages for the breach which we consider as reasonable. We, therefore, accept the appeal in so far as to decree the specific performance of the contract to sell and allow Rs. 50 damages for the breach. The cross-objections are dismissed, and as to the costs the successful plaintiff will recover $\frac{1}{4}$ ths of his costs throughout the litigation from the defendant.

Z. K.

Appeal partly allowed.

ODH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 103 OF 1922.

November 2, 1922.

Present:—Mr. Daniels, A. J. C.

PULAI—DEFENDANT—APPLICANT

*versus*RANA UMANATH SINGH—PLAINTIFF—
OPPOSITE PARTY.*Civil Procedure Code*. (Act V of 1908), s. 115, O. XXIII, r. 1 (2)—*Withdrawal of suit—Revision*.

Where, in granting an application for the withdrawal of a suit with permission to bring a fresh suit, the Court fails to consider whether the grounds alleged in the application came within r. 1 of O. XXIII of the Civil Procedure Code, the High Court will interfere in revision.

Application against the order of the Sub-Divisional Officer of Salon and Dalman, District Rae Bareilly, dated the 21st August 1922.

Mr. S. N. Roy, for the Applicant.

Mr. Ali Muhammad, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order granting the plaintiff permission to withdraw a suit under O. XXIII, r. 1, with permission to bring a fresh suit. The order was passed by an Assistant Collector in an arrears of rent case, the decree in which would be appealable to the Civil Court.

(5) 64 Ind. Cas. 18; 3 L. 92; 3 L. L. J. 505; (1922) A. I. R. (L.) 287.

(6) 18 Ind. Cas. 5; 58 P. R. 1913; 48 P. L. R. 1913; 36 P. W. R. 1913.

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and it is not disputed that this Court has jurisdiction. The reasons for which withdrawal was applied for are not of the kind recognised by O. XXIII, r. 1, sub-clause (2). These were that the defendant had removed the grain (the suit was one for rent in kind) and, therefore, the plaintiff would not be able to get his money and also that the defendant alleged that he had paid the rent which the plaintiff denied. It has been contended before me that, assuming the order to be wrong, it was one which the Assistant Collector had jurisdiction to pass and, therefore, this Court could not interfere. If the learned Assistant Collector had applied his mind to the question whether the reasons alleged for withdrawal were such as came within the rule under which he purported to give permission, there would be much force in this contention. It appears from the record, however, that he never applied his mind to this question at all. He gives no reason whatever for allowing the plaintiff permission to bring a fresh suit and it is quite clear that if he had considered the language of the section for a moment such permission could never have been given. There is ample authority that the High Court can and will interfere in revision in such cases. As an instance, I need only refer to the case of *Rajendra Lal Sur v. Atal Bihari Sur* (1).

I allow the application and set aside the lower Court's order. The lower Court will proceed to dispose of the case from the point at which the proceedings had reached when that order was passed. The applicant will get his costs in this Court.

W. C. A.

Application allowed.

(1) 39 Ind. Cas. 969; 44 C. 454; 25 C. L. J. 455.

PATNA HIGH COURT.

MISCELLANEOUS APPEAL NO. 41 OF 1921.

March 21, 1923.

Present:—Mr. Justice Das and Mr. Justice Kulwant Sahay.

Maulvi JAMIL AHMAD—PETITIONER—
APPELLANT

versus

Babu KESHO DAS AND OTHERS—OPPO-
SITE PARTY—RESPONDENTS.*Execution of decree—Sale—Application for postponement of sale—Order declaring that if fresh postponement was applied for damages would be awarded, legality of—Order, whether executable.*

One of several judgment-debtors applied for postponement of an execution sale. The Court granted the application on payment of costs and also directed that if a fresh postponement was asked for damages would be awarded to the decree-holder at a certain rate. Subsequently, another judgment-debtor applied for postponement of the sale in respect of one of the properties in which he was interested and this was granted. After several applications for execution had been made, two of the judgment-debtors again applied for postponement of the sale. This was granted on payment of costs but the Court made an order that damages at the rate mentioned in its first order should be incorporated in the account. This order was subsequently modified on the application of the two judgment-debtors who had made the last application and the Court directed that the decree-holder would be at liberty to recover the damages by a separate execution and that they should not be incorporated in the account. The decree-holder made an application for execution of the first order for realisation of the damages more than three years after the date of the order directing the inclusion of the amount of damages in the account, but within three years from the order modifying the previous order and directing separate execution for realisation of damages:

Held, (1) that the Executing Court had no jurisdiction to direct that in the event of a fresh application for postponement damages would be awarded to the decree-holder; [p. 1037, col. 2.]

(2) that the order having been made on the application of one of the judgment-debtors was not binding on the other judgment-debtors; [p. 1037, col. 2.]

(3) that the second application for postponement of the sale having been made by another judgment-debtor in respect of the property in which he was interested did not attract the operation of the order directing the award of damages; [p. 1037, col. 2.]

(4) that none of the orders passed by the Court actually awarded damages to the decree-holder against all the judgment-debtors, so that none of the orders was capable of execution; [p. 1038, col. 1.]

(5) that, assuming that the first order was capable of execution and that it came into operation when the second application for postponement was made the application for execution was barred by time having been made more than three years after

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the date of the second application for postponement; [p. 1038, col. 1.]

(6) that the last order directing that the amount of the damages should be excluded from the account and that the decree-holder should be at liberty to realise the damages by a separate execution did not operate to give a fresh start of limitation to the decree-holder inasmuch as it was made on the application of two of the judgment-debtors and not of the decree-holder. [p. 1038, col. 2.]

Miscellaneous appeal from an order of the Subordinate Judge, Third Court, Patna, dated the 8th January, 1921.

Messrs. *Mohammad Hasan Jan* and *S. Sultan Ahmad*, for the Appellant.

Messrs. *S. M. Tahir*, *P. N. Sinha*, *N. C. Ghose*, *N. C. Sinha*, *K. Hussain* and *B. N. Ghose*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal against the order of the Subordinate Judge of Patna, dated the 8th January 1921, dismissing the appellant's objection to the execution of a decree. On the 4th of September 1905 a mortgage decree was passed against *Musammat Bibi Fasihan*. Execution was once taken out of the decree in the life time of *Bibi Fasihan* in the year 1908, which was dismissed in March 1910. *Bibi Fasihan* died, and fresh executions were taken out against her heirs. The fourth application for execution was filed on the 4th of October 1912 which was registered as Execution Case No. 115 of 1912. In the course of this fourth execution an application was made on the 27th of November 1912 by *Saiyid Abdul Fateh alias Muhammad Umar*, one of the heirs of *Bibi Fasihan*, praying for postponement of the sale, and on that date an order was passed upon that application to the following effect:—"It is ordered that the sale be postponed on payment of Rs. 100 as cost but if the judgment-debtor will take further time after fresh proclamation they will have to give damage at the rate of 6 per cent. per annum in addition to the interest given in the decree as the decree-holder had been much troubled with frivolous objection." The cost of Rs. 100 awarded under this order was paid and the sale was adjourned. In the course of the said execution proceeding a petition was filed by *Muhammad Kalimuzzafar*, another judgment-debtor, on the 16th June 1913, praying for postponement

of the sale of one of the properties, and the Court allowed the prayer and postponed the sale of that property which was lot No. 3. That execution case was ultimately dismissed on 22nd July 1914. Fresh execution was taken out on the 17th September 1914 which was dismissed on the 30th of July 1915. On that very day, i.e., 30th July 1915 another application for execution was filed, and it was registered as Execution Case No. 115 of 1915. On the 25th September 1915 two of the judgment-debtors, *Musammat Bibi Habiba* and *Muhammad Abul Fateh alias Muhammad Umar*, again applied for postponement of the sale, and the Court was on that date again pleased to postpone the sale on payment of Rs. 100 as cost to the decree-holders. The order of the 25th September 1915 after postponing the sale and awarding Rs. 100 as cost to the decree-holders proceeded as follows: "It has been brought to my notice by the decree-holder's Pleader that, in accordance with the order No. 7 of 27th November 1912, passed in Execution Case No. 115 of 1912, they are entitled to get damages at 6 per cent. per annum on the decretal amount should the judgment-debtors again apply for time. I have seen that order to-day and I find that the order directs damages at 6 per cent. per annum to be given to the decree-holders in addition to the usual interest allowed in the decree. It appears that the judgment-debtors again applied for time and so the order should be now put in force. The Vakils for the aforesaid judgment-debtors raised no objection to the above order being enforced. I direct accordingly that a fresh proclamation be issued fixing the 24th November, after incorporating the damages at the above rate in the account if it is not already included in it, the date from which the damage is to be calculated being the 16th June 1913 which was the next sale day after the passing of the order referred to above." Thereafter, it appears that two objections were filed on behalf of *Bibi Habiba* and *Abul Fateh alias Umar* to the effect that they were not bound by the order of the 27th November 1912 under which damages were allowed in Execution Case No. 115 of 1912 and that the amount of the damages should not be included in the account of the decree which is a mortgage-decree. By an order

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dated the 23rd February 1916, the Court disallowed the first objection but allowed the second objection and ordered that "the item of damages be excluded from the account, which the decree-holders are at liberty to realize by a separate execution." On the 21st February 1919 the decree-holder applied for execution of the order of the 27th of November 1912 for realization of the damages awarded under that order. This application was dismissed on the 26th of March 1919. A second application for execution of the same order was made on the 17th April 1919 which was dismissed on the 26th November 1919. The present application for execution of the order of the 27th of November 1912 was made on the 9th of December 1919. In the meantime, sometime in the year 1918, the estate of Bibi Fasihan was placed in the hands of a Receiver who now represents all the judgment-debtors, the heirs of the original debtor Bibi Fasihan. The Receiver filed an objection to the execution of this decree on the ground that the Court had no jurisdiction to award damages and even if it had all the parties being not represented, the Receiver is not bound thereby; secondly, that the execution was barred by limitation, and, thirdly, that the order awarding damages is in the nature of a penalty and that order should not be executed. The learned Subordinate Judge, by his order dated the 8th of January 1921, has disallowed the objections, and the present appeal is preferred by the Receiver against this order. The points taken by the learned Counsel on his behalf are:

- (1) that the order awarding the damages was illegal and is not binding on the Receiver;
- (2) that there is no order which is capable of execution, and
- (3) that in any event the application for execution is barred by limitation.

As regards the first objection, it is argued on behalf of the decree-holders respondents that the Court had power to put the parties to terms on granting adjournment of the sale. On reference to the order of the 27th of November 1912, it appears that the Court did, as a matter of fact, award Rs. 100 as cost before postponing the sale. The further direction for payment of damages was in the event of a fresh application for postponement being made at some future date. Now, the sale was postponed

on the 27th of November 1912 at the instance of only one of the judgment-debtors. The other judgment-debtors did not apply for postponement and the application of Abul Fateh of the 27th of November 1912 related not to all the mortgaged properties but only to the property with which he was concerned. In my opinion, the Court had no jurisdiction to make an order awarding damages for an event which might or might not occur at some future time. On the 16th of June 1913 the sale of one of the properties, namely, lot No. 3, was postponed on the application of another judgment-debtor, Kalimuzzaffar. The other judgment-debtors did not on that date apply for postponement of the sale of their properties, and assuming that the order of the 27th of November 1912 awarding damages was a good order so far as Abul Fateh was concerned, the fresh application for postponement made by Kalimuzzaffar on the 16th of March could not bring into operation the effect of the order of the 27th of November 1912.

The next order, which is of importance, is that of the 25th of September 1915. Now, that order was passed on the application of only two of the judgment-debtors, *Musammam* Bibi Habiba and Muhammad Abul Fateh *alias* Muhammad Umar. By that order the Court merely ordered that the damages awarded by the order of the 27th November 1912, should be calculated and incorporated in the account for the sale of the mortgage properties. This order of the 25th of September 1915 did not independently award any damages; it simply ordered the damages to be incorporated in the general account under the mortgage decree. It has been argued that this was a consent order and, therefore, all the judgment-debtors are bound by it, but on reference to the order-sheet it would appear that the consent was given only by the two judgment-debtors, *Musammam* Habiba and Muhammad Umar, the other judgment-debtors do not appear to be parties to this order and it does not appear that this order was passed in their presence or that they were consenting party thereto.

The next order which it is necessary to notice is the order of 23rd February 1916. Now, this order again was made on the application of the said two judgment-

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debtors, Bibi Habiba and Abul Fateh, and by this order the order of the 25th of September 1915 was cancelled and it was ordered that the damages should not be incorporated in the general account under the mortgage-decree, and the decree-holders were at liberty to realize the damages by separate execution. This order also is not an order which awarded damages and which is capable of execution. The order of the 25th of September, 1915 directed the damages to be incorporated in the general account, while the order of the 23rd February 1916 directed that the damages should be excluded from the general account. Therefore, there is, as a matter of fact, no order awarding damages at 6 per cent, per annum which is binding on all the judgment-debtors and which is capable of execution; and, in my opinion, the objection of the Receiver who now represents all the judgment-debtors is valid and it must be held that the order of the 27th of November 1912, if it be held to be an order which is capable of execution, is not binding on all the judgment-debtors, and the orders of the 25th of September 1915 and 23rd February 1916 are not orders awarding damages which are capable of execution.

In the next place, it contended that the ordersought to be executed is the order of the 27th of November 1912. I have held that this is not an order which is capable of execution inasmuch as it does not award damages independently but it makes a conditional order that, in the event of any future application for adjournment, the judgment-debtors will have to pay damages and no order has yet been made, as a matter of fact, awarding the damages. But, assuming that the order of the 27th of November 1912 is capable of execution, the application which was for the first time made for the execution of that order on the 21st February 1919 was barred by limitation. It is said that the order of the 23rd February 1916 saves limitation, but that order was made on the application of two of the judgment-debtors, and it merely directed that the damages should not be included in the general account of the mortgage-decree. There was no application by the decree-holders on that date and it cannot be said that that order gave a fresh start to the period of limitation. If the order of the 27th

of November 1912 be held to be a valid and binding order it came into operation on the 16th of June 1913 when application for postponement of the sale was made for the first time after that order, and the application of the 21st February 1919 being beyond three years from that date was barred by limitation. In this view of the matter, the objection of the Receiver must be allowed and the order of the Court below set aside.

The result is that this appeal is decreed with costs.

Das, J.—I agree.

Z. K.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE

NO. 952 OF 1921.

February 26, 1923.

Present:—Mr. Justice Ross.

Babu POONIT SINGH—DEFENDANT—

APPELLANT

versus

KAMAL SINGH AND OTHERS—PLAINTIFFS

RESPONDENTS.

Ejectment, suit for—Possession, persons in—Necessary parties.

In a suit for ejectment, it is neither necessary nor proper to join any person who is merely in receipt of the rents and profits of the property sought to be recovered. But it is necessary that all persons who are actually in physical possession of it should be made defendants.

Kashi v. Sadashiv Sakharam Shet, 21 B. 229; 11 Ind. Dec. (N. S.) 154 and *Musammatt Bhagwati Kuer v. Jagdam Sahay*, 62 Ind. Cas. 933; 6 P. L. J. 604; 2 P. L. T. 471, referred to.

Appeal from a decision of the District Judge, Gaya, dated the 23rd February 1921, affirming a decision of the Munsif, Third Court, Gaya, dated the 21st January 1920.

Messrs. Sultan Ahmad, C. C. Das and Kailaspati, for the Appellant.

Mr. Jagobind Prasad Sinha, for the Respondents.

JUDGMENT.—The relevant facts are these. One Jawad Hossain had a *taakhta* of 3 annas 15 *kauris* and odd in *Mauza Ismailpur Bharthu* of which 2 annas 10 *dams*

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and odd was *milkiat* and 10 *dams* and odd *mukarrari*. His wife Bibi Barkatunnissa had also a *takhta* of 4 annas 7 *dams* and odd *milkiat* interest. This share eventually came to Jawad Hossain so that he had in all 7 annas 8 *dams* and odd. Besides this, he had 10 *dams* and odd share which was *mukarrari* to one Bal Gobind Singh. In 1907, he mortgaged 7 annas 11 *dams* share in the two *takhtas* without specification whether *milkiat* or *mukarrari* interest was conveyed. This property was eventually purchased by the plaintiffs in execution of a decree for sale in a suit on a mortgage and they took delivery of possession. In the meantime, Jawad Hossain had settled Plot No. 2388 within these *takhtas* with the defendant who built a house on it. The present suit is for possession of this land and for the removal of building.

Both the Courts below have decreed the suit.

Two points are urged in second appeal: (1) that the plaintiffs are part proprietors only and Jawad Hossain is a necessary party and that no decree can be passed in his absence, and (2) that there is an estoppel against the plaintiffs by reason of the fact that in the Land Registration Department of the Collectorate they have been registered in respect of the 10 *dams* share which is in *mukarrari* to Bal Gobind Singh and consequently they cannot now deny that Jawad Hossain has still a share of 10 *dams* of two *takhtas* above-mentioned which he was free to deal with. There is nothing in the second contention as an independent point, because the suit on the mortgage was brought on the 27th February 1915, whereas the settlement with the defendant was made not before April 1915. It is, therefore, subject to the result of the mortgage suit. Moreover, the house building began in November 1915 and in that very month there were criminal proceedings under section 144 of the Criminal Procedure Code. Consequently, there was no acquiescence on the plaintiff's part.

The first contention was strongly pressed. It was suggested that the decision of the question at issue involves the construction of the mortgage-bond in order to ascertain whether the mortgagor included in the mortgage the 10 *dams* *milkiat* share in

mukarrari to Bal Gobind Singh or the 10 *dams* *mukarrari* share of Jawad Hossain and that this could only be determined in the presence of Jawad Hossain. It was pleaded by the defence that the plaintiffs were only part proprietors and could not maintain the suit. Now, this argument, in my opinion, misconceives the nature of the suit in ejectment: "The persons to be made defendants in an action of ejectment, i.e., to be named in the writ, are all the tenants in possession of the land, etc., sought to be recovered. The persons who have a right to defend in an action of ejectment are any persons named in the writ, and any person who is in possession by himself or his tenant." Dicey on Parties to an Action, pages 494 and 495. "Strictly, all persons who are actually in physical possession of the property should be made defendants. It is neither necessary nor proper to join any person who is merely in receipt of the rents and profits of the land," Bullen and Leake's Precedents of Pleadings, 7th Edition, page 877. The suit is, therefore, properly constituted without making Jawad Hossain a party. It is true that he might have come in to defend the suit; but he did not do so, and the defence never required that he should be made a party. The defendant is admittedly the tenant in possession. He is, therefore, the necessary, and the only necessary party to the suit: *Kashi v. Sadashiv Sakharam Shet* (1) and *Musammatt Bhagwati Kuer v. Jagdam Sahay* (2). It follows, therefore, that there is no defect of parties in this suit. The plaintiffs have proved their title to the property as against the defendant. That has been found as a fact. The defendant is the person in possession. All necessary parties are, therefore, before the Court.

The appeal is dismissed with costs.

N. K.

Appeal dismissed.

(1) 21 B. 229; 11 Ind. Dec. (N. S.) 154.

(2) 62 Ind. Cas. 933; 6 P. L. J. 604; 2 P. I. T 471.

KHUSHI MUHAMMAD v. HAYAT.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2800 OF 1922.

April 21, 1923.

Present.—Mr. Justice Campbell.

KHUSHI MUHAMMAD—DEFENDANT

—APPELLANT

versus

HAYAT—PLAINTIFF—RESPONDENT.

Construction of document—Exchange, deed of—Suit for possession of property received in exchange—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 113, 144.

A suit was compromised and the compromise recited that the parties had exchanged certain properties and that the exchange would be effected on a certain date. Plaintiff sued to recover the property which under the compromise had been agreed to be transferred to him;

Held, (1) that, read as a whole, the meaning of the compromise was that the exchange would take place on a future date;

(2) that, therefore, the suit was one for specific performance of a contract to hand over the ownership rights in the property in suit on a certain date and not for possession of property in which the ownership rights had passed completely by the deed of compromise;

(3) that the suit was, consequently, governed by Art. 113 and not by Art. 144 of Sch. I to the Limitation Act.

Talewar Singh v. Bahori Singh, 26 A. 497; A. W. N. (1904) 72, relied on.

Basheshar Nath v. Devi Pershad, 19 Ind. Cas. 411; 20 P. R. 1913; 101 P. W. R. 1913; 185 P. L. R. 1913, distinguished.

Second appeal from a decree of the Senior Subordinate Judge, Gujrat, dated the 15th August 1922, reversing that of the Munsif, First Class, Gujrat, dated the 23rd May 1922.

Mr. Sagar Chand, for the Appellant.

Sayad Mohsin Shah, for the Respondent.

JUDGMENT.—In the suit from which this second appeal has arisen Hayat was the plaintiff and Khushi Muhammad the defendant.

In 1909 the plaintiff brought a suit against the defendant for a certain plot of land. The suit terminated in a compromise embodied in a deed presented to the Court, of which the material portions are as follows:—

“Jae muddawiya khola mai apna makan sakunati yani ek kotha wa chulhani wa sahn ke muddai ne muddalia No 1 ko de diya hai. Us ke tabadla men muddalia No. 1 ne apna makan muddai ko de diya hai. Fari-

gain apne apne makanat ki lakkriyan uwar levenge aur baqi chaukhanda waghaira ka tabadla hasab indraj bala hoga. Yakam Maghar Sambat 1966 ko.”

No decree was passed in terms of this compromise and the suit was dismissed. The plaintiff, on the 30th of July 1920, brought the present suit for possession of the subjects mentioned in the compromise as transferred or to be transferred to him.

The Trial Court dismissed the suit on the ground that the plaintiff had rescinded the contract to exchange but on appeal this decision was reversed and the plaintiff's claim was decreed. In second appeal to this Court it is contended that the suit was barred by limitation; the Article applicable being No. 113 and not No. 144 applied by the Courts below.

The defendant-appellant relies upon *Talewar Singh v. Bahori Singh* (1) a case which was considered and distinguished in *Basheshar Nath v. Devi Pershad* (2). The latter case, however, does not apply to the facts before me, for there the compromise was an agreement which recognised the title of each set of claimants to the property in suit as an already subsisting title and which left nothing to be done by any party in future with a view to conveying to another party his share in the property. *Talewar Singh v. Bahori Singh* (1) has more resemblance to the present case although there is also a difference. It dealt with certain suits which were referred to arbitration and the arbitrator's award was passed in terms of a compromise entered into between the parties. The award set out the terms of the compromise according to which the parties had arranged to transfer the one to the other different portions of the property which was in dispute. In a subsequent suit it was held that the Article applicable to the claim put forward for the recovery of the property dealt with in the compromise was Art. 113 and not Art. 144, since the agreement of compromise entered into was one which necessarily had to be enforced specifically before the suit for possession of the property under the compromise could be maintained.

(1) 26 A. 497; A. W. N. (1904) 72.

(2) 19 Ind. Cas. 411; 20 P. R. 1913; 101 P. W. R. 1913; 185 P. L. R. 1913.

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The whole question turns upon the interpretation of the words of the compromise with which we are dealing and, read as a whole, their meaning to my mind is that the exchange of properties had not taken place but was to take place on a future date, that is to say, on the 1st of *Maghar Sambat* 1966, after the wood-work of the houses had been removed. It has been argued for the respondents that the words *de diya hai* mean that the transfer was already an accomplished fact and that it was an executed contract. The whole document, however, has to be read and the later words *tabadla hasab indraz bala hoga Yakam Maghar Sambat* 1966 are very explicit.

The suit then was for specific performance of a contract to hand over the ownership rights in the property in suit on a certain date and not for possession of property in which the ownership rights had passed completely by the deed of compromise. Art. 113 governs the suit which thus was out of time, since 1st *Maghar* 1966 is equivalent to 22nd November 1909.

I accept the appeal, set aside the decree of the lower Appellate Court and dismiss the suit with costs throughout.

N. K.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1711 OF 1920.

January 5, 1923.

Present:—Mr. Justice Walmsley and Mr. Justice B. B. Ghose.

ANANTARAM BHATTACHARJEE—
DEFENDANT NO. 1—APPELLANT

versus

HEM CHANDRA KAR AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 120—Money wrongfully taken under bona fide claim.—Suit for recovery—Limitation—Art. 62, interpretation of.

The plaintiff and the defendant were owners of two contiguous villages. There being a dispute between them with regard to the ownership of some lands, the latter were

attached under section 146 of the Criminal Procedure Code, the profits pertaining thereto being deposited in Court. The defendant withdrew some of the amount deposited from Court as representative his share of the profits of the land attached. The plaintiff sued for declaration of his right to the land and for recovery of the sum withdrawn, on the allegation that the land attached being in his village the money deposited in Court was his. It was urged that it being a suit for money payable by defendant for money received by defendant for the plaintiff's use, it was governed by Art. 62 of the Schedule I to the Limitation Act.

Held, that it could not be said by any means that the defendant received the money for the use of the plaintiff and that as he withdrew it honestly believing that he was entitled to it, the plaintiff's suit to recover it was governed by Art. 120 and not Art. 62 of the Sch. I to the Limitation Act.

Gurudas Pyne v. Ram Narain Sahu, 10 C. 860; 11 I. A. 59; 8 Ind. Jur. 322; 4 Sar. P. C. J. 548; 5 Ind. Dec. (N. S.) 575 (P. C.), relied on.

The plain meaning of the words in Art. 62 of the Sch. I to the Limitation Act should be given effect to without having recourse to any technical rules of English Law regarding forms of action. [p. 1044, col. 1.]

Appeal against a decree of the District Judge, Bankura, dated the 16th of March 1920 affirming that of the Subordinate Judge of that district, dated the 22nd of April 1919.

Babu Bijoy Kumar Bhattacharjee, for the Appellant.—The defendant No. 1 is the appellant. The appeal arises out of a suit for recovery of money. The plaintiffs and the defendants are owners of two contiguous *Mouzas*, Ghola and Kangore respectively. There was some dispute about some lands each party claiming it to be theirs and in the result the lands were under attachment under section 146, Criminal Procedure Code, till 1916. Subsequently the dispute ended in a compromise. In the present suit plaintiff claims to recover from me the sums I withdrew from the Collectorate as profits of *Mouza* Kangore and also for a declaration of title to the lands in suit. Both the Courts have decreed the suit. My point is, first, that the question of title cannot be gone into inasmuch as it is bound by *res judicata* by virtue of previous suits between the same parties relating to the lands in suit. My next point is that the claim to recover money is barred by limitation under Art. 62 of the Limitation Act. See *Mahomed Wahib v.*

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Mahomed Ameer (1). The principle laid down there has been followed in several cases. See also *Sinclair v. Brougham* (2). I submit on these grounds the judgment of the Court below is unsustainable.

Babu *Manmatha Nath Mukerjee*, for the Respondent.—The appeal is concluded by findings of fact. The question of *res judicata* was not raised in the Courts below. Even if so, the previous suits did not relate to the present lands as those judgments show and nothing was adjudicated on the question of title. As regards limitation, the case is covered by Art. 120. English Law will not apply. See *John v. Dodwell & Co.* (3); *Gurudas Pyne v. Ram Narain Sahu* (4).

Babu *Bijoy Kumar Bhattacharjee*, replied in brief.

JUDGMENT.

Ghose, J.—This appeal arises out of a suit for recovery of certain sums of money withdrawn by the defendant No. 1 from the Collectorate which has been decreed by both the Courts below. The defendant No. 1 is the appellant before us. The relevant facts which give rise to the arguments in this Court lie within a narrow compass. The plaintiffs are the owners of a village named Ghola in *mukurrari* right while the defendant No. 1 and the defendant No. 3 are the owners of a contiguous *Mouza* called Kangore. The defendant No. 3 owns five-sixths of *Mouza* Kangore and the defendant No. 1 one-sixth share. Some time in 1907 there was a dispute between the defendant No. 3 and the plaintiff's predecessor-in-interest with regard to some lands, one party alleging that the lands appertained to Kangore and the other that they appertained to Ghola. The lands were attached under section 146 of the Code of Criminal Procedure and remained under attachment up to the year 1916. In consequence, several suits were brought by the defendant No. 3 for establishment of his right to these lands and the dispute between the defendant No. 3 and the plaintiffs

terminated in a compromise. In the meantime, the defendant No. 1 withdrew from the Collectorate certain sums of money representing his share of the profits of the lands which had been attached as appertaining to *Mouza* Kangore on various dates, *i. e.*, 11th May 1913, 19th June 1913, 7th January 1916 and 18th January 1916. The plaintiffs commenced this suit on the 16th March 1917 for declaration of their right to the lands, for determination of the northern boundary of their *Mouza* and also for recovery of the sums withdrawn by the defendant No. 1, on the allegation that the lands which had been attached being in their *Mouza* Ghola the money in the Collectorate was their money. It has been found by the lower Appellate Court that the lands are situated within village Ghola and that the plaintiffs were entitled to the entire sum in deposit in the Collectorate, and accordingly a decree has been made in favour of the plaintiffs. The defendant No. 1 urges that the decree of the lower Appellate Court is erroneous, first, on the ground that the claim with regard to the sums withdrawn by the defendant No. 1 from the Collectorate on the 11th of May and the 19th of June of the year 1913 is barred by limitation, and, secondly, that the question as regards the title to the land is barred by the rule of *res judicata*. Certain other objections were raised with regard to the process of reasoning by which the learned Judge came to the conclusion that the lands were included within the plaintiff's *Mouza* Ghola, but I do not think they can be urged in second appeal.

The second point as regards the question of *res judicata* may be very shortly dealt with. It is based upon this fact: In the year 1906 the defendant No. 1 brought a suit for recovery of his one-sixth share of *Mouza* Kangore in which the plaintiff's predecessors were impleaded as defendants as those persons also laid a claim to *Mouza* Kangore. The present defendant No. 1 obtained a decree for what he claimed. It does not appear that any question was raised or decided as regards the lands now in dispute. The learned Judge finds that in that case no question as to the boundaries between

(1) 32, C. 527; 1 C. L. J. 167.

(2), (1914) A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 58 S. J. 302; 30 T. L. R. 315.

(3), (1918) A. C. 563; 87 L. J. P. C. 92; 118 L. T. 661; 34 T. L. R. 261.

(4) 10 C. 860; 11 I. A. 59; 8 Ind. Jur. 322; 4 Sar. P. C. J. 548; 5 Ind. Dec. (N. S.) 575 (P. C.).

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the villages was decided and that the suit did not cover any lands of Gholia and also that the plaintiff in that case does not show that these lands were included in it. The plea of *res judicata* with regard to Suit No. 193 of 1906 does not, therefore, appear to be sustainable.

Another argument was raised with regard to this plea of *res judicata*. The defendant No. 1 brought a suit in 1916 for partition of the lands of *Mouza* Kangore and the plaintiffs in the present suit were impleaded as defendants. It is said that they objected to the boundaries given in the plaint of *Mouza* Kangore and the Court found that the boundaries given in the plaint were correct. It, however, appears from the judgment in that suit which has been read over to us, that the question as to what lands were included within those boundaries was left open and it cannot be said that the lands now in dispute were the subject of adjudication in the suit of 1916 in any way. The argument that has been addressed to us on this matter does not also appear to have been raised in either of the Courts below. This plea of the appellant also fails.

The question as regards limitation is one of some difficulty. The appellant argues that the suit is governed by Art. 62 of the first Schedule to the Limitation Act, as it should be held that this was a suit for money payable by the defendant No. 1 to the plaintiffs for money received by the defendant No. 1 for the plaintiff's use. Apart from authorities, it is difficult to understand how it can be said that the defendant No. 1 when he received the money received it for the plaintiff's use. The defendant No. 1 withdrew the money which was in deposit in the Collector's Office as being the profits of the lands of *Mouzah* Kangore which had been attached under the orders of the Magistrate and he took the money as owner of Kangore. The defendant No. 1 apparently had good reason for believing at the time that the money was really his. It cannot, therefore, be said by any process of reasoning that the defendant No. 1 received the money for the use of the plaintiff. The defendant No. 1, however, relies upon several cases in support of his contention that, under these circumstances, he should be considered to have received the money for the plaintiffs' use. The principal case on which he relies

is the case of *Mahomed Wahib v. Mahomed Ameer* (1). The facts of that case, by themselves do not raise much difficulty, because in that case one co-mortgagee received the entire sum of money due to himself and another co-mortgagee from the mortgagor and the other co-mortgagee brought the suit to recover his share of the money. It may be said in such a case that the defendant had received the money on behalf of and for the benefit of all the co-sharers. But certain observations in the judgments of that case appear to support the contentions of the appellant. The real difficulty seems to be that, in construing the words of Art. 62 of the Limitation Act, the Courts in some of the cases have considered that that Article refers to all cases where an action for money had and received would lie at Common Law in England.

The Common Law form of action for money had and received grew out of the circumstances that at Common Law in England an action *in personam* is maintainable only on contract or on tort. Where, therefore, an action was not based on tort and the plaintiff was unable to establish any contract by evidence, it was found necessary to have recourse to a fiction of a promise to pay "implied in law" in order to give relief to the plaintiff and to meet the justice of the case. The history of this form of action and the reasons which led to its extension are set forth in the case of *Sinclair v. Brougham* (2). (Speech of Lord Haldane, L. C., at pages 415-417, and of Lord Sumner at pages 454-456). It is pointed out by Lord Sumner that this was said to be a "liberal" action, in that it was attended by a minimum of formality, and was elastic and readily capable of being adapted to new circumstances. There does not appear to be any sufficient reason why this artificial form of action should be imported in this country in order to decide whether a suit would come under Art. 62 of the Limitation Act. In India, law and equity are administered by the same Courts, which are untrammelled by any technical rules as to the form of an action in giving relief to the plaintiff where the defendant has received money which according to the justice of the case he ought to refund. The observations of the Judicial Committee in the case of *John v. Dodwell*

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& Co. (3) furnish an illustration of this view. In my opinion the plain meaning of the words in Art. 62 of the Limitation Act should be given effect to without having recourse to any technical rules of English Law regarding forms of action. The plaintiff in this case is equitably entitled to the money as the profits of his lands, which the defendant No. 1 withdrew although honestly believing that he was entitled to it. In the case of *Gurudas Pyne v. Ram Narain Sahu* (4) their Lordships of the Privy Council observe:—"The suit is to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber and, finding them in the hands of the defendant to make him responsible for the amount. That does not fall either within Art. 60 (Article No. 62 of the Act of 1908) or Art. 48, but comes within Art. 118 (Art. 120) as 'a suit for which no period of limitation is provided elsewhere in this Schedule.'" These observations apply to this case, and it falls within Art. 120. In my judgment, therefore, no part of the plaintiff's suit is barred by limitation.

The appeal, therefore, fails and is dismissed with costs.

Walmsley, J.—I agree.

N. K.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 198 OF 1922.

February 5, 1923.

Present.—Mr. Hallifax, A. J. C.

ARJUN AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

CHHAGANLAL AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—Joint family—Mortgage by father—Liability of sons—Decree against father, whether can be re-opened—Debt without consideration, whether binding.

In a suit on a mortgage brought against the father in his representative capacity, the sons cannot re-open a decree against him except on the ground that the debt for which the mortgage was given was not binding on them under the Hindu Law: [p. 1045, col. 1.]

Dhudabai v. Narain, 66 Ind. Cas. 239; 5 N. L. J. 73; (1922) A. I. R. (N.) 28, *Motiram v. Asaram Ram Gopal*, 53 Ind. Cas. 776; 16 N. L. R. 64 and *Sahu Ram Chandra v. Bhuji Singh*, 39 Ind. Cas. 280; 39 A 437; 21 C. W. N. 698; 1 P. L. W. 557;

15 A. L. J. 437; 19 Bom. L.R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), relied on.

Under the Hindu Law, the sons are not bound by a debt contracted by their father which is "illegal or immoral." The term "illegal or immoral" is used as a translation of the word *Avyavaharika* in the texts, and includes the various kinds of debts specified as coming within that category. These include debts which are without consideration. [p. 1045, col. 2.]

If a debt contracted by the father of a joint Hindu family is without any consideration, it is illegal or immoral and is not binding on the sons. [p. 1045, col. 2.]

Chakauri Mahton v. Ganga Proshad, 12 Ind. Cas. 609; 39 C. 862; 16 C. W. N. 519; 15 C. L. J. 228; relied on.

Appeal against the decree of the District Judge, Bhandara, dated 7th January 1922. In Civil Appeal No. 92 of 1921.

Sir Bipin Krishna Bose and Mr. P. N. Rudra, for the Appellants.

Messrs. Gupta and Eraksha, for the Respondents.

JUDGMENT.—The two appellants are the sons of Wanosa Teli with whom as a joint Hindu family they owned a one-sixth share as inferior proprietors in the village of Dhongargaon. The right they held was very probably not exactly that of inferior proprietors properly so called but it was an exactly similar subordinate right created by the *zemindar* himself in 1874; nothing however hinges on the exact character of their right in the village. On the 15th of July 1890 the *zemindar* Dajiba Babu, who owed Rs. 2,500 to the defendants, executed mortgage-deed (Exhibit D-3) in their favour. In this he mortgaged his full proprietary rights in Dongargaon and another village, assigning to his mortgagees the right to recover the land revenue from the subordinate proprietors. All the latter also joined in executing the mortgage promising to pay the land revenue to the mortgagees and not to the *zemindar*, and undertaking further that if the *zemindar* should in any year realise it from them they would make a second payment of the same amount to the mortgagees. As security, each of them mortgaged his subordinate rights in the village.

(2) On the 25th of June 1896 the present *zemindar* Satu Bapu executed another mortgage (Exhibit P-1) in favour of the

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defendants for a consideration of Rs. 5,699-8-3 which included a sum of Rs. 2,000 due on the previous mortgage. Wanosa, with the other subordinate proprietors, executed this in the same way as they had executed the mortgage of 1890, and for three years paid the land revenue to the mortgagees. In the three following years, however, it was recovered from them by the Government on behalf of the *zemindar* who had failed to pay it. In 1906 the mortgagees sued on the bond of 1896 and on the 17th of July 1907 obtained a preliminary decree for foreclosure which covered Wanosa's one-sixth share in Dongargaon with other property. This was made final on the 21st of March 1908 and the mortgagees took possession of the property on the 7th of July 1908. The two appellants filed the suit out of which this appeal arises for possession of their two-thirds share of the property alienated by their father Wanosa, that is to say, a one-ninth share in the subordinate proprietary rights in the village, on the ground that he had no right to alienate it.

(3) The only ground on which the learned Counsel for the respondents resisted the claim in this Court was the contention that as the property had already passed out of the joint Hindu family the plaintiffs can challenge their father's alienation only on the ground of his debt being illegal or immoral. The question was discussed at length by a Full Bench of this Court of which I was a member in *Dhudabai v. Narain* (1) and it was held unanimously that the ruling of the Bench of this Court in *Motiram v. Asaram* [*Ramgopal*] (2) was correct. The placitum in the latter case was as follows: "In a suit on a mortgage brought against the father in his representative capacity, the father represents the entire joint family, and the sons cannot re-open a decree against him except on grounds personal to themselves, *e. g.*, that the debt for which the mortgage was given was not binding on them under the Hindu Law." But if in regard to an admitted or proved existing debt of their fathers the sons are only entitled to plead that it was illegal or immoral, it must be admitted that they are also entitled to plead that there was

no debt of their fathers existing at the time at all, and there is no difference between that and the plea that there was no debt of their father's existing at the time which was of such a nature as to justify an alienation of their shares for its satisfaction. That no such debt existed in this case is clear from the ruling of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* (3) the controversy in respect of which has been set at rest by their Lordships' judgment in *Chet Ram v. Ram Singh* (4).

(4) It appears to me, however, that the claim must succeed equally even if the plaintiffs can attack their father's alienation of their shares only on the ground that the debt for which he made it was "illegal or immoral," for the reason that it has been conclusively proved to have been contracted without any consideration. The only liability that Wanosa undertook in the mortgages was to pay the amount of the land revenue over again to the *zemindar's* creditor if the *zemindar* broke his contract with the creditor and realised himself the land revenue which he had assigned, and it was for failure to do this that the decree for foreclosure was obtained against Wanosa. It is clear that there was no consideration whatever for this almost preposterous undertaking. The term "illegal or immoral" is used as a translation of the word *Avyavaharika*. A summary of the eight kinds of debts coming within that category which are specified in the texts is given in the judgment of Mukerjee, J., in *Chakkauri Mahton v. Ganga Proshad* (5) and includes "promises without consideration," so that this debt has been shown to be "illegal or immoral" in the sense in which that expression is used in this connection.

(5) The decree of the lower Appellate Court will accordingly be set aside and the de-

(3) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 13; 44 I. A. 126 (P. C.).
(4) 67 Ind. Cas. 569; 14 A. 368; 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 98; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; 3 P. L. R. (P. C.) 1922; (1922) A. I. R. (P. C.) 247, 24 Bom. L. R. 123; 27 C. W. N. 150; 49 I. A. 228; 21 A. L. J. 114; 37 C. L. J. 79 (P. C.).
(5) 12 Ind. Cas. 609; 39 C. 862; 16 C. W. N. 519; 15 C. L. J. 228.

(1) 66 Ind. Cas. 239; 5 N. L. J. 73; (1922) A. I. R. (N.) 28.

(2) 53 Ind. Cas. 776; 16 N. L. R. 64.

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fendants will be ordered to put the plaintiffs in possession of a one-ninth share in the village of Dongargaon. They will also pay all the costs of this litigation.

N. H.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 165
OF 1922.

February 16, 1923.

Present :—Mr. Kanhaiya Lal, J. C.
Nawab QAMAR JEHAN BEGAM—
DEFENDANT—APPELLANT

versus

BANSIDHAR—PLAINTIFF AND ANOTHER—
DEFENDANT—RESPONDENTS.

Hindu Law—Alienation by widow—Legal necessity—Recitals in deed, value of.

In the case of an alienation by a Hindu widow the recitals in the deed assume greater importance by efflux of time, especially when proof of actual enquiry into the necessity justifying the deed becomes unavailable. But where the transferee from a Hindu widow happens to be alive and is examined and disbelieved on the existence of a necessity for the loan, no presumption in favour of such a necessity can be drawn from the mere fact of a recital to that effect in the deed. [p. 1047, col. 1.]

Nanda Lal Dhur Biswas v. Jagat Kishore, 36 Ind. Cas. 420; 43 I. A. 249 at p. 252; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 44 C. 186; 10 Bur. L. T. 177 (P. C.); referred to.

The fact that a bond is taken by a Hindu widow in lieu of a portion of the consideration for an alienation by her negatives the existence of an immediate necessity for that money. [p. 1047, col. 1.]

Appeal against decree of the Third Additional District Judge, Lucknow, dated 6th February 1922, upholding that of the Additional Sub-Judge, Lucknow, dated 22nd March 1921.

Messrs. *Wazir Hasan and Wasi Hasan*, for the Appellant.

Messrs. *A. P. Sen, Puttu Lal and Makund Behari Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for the recovery of possession of a certain house with shops situated in *Mohalla Fatehganj*, Lucknow. The allegation of the

plaintiff was, that Cheda was the owner of the said house and shops with the *sahan* lying in front of the same, and that after the death of Cheda, *Musammāt Janki* wrongfully sold the said property to Sheo Prasad in lieu of Rs. 2,000 on the 14th May 1886 without any legal necessity. *Musammāt Janki* died in December 1918. The plaintiff claims to be the next reversionary heir of Cheda. The defendants are the heirs of *Saiyid Nazir Hasan*, who had purchased the said property from Sheo Prasad on the 16th March 1888. The Courts below found that there was no legal necessity to justify the sale, except to the extent of Rs. 360, which were taken to pay a debt due by Cheda.

The sale deed recites a prior mortgage of the house and some of the shops effected by Cheda in favour of *Ali Bakhsh* for Rs. 350 on the 3rd March 1884 and another prior mortgage effected by *Musammāt Janki* in favour of *Brij Lal* in respect of another shop for Rs. 300 on the 31st October 1885 and purports to leave Rs. 650 with the vendee for the payment of the said mortgages. It also purports to acknowledge the receipt of the balance of the consideration partly in cash and partly by the execution of a bond by the vendee in favour of the vendor. At the time of the sale, the vendor seems to have asserted that the money was required for the payment of the debts aforesaid, and for the purposes of the Gaya ceremonies and the like; but, beyond the two mortgages above referred to, no other debts are specified. Cheda appears to have died some time between the dates of the above two mortgages. No evidence was produced to show that the bond of the 21st June 1884 or the *bahi* debt credited in the mortgage of the 31st October 1885 was due by Cheda. There is no recital to that effect in the deed of mortgage. No presumption can, therefore, be drawn in favour of the existence of a legal necessity to justify the mortgage of the 31st October 1885.

As regards the other necessity recited in the sale-deed, the Courts below disbelieved the evidence of Sheo Prasad; and, in the absence of circumstances rendering it probable that *Musammāt Janki* required money for the performance of the Gaya ceremonies, it is difficult to raise a presumption merely

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from the fact of a recital in the sale-deed in favour of the existence of such a necessity. As observed by their Lordships of the Privy Council in *Nanda Lal Dhur Biswas v. Jagat Kishore* (1) it is well established, that such recitals cannot by themselves be relied upon for the purpose of proving the assertion of fact which they contain, for it is obvious, that if such proof were permitted, the rights of reversioners could always be defeated by the insertion of carefully prepared recitals. Where all the original parties to the transaction are dead, all those who could have given evidence on the relevant points have grown old, or passed away, a recital consistent with the probability and circumstances of the case has greater importance and cannot be lightly set aside. But the person in whose favour the sale was effected in this instance is alive and was examined and disbelieved by the Courts below. It is not shown that no other evidence was available to prove that there was a reasonably credited necessity for the transaction. In fact a bond for Rs. 600 is said to have been taken by *Musammatt Janki* in lieu of a portion of the consideration payable by the vendee to her, suggesting thereby that there was no immediate necessity for that money. The sale cannot, in the circumstances, be upheld, and the *onus* which lay on the defendants to prove that there was legal necessity for a larger sum than Rs. 350 has not been discharged.

The appeal fails and is dismissed with costs.

G. H.

Appeal dismissed.

(1) 36 Ind. Cas. 420; 43 I. A. 249 at p. 252; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 44 C. 186; 10 Bur. L. T. 177 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1800 OF 1920.

June 15, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Chotzner

Hon'ble Raja RESHEE CASE LAW,
C. I. E.—PLAINTIFF—APPELLANT

versus

BHUBAN MOHAN PAL AND OTHERS—
RESPONDENTS.

Lease, construction of—"Thicca mokra," meaning of—*Tenancy from generation to generation.*

The use of the words "thicca mokra" in a lease in describing the rent fixed, indicates that the rent was fixed in perpetuity.

Raja Reshee Case Law v. Satish Chandra Paul, 764 Ind. Cas. 774; 35 C. L. J. 90; (1922) A. I. R. (C.) 123, followed.

A lease described the rent fixed as "thicca mokra" and went on to say that the grantee would enjoy the land by reclamation and cultivation from generation to generation and that the *jama* mentioned would be paid to the landlord from year to year. It also contained a clause prohibiting the grantee from alienating his rights without the consent of the landlord.

Held, (1) that the covenants as to the enjoyment of the land and payment of the rent read together indicated that the rent was fixed in perpetuity;

(2) that the use of the words "thicca mokra" strengthened that indication;

(3) that the covenant restraining alienation was inoperative in the absence of a clause for re-entry;

Nil Madhab Sikdar v. Narattam Sikdar, 17 C. 826; 8 Ind. Dec. (N. S.) 1095, and *Basarat Ali Khan v. Manirulla*, 2 Ind. Cas. 416; 36 C. 745; 10 C. L. J. 49, followed.

(4) that even if the covenant was valid it was not in itself a conclusive indication that the rent was not intended to be permanent.

Appeal against a decree of the Additional Special Judge, Midnapore, dated the 10th March 1920, reversing that of the Revenue Officer, Midnapore, dated the 22nd June 1918.

Babu Narendra Chandra Basu (with him Babu Nalin Chandra Pal), for the Appellant.

This is a suit for correction of an entry in the Record of Rights under section 106, Bengal Tenancy Act. My submission is that the defendant is not the holder of a permanent tenure with fixed rent as is mistakenly entered in the Record of Rights. The learned Revenue Officer came to the correct conclusion in saying that the rent was not fixed in perpetuity and as such the entry ought to be corrected and gave a decree to my client. Of course, the founda-

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tion of the whole suit is the lease of 1862 and it has to be properly construed to find out the intention of the grantor. I submit that the term *thicca* cuts away the ground from the contention that it is a permanent tenure with fixed rent and the word *mokra* cannot be taken to mean *mokarrari* the meaning whereof is well-known. This case is not on all fours with—*Raja Reshee Case Law v. Satish Chandra Paul* (1) and so the latter case is no authority to govern the present suit.

Babu Sartosh Kumar Pal, for the Respondents.—I beg to submit that *Raja Reshee Case Law v. Satish Chandra Paul* (1) is conclusive on the point raised by my learned friend. And, further, the provisions that the tenancy would be held from generation to generation and that the rent previously mentioned would be paid into the office of the landlord from year to year disprove my learned friend's contentions. Babu Narendra Chandra Basu, replied briefly.

JUDGMENT.—This is an appeal by the plaintiff landlord in a suit under section 106, Bengal Tenancy Act, for correction of an entry made in the Record of Rights. In the Record of Rights the defendant is entered as holder of a permanent tenure held under a fixed rent. The tenancy is governed by the terms of a lease granted by Raja Prithwi Ballabh Pal to Kadem Ali on the 16th February 1862. The Courts below have come to divergent conclusions as to the true construction of this document. The Trial Court held that the rent was not intended to be fixed in perpetuity. The lower Appellate Court has held that rent was fixed in perpetuity. The case now before us bears some resemblance to that of *Raja Reshee Case Law v. Satish Chandra Paul* (1). There, as here, the document was written in Ooriya character, possibly by a half literate scribe. The language of the document is a mixture of Bengali, Urdu, and Ooriya. The document states, in the first place, the different classes of land, their area and rent payable in respect thereof. The area is then totalled and found to amount to 275 *bighas* 4 *catas* and 14 *chattacks*. The aggregate rent

is stated to be Rs. 65-8. This rent is described as *thicca mokra* and the question in controversy is, what is the precise import of this phrase. The document proceeds to lay down that the grantee would enjoy the land by reclamation and cultivation from generation to generation and that the *jama* previously mentioned would be paid into the office of the landlord from year to year. Here, then, are two express covenants as to the meaning of which there is no room for doubt, namely, first, that the tenancy would be held from generation to generation; and, secondly, that the rent previously stated would be paid from year to year by the tenant to the landlord. If we read these two covenants together, which follow one after the other, the implication manifestly is that the rent previously fixed is to be paid from generation to generation; in other words, the rent is fixed in perpetuity. This conclusion is reached without reference to the words "*thicca mokra*." Those words, as interpreted in *Raja Reshee Case Law v. Satish Chandra Paul* (1) only strengthen the view we take. The word '*thicca*' is used to indicate the creation of a tenancy and the word '*mokra*' is in reality '*mokarrari*,' indicating that the rent was fixed in perpetuity. Consequently, if these two words are taken together, there is no escape from the inference that the rent was fixed in perpetuity; in other words, that the tenure was not only *maurasi* but *mokarari*. There is, however, a subsequent clause in the document which may militate against this view; namely, the clause which bars the alienation of the tenancy without the consent of the landlord. We are of opinion that this by itself is not a conclusive indication that the rent was not intended to be permanent. On the other hand, as has been pointed out by the Subordinate Judge on the authority of the decisions in *Nil Madhab Sikdar v. Narattam Sikdar* (2), *Basarat Ali Khan Manirulla* (3), the covenant is inoperative as there is no clause for re-entry. Indeed, the tenancy has been treated as transferable and the present occupant is not the original holder, but a

(1) 64 Ind. Cas. 774; 35 C. L. J. 90; (1922) A.I.R. (C.) 123.

(2) 17 C. 826; 8 Ind. Dec. (N. S.) 1995.

(3) 2 Ind. Dec. 416; 36 C. 745; 10 C. L. J. 49.

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successor-in-interest who has obtained the land by transfer.

We are of opinion that the conclusion of the Subordinate Judge is correct, and that this appeal must be dismissed with costs. We assess the hearing fee at one gold *mohur*.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 188, 192 AND 204 OF 1921.

March 21, 1923.

Present:—Justice Sir B. K. Mullick, Kt., and Mr. Justice Kulwant Sahay.

ISHAN CHANDRA KUNDU AND ANOTHER

—APPELLANTS

versus

NILRATAN ADHIKARI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7; O. XXXIV, rr. 4, 5—Compromise by minor—Sanction, form of—Absence of sanction, effect of—Mortgage, suit on—Compromise—Preliminary and final decrees, necessity of—Chota Nagpur Tenancy Act (VI of 1908), ss. 46, 47, whether retrospective.

In order to attract the provisions of O. XXXII, r. 7 of the Code of Civil Procedure it is enough to show that the attention of the Court was directly called to the fact that a minor was a party to the compromise and that the leave of the Court was obtained on petition or in some way not open to doubt. No particular formula is necessary to be used by the Court in order to grant the leave and when it is shown that an application was made by the guardian of the minor to the Court asking for leave to enter into the compromise and the Court made a note of that application and passed a decree in terms of the compromise, it must be held that the leave of the Court was expressly recorded within the meaning of O. XXXII, r. 7 of the Code. [p. 1051, col. 2.]

Manohar Lal v. Jadunath Singh, 28 A. 585; 8 Bom. L. R. 489; 4 C. L. J. 8; 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710; 33 I. A. 128 (P. C.), followed.

Rangulam Sahu v. Durga Pershad, 60 Ind. Cas. 980; 6 P. L. J. 190; 2 P. L. T. 325; (1921) Pat. 235; 3 U. P. L. R. (Pat.) 75, distinguished.

Where the leave of the Court is not obtained in respect of a compromise to which a minor is a party, the decree passed on the compromise is not a nullity but merely voidable at the option of the minor and so long as it is not avoided in a proper proceed-

ing, no objection can be taken in execution proceedings as regards the validity thereof. [p. 1052, col. 1.]

Virupakshappa v. Shidappa, 26 B. 109; 3 Bom. L. R. 565, relied on.

Rules 4 and 5 of O. XXXIV of the Civil Procedure Code, providing for the passing of a preliminary and a final decree in a suit on a mortgage lay down a mere rule of procedure and it is open to the parties to a particular litigation to waive this rule and to agree to a final decree being passed without a preliminary decree being passed in the first instance. [p. 1052, col. 1.]

A consent decree directing payment by instalments, is a perfectly valid decree and is not covered by r. 4 of O. XXXIV of the Civil Procedure Code so that in a case where such a decree is passed it is not necessary to make a final decree under rule 5 of the order. [p. 1052, col. 1.]

Bechu Singh v. Bichharam Sahu, 1 Ind. Cas. 677; 10 C. L. J. 91; *Arunbati Kumari v. Ram Nirvanjan Marwari*, 58 Ind. Cas. 299; 2 P. L. T. 38, relied on.

Sections 46 and 47 of the Chota Nagpur Tenancy Act have no application to a consent decree passed on the basis of a mortgage executed before the passing of the Act. [p. 1052, col. 2.]

Narayan Ganesh Ghatale v. Baliram, 48 Ind. Cas. 141; 46 C. 76; 24 M. L. T. 345; 14 N. L. R. 165; 28 C. L. J. 447; (1918) M. W. N. 885; 23 C. W. N. 297; 21 Bom. L. R. 53; 45 I. A. 179 (P. C.). *Kusadhaj Bhahta v. Broja Mohan Bhahta*, 31 Ind. Cas. 13; 19 C. W. N. 1228; 43 C. 217, distinguished.

Miscellaneous appeals from an order of the Subordinate Judge, Purulia, dated the 22nd August 1921.

Messrs. S. S. Bose, C. C. Das, B. N. Mitter, P. C. Rai and P. K. Mukherji, for the Appellants.

Messrs. N. C. Sinha and A. B. Mukherji, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—These are three appeals by the judgment-debtors against two orders of the Subordinate Judge of Purulia, dated the 22nd August 1921, disallowing their objections to the execution of a decree. The decree under execution was passed on the basis of a mortgage bond, dated the 4th of October 1909, executed by Beni Madhava Kundu, Dina Nath Kundu and Ishan Chandra Kundu for a principal amount of Rs. 31,518-12, carrying interest at Rs. 7-8 per cent. per annum, and the properties mortgaged were the *raiya* holding of the mortgagors. A suit upon the basis of the above mortgage was brought in the year 1919 against the three mortgagors who were defendants Nos. 1 to 3 in the suit and against

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Surja Kant De, who was impleaded as defendant No. 4 on the allegation of his being a subsequent mortgagee. The defendant No. 1, Beni Madhava Kundu, died after the institution of the suit, and his three sons, Atul Chandra Kundu, Gokhul Chandra Kundu and Lalit Mohan Kundu were substituted in his place. Lalit Mohan Kundu was a minor and Babu Ghokhul Chandra Ghosal, Pleader, was appointed as his guardian *ad litem*. The defendant No. 4, Surja Kant De, was also a minor and he was represented in the suit by his mother, Srimati Kishori Mohan Dasi, as his guardian *ad litem*. The defendants Nos. 1, 2 and 3 filed a written statement but no written statement was filed on behalf of the defendant No. 4 although time was once taken by his guardian for the purpose. After various adjournments, the case was taken up on the 31st of March 1920 when the defendants filed an application praying for time, as a talk of compromise was going on, and the Court adjourned the case to the next day with the direction that if the dispute was not settled amicably, the parties must be ready to go on with the case. On the next day, *i.e.*, on the 1st of April 1920, the plaintiffs and the defendants other than the defendant No. 4 filed a petition of compromise and Babu Gokhul Chandra Ghosal, the guardian *ad litem* of the minor defendant Lalit Mohan Kundu, filed an application for permission to compromise the case on behalf of the minor. There was no appearance on behalf of the defendant No. 4; the Court examined one witness and decreed the suit on compromise as against the defendants Nos. 2 and 3 and the heirs of the defendant No. 1, and *ex parte* as against the defendant No. 4. The terms of the compromise were that the suit was decreed for the total amount of Rs. 32,542-8, payable in 12 annual instalments from 1327 to 1328 B. S., and it was provided that if any instalment be in default the amount of all the instalments will be considered as in default, and the plaintiffs will be entitled to realize the decretal amount, *i.e.*, the entire amount, with interest at 6 per cent, per annum by execution of the decree and the sale of the mortgaged property. It was declared also that the mortgaged property will stand pledged for the satisfaction of the decretal amount,

and the decree will be considered as final and absolute. No payment was made, and the decree-holder applied for execution of the decree whereupon two petitions of objections were filed under section 47 of the Code of Civil Procedure; one on behalf of defendants Nos. 2 and 3 and the heirs of the deceased defendant No. 1; and another on behalf of defendant No. 4.

The principal objections raised by the defendants were (1) that there was no valid decree against the minor Lalit Mohan Kundu as there was no permission granted by the Court to his guardian *ad litem* to enter into the compromise on which the decree was made, (2) that the decree under execution being a mortgage-decree could not be executed unless a final decree was passed, and (3) that the properties sought to be sold being part of *raiya* holdings could not be sold under the provisions of sections 46 and 47 of the Chota Nagpur Tenancy Act. A further objection was taken by the defendant No. 4 to the effect that the execution could not proceed as no notice under O. XXI, 1, 22 of the Civil Procedure Code was served upon him; the execution petition having been filed more than a year after the date of the decree.

The learned Subordinate Judge has disallowed all the objections except the last objection of the defendant No. 4, namely, that the execution could not proceed for want of a notice under O. XXI, 1, 22 of the Civil Procedure Code. Three appeals have been preferred against the orders of the Subordinate Judge. Appeal No. 204 is on behalf of Lalit Mohan Kundu, the minor judgment-debtor; Appeal No. 188 is by the adult judgment-debtor; and Appeal No. 192 is by the defendant No. 4, the subsequent mortgagee.

As regards the first objection, it is argued by the learned Vakil for the appellant that the compromise decree cannot be executed as against the minor Lalit Mohan Kundu inasmuch as the provisions of O. XXXII, 1, 7 of the Code of Civil Procedure were not complied with and no leave of the Court was granted to the guardian to enter into the compromise on behalf of the minor and in support of his argument he has relied upon a number of rulings of the Privy Council as well as of the various High Courts. He argues that the decrees;

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in so far as the minor is concerned, is a nullity and is incapable of execution. From the documents on the record, it is true that it does not appear that any order was recorded in the order-sheet granting leave to the guardian to enter into the compromise on behalf of the minor, but the fact that the attention of the Court was expressly directed to the fact that there was a minor concerned and that the compromise was being entered into on his behalf, is evident from the order of the 1st of April 1920 where it is expressly stated that the guardian of the minor defendant applied for permission to compromise the case on behalf of the minor, and there can be no doubt that the Court did apply its mind and sanction the compromise on behalf of the minor. Reliance has been placed by the learned Vakil for the appellant on the case of *Ramgulam Sahu v. Durga Pershad* (1), where it has been held by this Court that it cannot be inferred that the Court has under O. XXXII, r. 7 of the Code of Civil Procedure sanctioned a compromise from the mere fact that the petition of compromise gave notice to the Court that the interest of the minor parties was intended to be affected by the compromise, and that the Court passed a decree in accordance with the compromise. In that case a suit had been brought by one Gaya Prasad on his own behalf and on behalf of his minor sons for partition of joint family properties. That suit resulted in a consent decree passed on a petition of compromise filed by Gaya Prasad. Subsequently, another suit was brought by the minors for a partition of the same joint family properties ignoring the previous consent decree, and one of the questions raised was whether the previous consent decree operated as a bar to the plaintiff's right to maintain the subsequent suit. Their Lordships on a reference to the petition of compromise filed in the suit and the entire evidence on the record came to the conclusion that there was nothing in the petition to suggest that the minors were parties to the compromise. No doubt, the compromise affected the interests of the

minors but as they were not parties to the compromise petition, the Court would not be called upon to exercise its judgment on the question whether the compromise was for their benefit. No leave was asked for by the guardian *ad litem* to enter into the compromise on behalf of the minors, and their Lordships were of opinion that the attention of the Court was not directed to the fact that there were minors whose interests were being affected by the compromise and that the Court did not apply its mind as to whether or not the compromise was for the benefit of the minors. Their Lordships on the evidence in that case came to the express finding that there was evidence on the record suggesting an inference that the Court never intended to exercise its judgment on the question whether the settlement was for the benefit of the minor and under those circumstances it was held that the compromise decree was not binding on the minors. In the present case before us, it is clear from the order-sheet that the attention of the Court was expressly drawn to the fact that the compromise was being effected on behalf of the minors inasmuch as a petition for leave to enter into the compromise was filed by the guardian and noted by the Judge. In order to attract the provisions of O. XXXII, r. 7 of the Code of Civil Procedure, it is enough to show that the attention of the Court was directly called to the fact that a minor was a party to the compromise and that the leave of the Court was obtained on petition or in some way not open to doubt. No particular formula is necessary to be used by the Court in order to grant the leave and when it is shown that an application was made by the guardian to the Court asking for leave to enter into the compromise and the Court makes a note of that application and passes a decree in terms of the compromise, it must be held that the leave of the Court was expressly recorded within the meaning of O. XXXII, r. 7 of the Code. This was the principle laid down by their Lordships of the Privy Council in the case of *Manohar Lal v. Jadunath Singh* (2),

(1) 60 Ind. Cas. 980; 6 P. L. J. 190; 2 P. L. T. 325 (1921) Pat. 2331 3 U. F. L. R. (Pat.) 75

(2) 28 A. 585; 8 Bom. L. R. 489; 4 C. L. J. 8; 10 C. W. N. 898; 9 O. C. 2191; M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710; 33 I. A. 128 (P. C.).

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and the case now before us comes directly within the principles so laid down.

Then, in the next place, it is to be noted that, assuming that the leave of the Court was not expressly recorded, that would not make the decree a nullity. It would only make the decree voidable at the option of the minor and so long as it is not avoided in a proper proceeding, no objection can be taken in the execution proceedings as regards the validity thereof. Reference may be made in this connection to the case of *Virupakshappa v. Shidappa* (3).

The second objection raised on behalf of the appellant is, that the decree under execution being a mortgage-decree it could not be executed unless it was made absolute and a final decree for sale was passed. As I have already stated, the compromise petition upon which the decree was made, expressly stated that the decree will be considered as final and absolute (*vide* paragraph 4 of the petition dated the 1st of April 1920). The suit was no doubt a mortgage-suit and had there been no compromise the ordinary procedure laid down in O. XXXIV, Civil Procedure Code, would have been followed and a preliminary decree ought in the first instance to have been passed, and in that case it would be necessary to make a final decree at a subsequent stage. But this is a mere rule of procedure and it is always open to the parties to a litigation to waive a particular procedure and to agree to a final decree being passed without a preliminary decree being passed in the first instance. A consent decree, directing payment by instalments is a perfectly valid decree and it is not covered by Order XXXV, r. 4 of the Civil Procedure Code, and, therefore, it is not necessary to make a final decree under rule 5 of the said Order. This view is supported by the judgment of their Lordships of the Calcutta High Court in the case of *Bechu Singh v. Bichharam Sahu* (4). Reference may also be made in this connection to the case of *Arunabatti Kumari v. Ram Niranjani Marwari* (5). In my opinion, there is no substance in this objection and the learned Subordinate Judge was right in disallowing the same.

The third objection is based on the provisions of sections 46 and 47 of the Chota Nagpur Tenancy Act. Now, the mortgage in suit is dated the 4th October 1909. The Chota Nagpur Tenancy Act was introduced in the District of Manbhum in December 1909 and, therefore, the mortgage of October 1909 was not affected by the provisions of sections 46 and 47 of the Chota Nagpur Tenancy Act. But, it is argued that the compromise was effected at a time when the Act was in force and it was by the compromise that the properties now sought to be sold were mortgaged, and the present sale is based on the contract entered into in the compromise petition of the 1st of April 1920. This argument proceeds on the assumption that the compromise was in effect a fresh contract which was the origin of the rights between the parties, and although it came into existence in consequence of the mortgage of 1909 yet, for the purpose of enforcement and for the purpose of the application of sections 46 and 47 of the Chota Nagpur Tenancy Act, this fresh contract must be taken to be the transaction between the parties which was the foundation of their rights. Reliance has been placed by the learned Counsel on the case of *Narayan Ganesh Ghatate v. Baliram* (6) and *Kusadhaj Bhakta v. Broja Mohan Bhakta* (7). But those cases have no application to the facts of the present case. In the first case it was held on a consideration of the facts of that case and on an interpretation of the conciliation award that the original mortgages and the decree based thereon were extinguished by the subsequent award which was duly registered and which had the same legal effect as an entirely fresh contract. In the second case all that was held was that a contract of parties is nonetheless a contract because there is superadded to it the command of a Judge. Here there was no fresh contract in the year 1920. The suit was based on the mortgage of 1909, and the decree was passed on the basis of that mortgage. On

(3) 26 B. 109; 3 Bom. L. R. 565.

(4) 1 Ind. Cas. 677; 10 C. L. J. 91.

(5) 58 Ind. Cas. 299; 2 P. L. T. 38.

(6) 48 Ind. Cas. 141; 46 C. 76; 24 M. L. T. 345; 14 N. L. R. 165; 28 C. L. J. 447; (1918) M. W. N. 885; 23 C. W. N. 297; 21 Bom. L. R. 53; 45 I. A. 179 (P. C.).

(7) 31 Ind. Cas. 131; 19 C. W. N. 1228; 43 C. 217.

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a true construction of the petition of compromise it cannot be held that a fresh contract of mortgage was entered into between the parties in 1920. What was intended was that the original mortgage of 1909 will stand; only payment was to be made by instalments as agreed to between the parties. In this view of the case, sections 46 and 47 of the Chota Nagpur Tenancy Act have no application to the facts of the present case.

The objections taken by the defendant No. 4, (who is the appellant in appeal No. 192) in the Court below, were, first, that the decree could not be executed as no final decree in the mortgage-suit had been made against him and that the execution could not proceed as no notice under O. XXI, r. 22, had been served on him. As regards the objection of there being no final decree it has already been held that the decree in execution is itself a final decree and no fresh final decree was necessary to be passed. The other objection, as regards the want of notice under O. XXI, r. 22, has been allowed by the Court below. In this Court a fresh objection was sought to be taken on behalf of this appellant to the effect that as he was not a party to the compromise petition no final decree could be passed against him. That may be so, but the decree as it stands is a final decree. It may be bad in law so far as he is concerned, but so long as it is not set aside in a proper proceeding, this defendant cannot be allowed to take the objection in the execution proceedings, and his objection taken for the first time here in appeal cannot be entertained.

The result is, that all the three appeals must be dismissed with costs.

Mullick, J.—I agree. In my opinion, the Subordinate Judge did not violate the provisions of O. XXXII, r. 7 of the Civil Procedure Code. The leave of the Court has been expressly recorded in the proceedings although there are no words expressly stating that the guardian is the grantee of such leave. *Manohar Lal v. Jadunath Singh* (2) was decided in 1906, that is to say, two years before the present Civil Procedure Code came into operation, and in my opinion the Code did not make any alteration in the law as interpreted by their Lordships of the Judicial Committee in

that case. Their Lordships observed that there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order or petition or in some way not open to doubt that the leave of the Court was obtained. In the present case it has been shown in a manner not open to doubt that the leave of the Court was obtained.

I am further of opinion that, even if the decree is bad on the ground that the leave of the Court was not taken, it is not a nullity and that it can only be avoided by a properly constituted proceeding. It cannot be called in question by way of objection to any proceeding taken in execution of it.

With regard to the objection that the decree is a nullity because it was not made in accordance with the provision of O. XXXIV of the Civil Procedure Code, in my opinion it was open to the parties to dispense with a preliminary decree; the making of a final decree payable in instalments was not illegal much less was it a nullity and in any event such a decree could not be challenged in execution proceedings.

Z. S.

*Appeals dismissed.***PATNA HIGH COURT.**

FIRST CIVIL APPEAL No. 24 OF 1920.

December 8, 1921.

Present:—Mr. Justice Das and
Justice Sir John Bucknill, Kt.

JATADHARI SINGH AND OTHERS

—DEFENDANTS—APPELLANTS

versus

DUKHI SINGH AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Alienation—Neces.

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stily, absence of—Share of alienor, whether can be charged.

Where a mortgagee or purchaser from the *harta* of a joint family enquires into the necessity for the loan or the sale and satisfies himself by an honest and *bona fide* enquiry that the necessity exists, the law completely protects him; for it is not a condition for his success in any litigation which may arise out of the transaction that he should prove the existence of the necessity. It is sufficient if he proves that he made an honest enquiry and was satisfied that the necessity existed. If he fails to make such an enquiry, the Court will not raise an equity in his favour, merely because the alienor made a representation to him that he had power to charge the joint family property. When, however, there is a further undertaking by the alienor that he would make good the representation by partition or otherwise, the Court has power to compel him to do that which he undertook to do. But where there is no such undertaking it is impossible for the Court to direct that the members of the joint family should hold the family properties in definite shares and that the share of the alienor should remain charged with the payment of any money to the mortgagor or the purchaser. [p. 1055, col. 2; p. 1056, col. 1.]

Lachman Prasad v. Sarnam Singh, 40 Ind. Cas. 284; 39 A. 500; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 44 I. A. 163 (P. C.), followed.

Mahabeer Pershad v. Ramyad Singh, 20 W. R. 192; 12 B. L. R. 90, *Banwari Lal v. Sheo Sankar Misser*, 1 Ind. Cas. 670; 13 C. W. N. 815, *Mohunt Ram Sundar Dass v. Barham Deo Narain Thakur*, 2 Ind. Cas. 986; 14 C. W. N. 552, referred to.

Appeal from a decision of the Sub-Judge, Gaya, dated 28th August 1919.

Mr. *Kailashpati*, for the Appellants.

Mr. *Shiveshwar Dayal*, for the Respondents.

JUDGMENT.—This was a suit by the respondents to set aside two sale deeds, the first executed on the 20th of December 1904, and the other executed on the 15th of February 1906, by the defendants Rameshwar Singh and Parmeshwar Singh. Rameshwar Singh and Parmeshwar Singh are the sons of the plaintiff No. 1, Dukhi Singh, and it is not disputed that the plaintiffs together with the defendants, Rameshwar Singh and Parmeshwar Singh, formed a joint *Mitakhshara* Hindu family. The documents show that the sale-deeds had to be executed because there were prior debts and because the executants wanted money for necessary family purposes; but there is not an iota of evidence in the record to establish that

there were any debts prior to the execution of the sale-deeds which were binding on the joint family. The sale-deed of the 20th of December 1904 is Exhibit C, and it appears that the consideration money for Exhibit C was Rs. 2,000 which went to satisfy two earlier bonds, Exhibits A and B. Exhibit A was executed on the 11th of May 1901, and Exhibit B was executed on the 10th of November 1903. There is not an atom of evidence in the record to the effect that the money which was borrowed on Exhibit A and on Exhibit B was required for joint family purposes; and the same appears to be the case with reference to the second sale-deed executed on the 15th of February 1906, Exhibit C (1). The consideration for the second sale-deed was Rs. 1,625—and we are informed that the whole of it went to satisfy the hand-notes Exhibits H and H (1), and the bonds Exhibits J and K. But, again, there is no evidence at all that Exhibits H, H (1) J and K were executed for any purpose which would bind the joint family. The result is, that there was no legal necessity at all for the documents which were impeached in this suit. The plaintiffs were accordingly entitled to succeed and the appeal must be dismissed with costs.

The learned Subordinate Judge in giving a decree to the plaintiffs has made an order that the plaintiffs should recover the property,—

“Subject to the charge of Rs. 388-12-0 declared above in respect of 1 anna 2 pies 15 *krtis* 4 *masants* interest of plaintiff No. 1 and defendants Nos. 5 and 6 in the same”.

Against this portion of the decree the plaintiffs appeal to this Court. The learned Subordinate Judge thought that, as there was a misrepresentation on the part of plaintiff No. 1 and defendants Nos. 5 and 6, he was at liberty to put a condition into the decree, which in effect compels the members of the joint family, of which the plaintiffs and defendants Nos. 5 and 6 are members, to hold the joint family properties in defined shares. Now, in my opinion, the proposition enunciated by the learned Subordinate Judge is quite untenable on the decided cases. It is quite true

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that in *Mahabeer Pershad v. Ramyad Singh* (1) the Calcutta High Court took the view that the minor (who was not a party to the transfer, which transfer was held to be without legal necessity), was entitled to a declaration that the mortgage-decree and sale were void, and on that declaration to recover the property for the family; but that the mortgagees were entitled in equity, as against the father, and the elder brother, to insist upon their calling their shares into existence by partition and realising them with a view to repayment of the loan with interest; and it is also true that this case has been followed in two subsequent decisions of the Calcutta High Court. See *Banwari Lal v. Sheo Sankar Misser* (2) and *Mohunt Ram Sundar Dass v. Barham Deo Narain Thakur* (3). In my opinion, this view can no longer be maintained in view of the decision of the Judicial Committee in *Lachhman Prasad v. Sarnam Singh* (4). The learned Judges deciding *Mahabeer Pershad v. Ramyad Singh* (1) were impressed by the fact that, the consequence of giving a decree to the plaintiffs without making it conditional on the refund of the mortgage-money would be that the properties would return to the management of the very man who obtained the loan on the pretended security afforded by the mortgage of the property, and they thought that this result did not accord very well with equity or good conscience. Investigating the question a little more in detail, they thought that as any member of the joint family may, whenever he chooses, require that the properties shall be divided by metes and bounds it was open to the mortgagees in equity to insist upon the person who entered into the mortgage transaction calling his share into being and realising it for the benefit of the mortgagees; and in this view, the learned Judges said as follows:—“He obtained their money by representing that he had a power to charge the

joint family property, which he knew at the time he did not possess; he is, therefore, at least bound to make good to them that representative so far as he can by the exercise of such proprietary right over the same property as he individually possesses;” and in the result the learned Judges in giving the decree to the plaintiff made it a condition that on recovery the property should be held and enjoyed by the family in defined shares and that the shares of the father and of the eldest son should be jointly and severally subject to the lien thereon of the defendants first party for the repayment of the sum of Rs. 3,000 advanced by the defendants first party to them. The Judicial Committee in the case of *Lachhman Prasad v. Sarnam Singh* (4) declined to say whether that case was rightly decided or not but it took the view that that case proceeded upon the footing that there was a representation on the part of the persons who entered into the mortgage transaction that they had power to charge the joint family property, and that they would make good the representation by partition or otherwise. The Judicial Committee pointed out that there was little, if any, evidence of such a representation, but that such a representation was undoubtedly the basis of the judgment; and that, unless the learned Judges had held that an equity arose out of it, their judgment would have amounted to this, that for every mortgage by the head of the joint family the property of the joint family could be made available to the extent of the interest of the mortgagor.

Now, in my opinion, no question of equity does arise in this case, nor indeed did it arise in the case of *Mahabeer Pershad v. Ramyad Singh* (1). It may be that there was a representation that they had power to charge the joint family property, but such a representation is to be found in every case where the *karta* of a joint *Mitakshara* family alienates joint family property. Such a representation by itself raises no equity in favour of the purchaser or the mortgagee, for the law does not permit him to act upon that representation unless he satisfies himself by an honest and *bona fide* enquiry that the representation is true. Where he so enquires into the necessity for the loan or the sale and satisfies

(1) 20 W. R. 192; 12 B. L. R. 90.

(2) 1 Ind. Cas. 670; 13 C. W. N. 815.

(3) 2 Ind. Cas. 986; 14 C. W. N. 552.

(4) 40 Ind. Cas. 284; 39 A. 500; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 44 I. A. 163 (P. C.).

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himself by an honest and *bona fide* enquiry that the necessity exists, the law completely protects him; for it is not a condition for his success in any litigation which may arise out of the transaction that he should prove the existence of the necessity. It is sufficient if he proves that he made an honest enquiry and was satisfied that the necessity existed. It is difficult to imagine why the Court should raise an equity in his favour if he does not do what the law compels him to do, namely, to make an honest and *bona fide* enquiry into the existence of the necessity for the loan or the sale. There is, in my opinion, no room for the application of any equitable doctrine where the purchaser or the mortgagee does not choose to protect himself but merely relies upon the representation made to him. The case would stand on a different footing if, in addition to the representation that he had power to charge the joint family property there is a further undertaking that

he would make good the representation by partition or otherwise. Where it is proved to the satisfaction of the Court that there was such an undertaking on the part of the *karta* of the joint family, the Court has ample power to compel him to do that which he undertook to do; but where there is no such undertaking it is, in my view, impossible for the Court to direct that the members of a joint family should hold their properties in definite shares and that the share of one or some of the members should remain charged for the payment of any money to the mortgagee or the purchaser.

I would allow the cross-appeal and vary the decree by directing that the claim of the defendants to a charge for Rs. 388-12-0 upon 1 anna 2 pies 15 *kris* 4 *masants* interest of plaintiff No. 1 and defendants Nos. 5 and 6 be entirely disallowed.

Z. K.

Appeal dismissed.
Cross-appeal allowed.

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• **Adverse possession—Ejectment suit—Burden of proof—Suit arising out of order in proceedings under s. 145, Criminal Procedure Code—Necessary parties—Thakbust map, value of.**

In an action for ejectment it is incumbent on the plaintiff not only to prove his title but also that he has been in possession within twelve years of the date of the suit.

In a suit for possession arising out of an order made under section 145 of the Criminal Procedure Code, the plaintiff has a cause of action only as against the person whose possession has been confirmed by the order and is not bound to implead as parties to the suit any other person who might have a claim to the property in dispute.

The object of the Thakbust Survey which preceded the Revenue Survey, was to ascertain the position of boundaries and areas of estates and villages; it was no part of the duty of the Revenue Officers, conducting the thakbust operations to record prescriptive rights.

Thakbust maps, therefore, are good evidence of possession at the time they were made, but they are no evidence of title acquired by prescription or adverse possession. *PAT CHATTRAPAT PRATAP v. C. G. LEES*, 4 P. L. T. 487; 1 P. L. R. 322.

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 — **Exclusive possession—Title acquired by prescription—Suit for possession, whether maintainable.**

Where a stranger is in adverse possession of a house, the true owner cannot keep his rights in the house alive against the accrual of prescription by the fact that, occasionally, he goes and stays in the house as a guest for a few days.

A person who has completed the statutory period of prescription and thus acquired title to property is entitled to eject any person with no title who seeks to retain possession of the premises. *M. AMMAKANNU AMMAL v. NARAYANASWAMI MUDALIAR*, 17 L. W. 629; (1923) A. I. R. (M.) 633.

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A tenant who enters into possession on certain terms cannot prescribe for the estate of a tenant holding on more favourable terms because the original character of the tenant's possession continues so as to bar any right of prescription. *M. SUNDARAJA CHARIAR v. ALI MUHAMMAD*, 44 M. L. J. 649.

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 — **Agra Tenancy Act (II of 1901), s. 10—Ex-proprietary tenant—Relinquishment, of sir rights—Fraud—Landlord in actual possession as sub-tenant—Delivery of possession.**

The mere execution of a deed of relinquishment of his sir rights by an ex-proprietary tenant in

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favour of the landlord does not amount to constructive fraud on behalf of the latter.

Where in the case of a relinquishment of his sir rights by an ex-proprietary tenant in favour of his landlord, the latter is already in actual physical possession of the land as a sub-tenant, there is no necessity of a formal delivery of possession. *A BHAGWANT v. MARE*, (1923 A. I. R. (A.) 113.

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 — **Agreement for sale—Consideration, payment of—Vendee already in possession—Conveyance not registered—Suit for possession by vendor—Vendee, position of.**

When a person agrees to sell property to another who is already in possession and the latter pays the purchase-money but omits to take a registered conveyance the position is the same as if the document had been executed and the former person is not entitled to recover possession, even though the right to obtain specific performance of the agreement to sell has become time-barred.

Venkatesh Damodar v. Mallappa Bhimappa, 66 Ind. Cas. 863; 24 Bom. L. R. 242; (1922) A. I. R. (B.) 9; 46 B. 722, relied on.

P mortgaged a plot of land to D (1) who assigned the mortgage by registered deed to M and his wife. Later P made over possession to M and made a report to the Revenue Surveyor that the land was sold outright. No conveyance was executed. M conveyed the land by registered sale-deed to D (2). P sued D (1) and D (2) for redemption and was granted a decree:

Held, that the sale was not valid, because no registered conveyance was executed but that the intention to sell was clear and, therefore, P could not be allowed to take advantage of his neglect to give conveyance in due form and fall back upon his mortgage and redeem the land. To give him a decree would be in effect to assist him in perpetrating a fraud on his vendee. *L. B. MAUNG SHWE HMON v. MAUNG THA BYAW*, 11 L. B. R. 462; (1923) A. I. R. (K.) 125.

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 — **Appeal, second—Document of title, misconstruction of—Misconstruction of written evidence—Question of law.**

The misconstruction of a document which is the foundation of a suit and which is in the nature of a contract or a document of title, is allowed to be a ground for a second appeal.

A special appeal does not lie because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. For instance, a writing supposed to contain an admission may be put in as part of the evidence, but a mistake in its meaning is not a misconstruction of a document upon which a special appeal will lie, if it is connected with other evidence, affecting its construction. *C. PRAN KISHORE TARAFDAR v. SARODA FROSAD PAKRASI*, (1923) A. I. R. (C.) 358. 37 C. L. J. 500.

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 — **Point of law, necessitating additional evidence, admissibility of.**

Per Pratt, J.—An appellant cannot, in second appeal, take a point of law which involves the taking of additional evidence. *B. SHRIDHAR LAXMAN v. JANARDHAN BAPUJI*, (1923) A. I. R. (F.) 37.

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Arbitration—Suit before Court having no jurisdiction—Agreement to abide by decision—Appeal, right of, if terminated—Suit before Court having jurisdiction—Agreement to have dispute settled by special procedure, effect of.

When parties to a dispute agree to a Court proceeding without jurisdiction, *extra cursum curiae*, they cannot appeal from its decision. Parties to a suit may agree not to appeal from a decision of a Court and such an agreement will be inferred from the fact that they agreed to the Court taking a course which is altogether outside its ordinary powers.

This does not, however, apply to mere deviations from procedure if the Court has jurisdiction over the subject, unless there is an attempt to give it a jurisdiction it does not possess, so that a Court of Appeal cannot properly review the decision. Such deviations do not deprive either of the parties of the right of appeal. The real question in such cases is whether the agreement results in the Court assuming jurisdiction which it otherwise could not have, or involves the Court going so outside its ordinary course of procedure that it is impossible for the Appellate Court to review its decision.

A right of appeal can only be given up by a clear agreement and a Court will not imply a term in an agreement giving up a right of appeal unless it is driven to do so.

In order to make a Court an arbitrator there must be a clear agreement to that effect. A Court acting *extra cursum curiae* does not involve an application of the provisions contained in the second Schedule to the Code of Civil Procedure.

Pisani v. Attorney-General (Gibraltar), (1874) 5 P. C. 516; 30 L. T. 729; 22 W. R. 900, *Burgess v. Morton*, (1896) A. C. 136; 65 L. J. Q. B. 321; 73 L. T. 713, relied on.

Sayad Zain v. Kulabhai Lallubhai, 23 B. 752; 1 Bom. L. R. 366; 12 Ind. Dec. (N. S.) 3, *Rao Bahadur Raoji Trimbar v. Govind Vinayak*, Un. P. J. Bom. H. C. (1897), 113, *Jamnadas v. Gordhandas*, Un. P. J. Bom. H. C. (1896) 424, distinguished.

Chengalraya Chetti v. Raghava Ramanuja Doss, 52 Ind. Cas. 569; 37 M. L. J. 100, *Nidamarthe Mukkanti v. Thammanna Ramayya*, 26 M. 76, dissented from.

In a suit relating to a diversion of water, the parties agreed in writing that the Judge should go and inspect the spot and that they would abide by his decision on such local inspection and perusal of plans and other records.

Held, that the parties had merely agreed to the evidence being taken in an irregular or unusual manner and that the Court had not acted either as arbitrator or *extra cursum curiae*, and that there was no intention to give up a right of appeal. *M. SANKARANARAYANA PILLAI v. RAMASWAMY PILLAI*, 44 M. L. J. 258; 17 L. W. 303; (1923) M. W. N. 1541; (1923) A. I. R. (M.) 444 140

Auction sale—Property sold subject to mortgage-decree—Payment by mortgagee out of Court—Payment not certified to Court—Encumbrance paid off by auction-purchaser—Credit given for amount paid by mortgagee—Refund of amount—Judgment-debtor, right of.

On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be whether the price be settled by private bargain or determined by public competition together with an indemnity against the encumbrances affecting the land. The contract of indemnity may be expressed or implied. If the purchaser covenants with the vendor to pay the encumbrances it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the encumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property.

Izzatunnisa Begam v. Periah Singh, 3 Ind. Cas. 293; 31 A. 583; 13 C. W. N. 1143; 10 C. L. J. 314; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 19 M. L. J. 682; 36 L. A. 203; (P. C.) followed.

Certain property was sold in execution subject to an encumbrance of a mortgage-decree for a certain sum of money. Before the proclamation of sale was issued, the judgment-debtor paid out of Court a part of the amount due under the mortgage-decree. This payment was not certified to the Court and was consequently ignored in the execution sale. Subsequently, the auction-purchaser paid off the encumbrance and was given credit by the mortgagee-decree-holder for the amount received by the latter. The judgment-debtor brought a suit against the auction-purchaser for recovery of the amount and, in the alternative, claimed it from the mortgagee-decree-holder.

Held, (1) that the auction-purchaser was under no obligation to pay the amount and the mere fact that he derived benefit from the payment did not give the judgment-debtor any cause of action against him;

(2) that in view of the fact that there was no fraud committed by the mortgagee-decree-holder the judgment-debtor's cause of action as against him could only be based on the ground of negligence or on a breach of an implied agreement to certify the payment and make it effectual in execution;

(3) that as there was no period fixed by the law for the certification of the payment, failure to certify within a particular time could not be treated as negligence or as a breach of agreement;

(4) that even if there was a breach of agreement on the part of the mortgagee-decree-holder, the loss was more directly due to the negligence of the judgment-debtor himself in not attending the hearing at which the sale-proclamation was prepared than to the mortgagee-decree-holder's failure to certify;

(5) that, consequently, the judgment-debtor was not entitled to claim the amount from either the auction-purchaser or the mortgagee-decree-holder. *N. MITSUI BUSSAN KAISHA, LTD. v. PADAMRAJ PULCHAND*, (1923) A. I. R. (N.) 210.

Award—Omission to file award in Court—Character of award, if affected.

If an award is valid, it is operative, even though neither party has sought to enforce it by a regular suit or by the summary procedure. This conclusion is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to the judgment of a Court of last resort. The award is in fact a final adjudication by a Court of the parties' own choice and until impeached upon sufficient grounds in an appropriate proceeding, an award which is on the face of it regular is binding. *O BAIKYA NATH CHOTTOOPADYA v. PANCHANANI DASSEE*, 37 C. L. J. 542. 128

Benami transaction—Burden of proof.

Where a person alleges a transaction to be a *benami*, one the *onus* is on him to prove that the apparent state of things is not the real state of things.

Courts in India should not approach *benami* transactions with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property is a trustee for one who holds the same for the interest of another. Even a slight quantity of evidence to show that the transaction was a sham one will suffice for the purpose. Still such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a *benami* or a sham transaction. Suspicion, however, does not amount to proof, and a transaction cannot be held to be *benami* on mere suspicion. *PAT. PURAN MALL v. DILWA*, 4 P. L. T. 54. 1003

Test—Court, duty of—Co-sharers—

Default in payment of Government dues—Sale of estate—Defaulting co-sharer, purchase by—Other co-sharer, right of.

The Courts in India need not approach a transaction alleged to be *benami* with that scrupulous rigour which, in other systems of jurisprudence, may demand the existence of the clearest positive evidence that the *ex facie* owner of a property holds the same for the interest of another. The vital test in cases of this class is, what is the source from whence the consideration came. The Court should also take into consideration the question of possession. But where the production of evidence of a conclusive character to satisfy these tests is hardly feasible, the Court must examine the surrounding circumstances.

A co-sharer who has defaulted to pay the Government dues and has thereby brought about the sale of an estate, cannot be permitted, if he purchases the estate at the sale, to hold it for his own benefit to the exclusion of his co-owner.

The co-owner who thus acts in breach of his obligation, contractual or fiduciary, cannot be permitted to profit by his own wrong to the detriment of the person whose interest it was his duty to protect. *GLALIT MOHAN v. MANORANJAN GHOSH CHAUDHURI*, 36 C. L. J. 208; (1923) A. I. R. (C) 13. 698

Bengal, Agra and Assam Civil Courts Act (XII of 1887), s. 8 (2)—Bengal Tenancy Act (V L I I of 1885), s. 153, proviso, application under—Transfer to Additional Judge, whether competent.

Under section 8 of the Bengal, Agra and Assam Civil Courts Act an Additional Judge has jurisdiction to hear an application made under the proviso to section 153 of the Bengal Tenancy Act transferred to him for disposal by the District Judge. *GLAL, BEHARY BASAK v. AKHIL CHANDRA SANTRA*, 27 C. W. N. 315; (1923) A. I. R. (C) 469. 794

Bengal Cess Act (IX of 1880), s. 54, notice under—Presumption—Denial, specific, by defendant, whether necessary.

Notice under section 54 of the Cess Act is a condition precedent to the liability to pay cess. A defendant must, if he contends non-service of such notice, state this specifically in his pleadings, otherwise due service of the notice will be presumed. *PAT MURLI MANOHAR v. RAJA NAND SINGH*. 1

Bengal Municipal Act (III of 1884), s. 261—"Kiln", meaning of—Pauja for firing bricks, if kiln.

The word "kiln" in section 261 of the Bengal Municipal Act refers to a structure which is of a permanent nature and does not include a *pauja* for firing bricks. *C SUPERINTENDENT & REMB. OF LEGAL AFFAIRS, BENGAL v. TROILOKHYA NATH*, 36 C. L. J. 168; 26 C. W. N. 926; (1922) A. I. R. (C) 194; 49 C. 1014; 24 C. L. J. 356. 356

Bengal Regulation (XVII of 1806)—Foreclosure proceedings—Notice—Proof—Presumption.

A Court will not presume that all the formalities required by Regulation XVII of 1806 in proceedings for foreclosure have been observed. The mortgagee must prove affirmatively the due performance of every necessary condition.

The mere fact that the notice issued in the proceedings is not forthcoming does not relieve the mortgagee of the burden of proving that the notice satisfied the requirements of the Regulation. On the contrary, the non-existence of the notice is fatal to the validity of the foreclosure proceedings. *L MUNSHI RAM v. NAURANGA*. 575

SS. 7, 8—Anomalous mortgage—Suit for foreclosure, whether necessary to complete mortgagee's title—Limitation.

Under the Bengal Regulation XVII of 1806 a mortgagee of an anomalous mortgage, *viz.*, a combined mortgage by conditional sale and usufructuary mortgage, is bound to institute proceedings for foreclosure within 12 years from the expiry of the period stipulated for redemption; and his title is incomplete until it is confirmed by a regular suit. *N RUPA BAI v. RODHA*. 121

Bengal Tenancy Act (VIII of 1885), ss. 3 (5), 50—"Rent" in section 50, if restricted to money rent—Rent payable partly in cash and partly in kind—Presumption, whether applicable.

In section 50 of the Bengal Tenancy Act, the term 'rent' cannot be restricted to 'money rent'. It bears the meaning attributed to it in section 3, clause (5) of the Act.

Bengal Tenancy Act—contd.

The substantive rule formulated in section 50 (1) and the presumption embodied in section 50 (2) of the Bengal Tenancy Act do not become inapplicable because a tenure-holder or *raiyat* holds at a rent payable partly in cash and partly in kind, or entirely in kind.

Although light may be thrown on the scope of a Statute by looking at what Parliament was doing contemporaneously and at the history of the Statute yet even when words in a Statute are so ambiguous that they may be construed in more than one sense, regard may not be had to the Bill by which it was introduced. *C DINA NATH PAL v. SATI PRASAD*, 36 C. L. J. 220; 27 C. W. N. 115; (1923) A. I. R. (C.) 74 **663**

— ss. 6, 7—Landlord and tenant—Enhancement of rent—Tenure held from time of Permanent Settlement—Order for confiscation of *zemindari*, effect of—Fixity of rent—Alteration, effect of.

Where certain *taluks* included in a *zemindari* have been held from the time of the Permanent Settlement, the fact that the *zemindari* was subsequently confiscated by Government and after the escheat *dowls* were taken from the *talukdars*, would not lead to the conclusion that the *zemindari* was extinguished and the tenure-holders became independent *talukdars*. The true effect of an order for confiscation must depend on its terms. If the tenures can be identified with those in existence at the time of the escheat, they must be deemed to have been held from the time of the Permanent Settlement within the meaning of section 6 of the Bengal Tenancy Act.

Where the original nature of a tenancy is not known the fact that the rent has been altered once, negatives the hypothesis that the rent had been fixed in perpetuity. *C NURUL HUQ v. BIRENDRA KISHORE*, 38 C. L. J. 121 **979**

— s. 20—Settled *raiyat*, who is—Condition to be fulfilled.

Where a person is alleged to be a settled *raiyat* within the meaning of section 20 of the Bengal Tenancy Act, it must be proved that he continuously held as a *raiyat* land situated in the village, although the land need not be identical throughout the period of 12 years. The holding of land is to be continuous and, further, it is to be in the character of a *raiyat*.

But though the land must be held as a *raiyat*, this does not necessarily mean that the land should have been actually cultivated, because land may be held by a *raiyat* as his homestead under section 182 of the Bengal Tenancy Act. It is, however, not sufficient for a *raiyat* that the character of land is such as would justify its use as a homestead, it must be established that the land is used by the *raiyat* as his homestead. *C PRODYOT KUMAR TAGORE v. UMESH CHANDRA SAHA* **640**

— ss. 22, 86, 87—Transfer of Property Act (IV of 1882), s. 54—Ijaradar—Advance of *takkavi* to tenants—Transfer of occupancy rights in lieu of *takkavi* loan—Sale—Surrender—Abandonment—"Acquire", in s. 22, meaning of.

An *ijaradar* made *takkavi* loans to certain occupancy tenants. The latter finding themselves

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unable to pay the loans gave up their holdings to the *ijaradar*:

Held, that the transaction amounted neither to surrender nor to abandonment of the holdings but to a sale of the occupancy rights of the tenants in favour of the *ijaradar*.

The word "acquire" in section 22 of the Bengal Tenancy Act before its amendment by the Act of 1907, implied the accrual to a *raiyati* tenancy of rights conferred by the Statute rather than the transfer of rights by another tenant. *PAT RAM DHEYAN SINGH v. BHULOTAN SINGH* **705**

— s. 29, proviso (1)—Suit for rent at increased rate—Landlord when entitled to succeed.

In a suit to recover rent at an increased rate the landlord is not entitled to the benefit of the first clause to the proviso to section 29 of the Bengal Tenancy Act, unless he brings himself within the precise language of that clause.

The plaintiff brought a suit for rent at an increased rate for four years beginning with 1321 B. S. The rent was not enhanced by writing registered as required by clause (a) of section 29 of the Bengal Tenancy Act. No increased rent was paid in 1320, but rent at the increased rate was actually paid from 1314 to 1319 B. S.:

Held, that the requirements of the first clause of the proviso to section 29 of the Bengal Tenancy Act had not been fulfilled, inasmuch as rent at the increased rate had not been paid for a continuous period of three years immediately preceding the period for which rent was claimed. *C JANKI BALLAV ROY v. ENAT MONDAL*, 37 C. L. J. 489; (1923) A. I. R. (C.) 600 **136**

— ss. 30 (a), 105, 113—Limitation Act (IX of 1908), Sch. I, Art. 131—Occupancy tenants entered as fixed rate tenants in Record of Rights—Enhancement of rent, suit for—Limitation—Settlement of rent under s. 105, whether bar to suit for enhancement.

It is not necessary to sue for a declaration that an entry in the Record of Rights that defendants are *raiyats* at fixed rates is wrong before instituting a proceeding for enhancement of rent under the Bengal Tenancy Act.

Therefore, a suit for enhancement brought more than six years after the date of the final publication of the Record of Rights in which the defendants are entered as *raiyats* at fixed rates is not barred by limitation.

A claim to enhance rent is a recurring cause of action and is governed by Art. 131 of Sch. I to the Limitation Act, limitation running from the date of refusal.

Where a fair and equitable rent has once been settled in a proceeding under section 105 of the Bengal Tenancy Act, it is a bar to any subsequent proceeding for the enhancement of rent before the expiry of the period mentioned in section 113 of the Act, except on the grounds mentioned in that section. *PAT SHROPRATAP DUBEY v. SHRO GHULAM LAL* **781**

— s. 40—Commulation of rent—Notice, absence of—Order commuting rent—Civil Court, whether bound.

Bengal Tenancy Act—contd.

An order under section 40 of the Bengal Tenancy Act commuting rent in kind to cash rent cannot justly be made without notice to the party affected and if so made, must be regarded as *ultra vires*.

An order under section 40 of the Bengal Tenancy Act, made by a Revenue Officer without jurisdiction, does not bind a Civil Court. **G GORA CHAND HALDAR v. RAKHAL CHANDRA GOPE**, 37 C. L. J. 473; (1923) A. I. R. (C.) 364. 37

s. 105—Remand—Appeal—Tenant, dis-possession of, from portion of tenancy—Rent, suit for—Suspension of rent, doctrine of—Fixa-tion of fair and equitable rent—Res judicata.

No appeal lies against an order of remand passed by the Special Judge under the provisions of the Bengal Tenancy Act.

In execution of a decree for arrears of rent seven *jotes* were put up for sale in this manner, namely, they were divided into two *jotes*, one of 68 *bighas* and odd *cottas* with one rental and the other of 111 *bighas* and odd *cottas* with another rental. The sale of the *jote* of 111 *bighas* and odd *cottas* was set aside and the tenants remained in possession without payment of any rent. The sale of the other *jote* was confirmed and the landlord auction-purchaser took delivery of possession of the 68 *bighas* and odd *cottas* of land. The landlord then brought rent suits in respect of the seven *jotes* in which it was held that as there had been a wrongful eviction or ouster from a portion of the lands of the original seven *jotes* there followed a complete suspension of rent and no claim for arrears of rent could be sustained. Upon this the landlord brought the present proceedings under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent of the 11 *bighas* and odd *cottas* of land in the possession of the tenants. The Revenue Officer passed the order accordingly but on appeal to the Special Judge it was held that instead of one consolidated rent the Revenue Officer should fix 7 *jamas* for 7 *jotes* and directed a remand. In appeal to the High Court the doctrine of suspension of rent was again urged and it was contended that the landlord was bound by the decisions in rent suits which operated as *res judicata*:

Held, (1) that there was as a matter of fact no wrongful eviction, as the rent-decree in execution of which the sale followed was binding on the tenants who were, therefore, not entitled to urge the doctrine of suspension of rent, and

(2) that inasmuch as the rent suits were in respect of payment of rent of 7 *jotes* and the present suit was for fixation of a fair and equitable rent in respect of one *jote*, the doctrine of *res judicata* could not be invoked. **G DEBI PRASAD v. OFFICIAL TRUSTEE OF BENGAL**, 37 C. L. J. 314; (1923) A. I. R. (C.) 333. 1018

s. 147 A—Compromise decree—Provisions of section not complied with—Decree, whether nullity.

A compromise decree passed in a suit between a landlord and a tenant without compliance with the provisions of section 147A of the Bengal Tenancy Act is a nullity and no effect can be given to it. **PAT KUNJ BEHARY v. CHARAN SINGH**

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Bengal Tenancy Act—concl.

s. 188, application of.

The provision contained in section 188 of the Bengal Tenancy Act has no application to the institution of a suit for arrears of rent, which is not something that the landlord is required or authorised to do by the Act. **G KALIPADA DAS v. SATI PRASAD**, 36 C. L. J. 234; (1922) A. I. R. (C.) 468; 27 C. W. N. 372. 722

Bombay District Municipal Act (III of 1901), s. 160

(3), order under, by District Court—Execution, mode of.

Where a District Court passes an order under section 160 (3) of the Bombay District Municipal Act, that order can be executed as a decree. It is not necessary for the successful party to make an application to the Court to pass a decree in accordance with the order or decision. **B BROACH CITY MUNICIPALITY v. GHULAM RASUL HAJI BANUBHAI**, 25 Bom. L. R. 305; (1923) A. I. R. (B.) 289; 47 B. 654. 636

Bombay Public Conveyances Act (VII of 1920), s. 2—Public conveyance—“Plying for hire,”

meaning of—Conveyance kept for letting out on hire, whether public conveyance.

The essential idea of a conveyance being used for the purpose of plying for hire is, that it should be available at some public place, or on some regular route for any one who wishes to travel by it. A conveyance, therefore, which is kept for letting out on hire to particular persons does not become by such user a public conveyance within the meaning of section 2 of the Bombay Public Conveyances Act. **B EMPEROR v. NASARVANJI BOMANJI**, 25 Bom. L. R. 95; 24 Cr. L. J. 310; (1923) A. I. R. (B.) 248. 70

Burmese Buddhist Law—Inheritance—Half, sister or brother v. maternal grandmother.

According to the Burmese Buddhist Law, inheritance should not ascend if it can be helped. Consequently, brothers and sisters of the half blood will succeed in preference to the maternal grandmother where there are no full brothers and sisters. **LB MA GVI v. MA KHIN SAW**, 11 L. B. R. 460; (1923) A. I. R. (R.) 124. 4

Calcutta Rent Act (III of 1920), ss. 2 (f) (ii), 15, 18—Order fixing standard rent under s. 2

(f) (ii)—Revision by President of Tribunal.

An order of the Rent Controller fixing the standard rent for certain premises under section 2 (f) (ii) of the Calcutta Rent Act is open to revision by the President of the Calcutta Improvement Tribunal under section 18 of the Act.

The Calcutta Rent Act contemplates “fixing” of the standard rent even in cases not coming under section 15 of the Act; in other words, in cases coming under section 2 (f) (ii) of the Act. **C ASUTOSH CHATTERJEE v. UPENDRA CHANDRA AICH**, 27 C. W. N. 50; (1923) A. I. R. (C.) 33; 37 C. L. J. 101. 221

Cattle Trespass Act (I of 1871), s. 22—Compensation not claimed in petition of complaint—Magistrate, jurisdiction of, to grant.

Where compensation is not claimed in the petition of complaint, the Magistrate is not justified in awarding compensation under section 22 of the

Cattle Trespass Act—contd.

Cattle Trespass Act. Pat. BAIJNATH SAHAY v. EMPEROR, (1925) Pat. 96; 4 P. L. T. 231; 1 P. L. R. 34 Cr.; (1923) A. I. R. (Pat.) 292; 24 Cr. L. J. 311 71

s. 24—Rescuing cattle—Driving cattle away by shouts and cries—Force or violence, whether necessary.

Driving cattle away by shouts and cries constitutes "rescuing" them within the meaning of section 24 of the Cattle Trespass Act.

Semble:—The word "rescue" does not necessarily imply the use of force or violence.

Inducing an animal to move may even amount to using force. **M KANMA KONDAH, In re, 17 L. W. 546 32 M. L. T. 355; (1923) M. W. N. 437; (1923), A. I. R. (M.) 608** 616

Cause of action—Incompetency to sue—Limitation, operation of—Limitation Act (IX of 1908), Sch. I, Art. 110—"When arrears become due," meaning of—Function of landlord and tenant united in same person—Receiver, appointment of—Suit for arrears of rent—Limitation terminus a quo.

When there is no one competent to sue there can be no cause of action, and, consequently, limitation cannot run, because there is no one against whom it can run.

Where a person as trustee of a temple and a mutt unites in himself the function of landlord and tenant, the cause of action for a suit to recover arrears of rent arises when there is some one in existence who can enforce payment of such arrears, as for instance, when a Receiver is appointed, at which time the "arrears become due" within the meaning of Art. 110 of Schedule I to the Limitation Act. **M DEVASIKAMANI v. GOVINDA RAO, 44 M. L. J. 318; 17 L. W. 344; 32 M. L. T. 174; (1923) M. W. N. 252; (1923) A. I. R. (M.) 461; 46 M. 579** 5

C. P. Courts Act (I of 1917), s. 28—Trial of suits under s. 92, Civil Procedure Code—Additional District Judge, jurisdiction of—Trials by other Tribunals, validity of—Jurisdiction to try suits under s. 92.

Under section 26 of the C. P. Courts Act, an Additional District Judge is empowered to try suits under section 92 of the Civil Procedure Code unless there is an order or direction to the contrary by the Local Government or the District Judge. **N GANORA v. NARAYAN, (1923) A. I. R. (N.) 112** 1016

C. P. Tenancy Act (I of 1920), s. 49 (1) 438

Charitable endowments, nature of—Founders, powers of—Hindu religious endowment—Direction entitling descendants of founder's daughters to participate in bhog offerings, validity of—Gift to human being and offering to deity; distinction between—Rule of determination—Usage—Founder, intention of, proof of—Dedication—Execution of document, whether essential.

A charitable corporation, in so far as it is charitable, is the creature of the founder, and the latter may provide for the government and administration of his creature and the application in perpetuity of its revenue. This is subject to the reservation that a founder may not, unless special power has been reserved in this behalf, after the constitution of the Corporation, vary

Charitable endowments—contd.

the trust or modify the application of the endowment or its revenue. These principles are applicable to religious endowments created in accordance with Hindu Law.

In the case of religious endowments created according to Hindu Law when the worship of an idol has been founded, the *shebaitship* is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution. There is no reason why the founder, who is competent to provide for the government and administration of the trust, should not be able to give a direction for its management, which is not inconsistent with its character as a religious and charitable trust. Although the grant once made cannot be resumed and is irrevocable, so long as the foundation continues, the *shebait* is bound to carry out all legitimate directions given by the founder at the time of the establishment but is free to manage the trust without interference by him or his representatives. The test in each case is, whether the direction given by the founder is inconsistent with the nature of the endowment as a religious and charitable trust or is a colourable device for the evasion of the law of perpetuities.

It is competent to the founder of a Hindu religious endowment to direct that the descendants of his daughters would be entitled to participate in the *bhog* offerings dedicated to the idols established by him. Such a direction is in no way inconsistent with the purpose of the endowment.

There is a fundamental distinction between a gift to a sentient being and an offering or dedication to a deity. Subject to special usages to the contrary, the offerings do not become the property of the officiating priest, but contribute to the maintenance of the shrine with all its rights, ceremonies and charities.

Where a practice has been observed in a religious endowment for a very long time the inference is that the system must have had its origin in a direction given by the founders of the endowment. A rule of determination is looked for in the case of such institutions in their usage, because it is an index to the intention of the founder. The proof of the intention of the founder becomes almost conclusive where the usage is immemorial, though the intention may be presumed from a number of instances extending over a limited period, provided only that the existence of an invariable practice is made out by clear and unambiguous evidence.

Venkatachalapati v. Subbarayadu, 13 M. 293; 4 Ind. Dec. (N. S.) 916; Greedharee Doss v. Nundakishore Doss, Marsh, 573; 2 Hay 633; Thackersay Dewraj v. Hurbhum Nursery, 8 B. 432; 4 Ind. Dec. (N. S.) 664, and Raghubhushana v. Vidatavridhi, 34 Ind. Cas. 875, relied on.

A Court should be slow to draw an inference which would defeat a right that has been exercised without question during a very long period, and unless such inference is irresistible the Court should presume everything that is reasonably possible to presume in favour of such a right.

The execution of a document is not essential for the purpose of a valid dedication which may be;

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inferred from application of proceeds and family conduct. **C RAMBRAMA CHATTERJEE v. KEDAR NATH BANERJEE**, 36 C. L. J. 478; (1923) A. I. R. (C.) 60 1026

Chota Nagpur Tenancy Act (VI of 1908), ss. 46, 47, whether retrospective.

Sections 46 and 47 of the Chota Nagpur Tenancy Act have no application to a consent decree passed on the basis of a mortgage executed before the passing of the Act. **PAT. ISHAN CHANDRA KUNDU v. NILRATAN ADHIKARI**, 4 P. L. T. 311; 1 P. L. R. 217; (1923) Pat. 184; (1923) A. I. R. (Pat.) 375 1049

Civil Procedure Code (Act XIV of 1882), s. 331 582

Civil Procedure Code (Act V of 1908), s. 1 O. XXI, r. 63—Attachment of debt—Objection of garnishee dismissed—Suit by auction-purchaser to enforce payment of debt—Objection, whether res judicata.

A garnishee, whose objection to the attachment of the debt on the ground that no debt is due by him to the judgment-debtor is disallowed, is bound to bring a suit within a year to set aside the order. If he fails to do so the order becomes final and conclusive and the garnishee is barred by the rule of *res judicata* from raising the same objection in answer to a suit to enforce payment of the debt by the auction-purchaser. **M SUBBEIR v. MOIDDEEN PITCHAI**, (1923) M. W. N. 282; 17 L. W. 582; 44 M. L. J. 588; 32 M. L. T. 304; (1923) A. I. R. (M.) 562 558

s. 11—Civil Procedure Code (Act XIV of 1882), s. 331—Res judicata—Ambiguous judgment—Extraneous evidence—Claim proceedings under s. 331—Procedure not followed—Order, whether res judicata.

A judgment in a matter of *res judicata* must stand by itself. It decides what it purports to decide no more and no less. If there is any ambiguity as to what it decided, which cannot be cleared up without further evidence, then it will not be a clear finding and not a case of *res judicata* at all.

On the death of one S, the *karnavan* of a Malabar *tarwad* sued the son of S. for money belonging to S. on the ground that S. was governed by the Marumakkathayam law and that the *tarwad* was his heir. The Court dismissed the suit holding that S. followed Makkathayam Law and the *tarwad* was not his heir. A subsequent suit was brought by the junior members of the *tarwad* to eject a person claiming under the son of S, from possession of certain other properties of S. on the ground that the *tarwad* was the successor-in-title to S. It was sought to be shown that the prior suit dealt only with the self-acquisitions of S. and not with his family properties which were comprised in the latter suit. There was nothing in the judgment in the previous case to show that only self-acquisitions were dealt with in that case:

Held, (1) that the question of the inheritance of the property of S. whether self-acquired or not, was directly and substantially in issue between the predecessors-in-title of the present litigants and the finding in the prior suit that S. followed the Makkathayam and not the Marumakkathayam

Civil Procedure Code—1908—cont'd.

Law was *res judicata* and was a final decision binding on the parties and their successors-in-title;

(2) that it was not open to the plaintiff to adduce extraneous evidence to prove that the Court was dealing only with the self-acquisitions of S. in the previous suit.

Where in a case governed by the Civil Procedure Code of 1882, on a claim by a third party obstructing delivery of possession to the decree-holder, the Court did not follow the procedure laid down in section 331 of the Code and the claim was not registered as a suit, and the matter was disposed of merely on petitions and an order passed directing the removal of the obstruction:

Held, that the order had not the force of a decree and would not operate as *res judicata* in a subsequent suit between the parties.

Where it is sought to give the formality of the legal effect of a decree to an order under section 331 of the Civil Procedure Code of 1882 in order that it may be used as *res judicata*, it must be shown that there was a formal array of parties, framing of issues and trial as laid down in the section, but if the petition has been wrongly treated as a merely interlocutory application in the suit, it cannot be on the same footing as a suit itself. **M KOONAMVELLI UNNARA v. KOYIPARAMBATH**, 17 L. W. 322; 44 M. L. J. 443; 32 M. L. T. 146; (1923) A. I. R. (M.) 514 582

s. 11—Limitation Act (IX of 1908), Sch. I, Art. 182—Execution application erroneously held not in accordance with law—Order not appealed against—Order, whether can be questioned subsequently—Res judicata, principles of—Application to execution proceedings.

When a competent Court has decided even though wrongly that an execution application is not in accordance with law, that order cannot be questioned in subsequent execution proceedings.

Though orders in execution proceedings do not come directly within the language of section 11 of the Civil Procedure Code, yet such orders, if not appealed from, are binding on the parties in subsequent proceedings on principles analogous to those of *res judicata* strictly so-called. **N JAGANNATH v. BHEARI LAL**, (1923) A. I. R. (N) 236 473

s. 11—Question of title—Decision by Revenue Court—Res judicata.

In an ejectment suit against an alleged tenant in the Revenue Court, if the tenant sets up the plea of proprietary title and the Court elects to try the question, its decision must be deemed to be the decision of a Civil Court and operates as *res judicata* in a subsequent suit for the establishment of title in the Civil Court. **A BARU MAL v. SUNDER LAL**, 21 L. J. 330 155

s. 11—Res judicata—Erroneous decision on question of law.

In deciding whether a decision in a former suit does or does not operate as *res judicata* in a subsequent one the facts of each case must be considered.

An erroneous decision on a question of law cannot be allowed to operate as *res judicata* so as to prevent a Court from deciding the same question

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on its arising between the same parties in a subsequent suit in accordance with law.

The question whether a tenancy is a permanent one or a tenancy-at-will, if not a question of law, is certainly a mixed question of law and fact and as such is open to examination in second appeal.

L. MOTI SAGAR v. DHANNA MAL, (1922) A. I. R. (L) 329 177

s. 11—*Res judicata*—*Finding as to res judicata based on mistake of fact, whether binding—Construction of document—Grant—Wakf—Inam Commissioner, decision of, whether binding on Court.*

When a Court decides that a certain matter is *res judicata* between the parties to the suit, that matter cannot be re-opened in a subsequent suit between the same parties, even though the decision was based on a mistake of fact.

Certain properties were held to be *wakf* properties in a suit. In a subsequent suit, the plaintiff in which was not a party to the prior suit, it was held that the question whether the properties were *wakf* was *res judicata* by virtue of the decision in the prior suit, the Court overlooking the fact that the plaintiff was not a party to the prior suit. The question as to the *wakf* nature of the properties again arose in a third suit between persons who were parties to the second suit:

Held, that the decision in the second suit that the question of the *wakf* nature of the properties was *res judicata* by virtue of the decision in the first suit, although based on a mistake of fact, was binding on the parties to the third suit.

Per Devadoss, J.—A grant of a village recited that a certain religious person was engaged in looking after a certain *Durgah* and that "there were not sufficient means for the said person to carry on all the religious objects of the institution and that the village was granted by way of aid to the maintenance of the servants, students and other men deserving of help at the aforesaid religious man's hands. The grant further stated that the village was to be treated as civil liability so that from year to year the income thereof may be utilised for the maintenance of the servants and the requisites of the *Durgah*. There was an endorsement on the document to the effect that the village had been fixed as aids for the maintenance of the aforesaid religious man and for the expenses of the *Durgah* and that the same was to be left in the enjoyment of the said person with effect from a certain date:

Held, that the grant was not a personal one burdened with a trust in favour of certain charities but that the properties were "*wakf*" properties inalienable by the grantee.

Ramandan Chethar v. Vava Levvai Marakayar, 39 Ind. Cas. 235; 40 M. 116; 32 M. L. J. 101; 15 A. I. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R. 405; 44 I. A. 21 (P. C.), relied on.

In construing *firmans* and grants, great weight ought to be attached to the actual words used in the grant and not to an endorsement which is brief and simple and may not fully express the intention of the grantor.

Civil Procedure Code—1908—contd.

In interpreting deeds and contracts, the intention of the parties to the document should be gathered only from the recitals in the documents to which they are parties and not from what they said or did before the document was executed.

The decision of an Inam Commissioner as regards the nature of a grant is not conclusive. It is for the Court to decide the nature of the grant though the Inam Commissioner's decision may help the Court in arriving at a finding as to the practice of an institution.

It is not a safe principle to interpret one document by referring to recitals in another. But where a Court has given a definite meaning to certain expressions, that meaning should be applied to those expressions in other cases. *M. JAGGA ROW BAHADUR GARU v. GORI BIBI*, 17 L. W. 521; (1923) M. W. N. 347; (1923) A. I. R. (M) 545 789

ss. 11, 16, 17, O. II, r. 2—*Suit for partition of some items of joint family property—Subsequent suit for partition of others, whether maintainable.*

A suit for partition of an item of joint family property is unsustainable where the plaintiff has already brought a suit and obtained a decree for partition as regards another item.

A suit for partition of joint family property is a comprehensive ascertainment of the assets, including immoveable property belonging to the family and the liabilities to be satisfied out of those assets. The effect of the provisions contained in section 11, Explanation IV, and O. II, r. 2 of the Civil Procedure Code is that ordinarily only one suit for partition will lie. The cause of action in a partition suit of joint family property must be regarded as exhaustive of the whole property available for division so far as its existence is known at the date of the plaint, even where the properties are situate within the jurisdiction of more Courts than one.

Sections 16 and 17 of the Civil Procedure Code do not override the principles of the provisions of section 11 and O. II, r. 2 of the Code. They simply provide for the machinery to enable litigants with property in more than one jurisdiction to adhere to these principles. *M. BANAKARA BASAVANA v. BANAKARA DODDALINGAPPA*, (1923) M. W. N. 294; 44 M. L. J. 652; 17 L. W. 740; (1923) A. I. R. (M.) 584 490

ss. 11, 47—*Mortgage—Redemption suit—Decree nisi—Second suit for redemption, whether barred.*

If a mortgagor brings a redemption suit and obtains a decree *nisi*, which entitles him on payment of a certain sum by a certain time to get back the property, and nothing further is done, and no attempt is made to get back possession, and no order is made barring the mortgagor's right to redeem, then a second suit can be brought for redemption and the same would not be barred either by section 11 or section 47 of the Civil Procedure Code. *B. RAMCHANDRA LAXMAN v. BALBHIM BABAJI*, 25 Bom. L. R. 211; (1923) A. I. R. (B.) 287 315

s. 11, Expl. IV, application of—*Res judicata—Suit for possession as joint purchaser*

Civil Procedure Code—1908—contd.

—Subsequent suit as owner by inheritance, maintainability of.

Though under O. II, r. 2, Civil Procedure Code, a plaintiff is not bound to join in one suit all the causes of action he has got against the defendant, he is bound to bring forward all the grounds in support of the claim or title he is litigating unless such union leads to confusion.

If a person sues for possession on the strength of his title, he must establish his title in that very suit by urging and proving all that would go to establish his title and cannot reserve one or more of such grounds for a future suit.

Where a plaintiff's suit for possession as co-owner on the strength of his title under a joint purchase is dismissed, a second suit for possession on the strength of his title as owner by inheritance is barred by section 11 read with Explanation IV of the Civil Procedure Code since in both cases the plaintiff was litigating under the same title, namely, his ownership and ought to have combined both the claims in the first suit.

Srimut Rajah Mooloo Vijaya Raganadha Bodha Gooroosawmy Periya Odaya Taver v. Katama Natchiar, 11 M. I. A. 50; 10 W. R. P. C. 1; 2 Sar. P. C. J. 212; 20 E. R. 20; *Woomatara Debea v. Kristohaminee Dossee*, 11 B. L. R. 175; 18 W. R. 163; *Kameswar Pershad v. Raj Kumari Ruttan Koor*, 20 C. 79; 19 I. A. 234; 6 Sar. P. C. J. 241; 10 Ind. Dec. (N. S.) 53 (P. C.); *Moosa Goolam Ariff v. Ebrahim Goolam Ariff*, 16 Ind. Cas. 70; 40 C. 1; 16 C. W. N. 937; 23 M. L. J. 215; 16 C. L. J. 642; 14 Bom. L. R. 1211; 12 M. L. T. 449; 5 Bur. L. T. 211; (1912) M. W. N. 1097; 10 A. L. J. 486; 6 L. B. R. 119; 39 I. A. 237 (P. C.); *Mashlamama Pillai v. Thiruvengadam Pillai*, 31 M. 385; *Gariya Rangaswamy Patrudu v. Majji Appalaswamy*, 34 Ind. Cas. 456; (1916) 1 M. W. N. 286; *Guddappa v. Tirhappa*, 25 B. 189; 2 Bom. L. R. 872, relied upon.

Ramaswami Ayyar v. Vythnatha Ayyar, 26 M. 760 at pp. 774-775; 13 M. L. J. 448; *Saminathan Chetty v. Palaniappa Chetty*, 26 Ind. Cas. 228; 41 I. A. 142; 18 C. W. N. 617; 17 New Law Reports 561; 83 L. J. P. C. 131; (1914) A. C. 618; 110 L. T. 913 (P. C.); *Thirukathal Madathi Raman v. Thiruthiyil Krishnen Nair*, 29 M. 153; 16 M. L. J. 48; *Mangalathammal v. Vetrappa Goundan*, 52 Ind. Cas. 813; (1919) M. W. N. 287, distinguished.

A plaintiff cannot by claiming in a subsequent suit a larger or a smaller share of the property in dispute in a former suit get rid of the effect of *res judicata*. *M NAINA MUHAMMAD ROWTHER v. ABDUL RAHMAN ROWTHER*, (1922) M. W. N. 845; 17 L. W. 188; 32 M. L. T. 82; (1923) A. I. R. (M.) 257; 46 M. 155

s. 11, Expl. IV—Res judicata—Test.

Where a defendant fails to take a plea which, if established, would result in the dismissal of the plaintiff's suit and the suit is decreed, the matter becomes *res judicata* under Explanation IV to section 11 of the Civil Procedure Code and cannot be re-agitated in a subsequent suit between the parties. *L NABI BAKSH v. MUHAMMAD SALAM ULLAH*, 5 L. L. J. 231

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—s. 11, Expl. IV—Suits for possession of property—Suit on ground of gift from father, dismissal of—Subsequent suit as orasa son, whether *res judicata*—Alternate claims, joinder of—Test.

A person claimed title to a plot of land as having been given to him by his father who, at the time of the suit, was dead. The suit was dismissed on the ground that the gift was invalid. He brought another suit in his capacity as the *orasa* son of his father but the Court held it to be *res judicata*.

Held, affirming the decision of the lower Court, that if the plaintiff had in the former suit put in the claim that he made in the subsequent suit as an alternative claim, there would have been no confusion and all questions relating to his title in the property would have been completely and finally determined.

The test whether a matter ought to have been made a ground of attack in a former suit is this: are the matters so dissimilar that their union might lead to confusion? *L B MAUNG BA THAW v. MA HMIT*, 11 L. B. R. 451; (1923) A. I. R. (R) 122; 2 Bur. L. J. 34

ss. 16 (d), 20 (c)—Suit to declare Will forgery and for cancellation—Place of suing—"Cause of action," meaning of.

Where a document affects the right of a person to any property, the cause of action for a suit by him to declare the document void arises not only where the document is executed, but also where the property itself is situated.

A suit by a reversioner for a declaration that a Will set up by the widow, alleged to have been executed by the last male owner, is a forgery and is void as against him and for obtaining its cancellation may be instituted in any of the Courts having jurisdiction over any of the properties mentioned in the Will, under section 20, clause (e) of the Civil Procedure Code.

In such a suit, the reversioner's allegation that he is entitled to succeed to the estate on the death of the widow if he survives her, and the threat to his rights involved in the setting up of a forged Will by the widow, constitute parts of his cause of action within the meaning of section 20 (e) of the Civil Procedure Code.

For the application of section 16 (d) of the Civil Procedure Code, it is not enough to say that the relief granted in the suit will indirectly affect the rights in immoveable property; the suit itself must be for the purpose of determining such rights.

The words "cause of action" mean the whole bundle of material facts which it is necessary for a plaintiff to allege and prove to obtain the relief he claims in the suit.

Per Venkatasubba Rao, J.—There is no difference between moveable and immoveable property in regard to the application of section 20 of the Civil Procedure Code. *M NITTALA ACHAYYA v. NITTALA YELLAMMA*, 43 M. L. J. 615; 16 L. W. 785; (1922) M. W. N. 834; (1923) A. I. R. (M) 109

s. 20—Contract for sale of goods—Suit for damages—Parties residing in different Provinces—Cause of action—Jurisdiction.

P. residing at Y. informed D. that he had certain goods to be sold at B. where D. carried on

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business, and inquired on what terms *D.* would be prepared to effect the sale; *D.* signified his willingness to sell the goods and intimidated his terms. *P.* despatched the goods to *D.* who sold them at *B. P.* instituted the present suit at *Y.* against *D.* for damages occasioned by *D.*'s conduct owing to which he failed to realise the proper value of the goods: the question was whether the suit was triable at *Y.*

Held, that the contract for the sale of the goods which was part of the cause of action, was formed at *Y.* and that the Court at *Y.* had jurisdiction to try the suit under section 20 of the Civil Procedure Code. *N CHAGAN LAL v. ABOOBAKAR ABDUR RAHMAN AND CO.*, (1923) A. I. R. (N) 167 465

—ss. 20, 120—S. 20, whether applicable to Original Side of High Court. See *LETTERS PATENT (MAD.)*, CL. 12 982

—s. 20 (c)—Place of suing—Suit to set aside collusive decree—Cause of action.

Plaintiff obtained a decree against *N.* and attached certain properties belonging to the latter at Amritsar. *J.* obtained another decree against *N.* at Ferozepore and got it transferred for execution to Amritsar where he applied for rateable distribution of the assets under plaintiff's decree. Plaintiff brought a suit at Amritsar for a declaration that *J.*'s decree was collusive and fraudulent:

Held, that the cause of action for the suit had arisen at Amritsar and the Amritsar Court, therefore, had jurisdiction to hear the suit. *L. BALLA MAL v. JAGAN NATH* 392

—s. 21, applicability of—Case remanded to one Court—Trial by another Court—Jurisdiction.

The jurisdiction of a Court trying a remanded case depends entirely on the order of the Appellate Court when remanding the case.

When the High Court remands a case for trial to a particular Court no other Court has jurisdiction to try it. Where a case is tried by a Court other than the one to which it is remanded, objection can be taken at any time to the jurisdiction of the Court, and the Court is bound to give effect to it. Section 21 of the Civil Procedure Code has no application to such a case. *M. URTHUMAN AMMAL v. NAINA MAHAMAD*, 44 M. L. J. 238; 17 L. W. 355; (1923) M. W. N. 194; 32 M. L. T. 276; (1923) A. I. R. (M) 351 314

—ss. 22, 23—Transfer of case—Balance of convenience.

Plaintiff sued defendants for an account of transactions carried on by the latter's Karachi firm as Commission Agents for the former for the purchase and sale of cloth at Karachi. The dealings all took place at Karachi, the persons from whom goods were bought and to whom goods were sold were at Karachi, and all the accounts relating to the dealings in question were at Karachi:

Held, that, in these circumstances, the balance of convenience was greatly in favour of the case being tried at Karachi and the case should, therefore, be transferred to Karachi. *L. BANARSI DAS v. KISHORI LAL*, (1923) A. I. R. (L.) 383 592

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—s. 35, O. XXI, rr. 35, 96—Symbolical possession—Formal possession—Actual possession.

There can be no symbolical possession as between the parties to a decree where the property is immovable property which is capable of immediate actual possession and comes within the scope of the directions in sub-r. (1) of r. 35 of O. XXI of the Civil Procedure Code. Symbolical possession is the term properly applied where the property is of a kind which can be taken possession in an execution only under sub-r. (2) of r. 35 and r. 36 and r. 96 of O. XXI of the Code—these being the cases when actual possession cannot be given.

Formal delivery of possession under section 35 (1) of the Code is actual delivery of possession, it is not delivery of symbolical possession. *N. PANDURANG v. SAMPAT*, (1923) A. I. R. (N.) 237 318

—s. 47—Auction-purchaser, whether representative of any party to suit—Court sale, objection to—Real dispute between judgment-debtor and decree-holder—Auction-purchaser interested—Suit to attack sale, maintainability of.

An auction-purchaser is a stranger to the proceeding and is not a representative of any of the parties to the suit so that any question arising between him and the parties to the suit or their representatives can be determined by a separate suit. But where a question raised by a judgment-debtor as to the legality of a Court sale is virtually one between the parties to the suit, i.e., between the decree-holder and the judgment-debtor and the auction-purchaser is interested in the decision and result of that question, the judgment-debtor ought not to be allowed to attack the sale in a suit. *B. BAI MANI v. RANCHODIAL AMRITLAL*, 25 Bom. L. R. 147; (1923) A. I. R. (B.) 214 266

—s. 47, O. XXI, rr. 2 (3), 99—Execution of decree—Satisfaction out of Court—Satisfaction not certified—Suit to restrain decree-holder from executing decree, maintainability of—Execution, if can be stayed.

When a decree is satisfied by an agreement out of Court and such satisfaction is not verified to the Court, a subsequent suit on the agreement is not maintainable having regard to section 47 and O. XXI, r. 2 (3) of the Civil Procedure Code, if the object of the suit is to restrain the decree-holder from executing his decree in contravention of the agreement. Whatever other relief may be granted by the Court in such a suit, it cannot restrain the decree holder from executing the decree. The Court also cannot stay execution of the decree under O. XXI, r. 29 of the Civil Procedure Code, for a period during which the suit may be pending.

The provisions of O. XXI, r. 29 of the Civil Procedure Code, apply to cases not coming under O. XXI, r. 2 (3) read with section 47 of the Code. *C. REILY v. GOLAP KHAN*, 27 C. W. N. 575; (1923) A. I. R. (C.) 645 38

—s. 47, O. XXI, r. 66—Execution of decree—Sale proclamation—Order directing sale free from incumbrance, nature of—Appeal.

Certain incumbrances were notified in a sale proclamation under O. XXI, r. 66 of the Civil

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Procedure Code at the instance of the decree-holder. The judgment-debtor subsequently made an application objecting that the property was not liable to be sold subject to those incumbrances. The Executing Court gave effect to the objection:

Held, that the order of the Executing Court was made under section 47 of the Civil Procedure Code and not under r. 66 of O. XXI of the Code and was appealable. *PAT GRANT v. SURAJ MAL*, (1923) Pat. 76; 1 P. L. R. 53; (1923) A. I. R. (Pat.) 134 860

s. 48 (1) (b), O. XX, r. 11, O. XXIII, r. 4—

Execution of decree, application of—Compromise—Decree made payable by instalments—Dismissal of execution application—Dismissal order, whether one "directing payment of money"—Limitation, whether extended.

The provisions contained in O. XXIII of the Civil Procedure Code are, by virtue of r. 4 of the Order, inapplicable to any proceeding in execution of a decree or order.

To render the provision contained in clause (b) of sub-section (1) of section 48 of the Civil Procedure Code applicable to a case there must be an order directing the payment of money on a certain date. Such an order can only be passed under O. XX, r. 11 of the Civil Procedure Code.

Before any order can be passed under O. XX, r. 11 of the Civil Procedure Code, the application on which it is made must be within time.

In execution of a decree the parties filed a compromise whereby the decretal amount was to be paid by instalments and on default in payment of a certain number of instalments the decree-holder was to be at liberty to execute the decree for the full decretal amount. The Executing Court thereupon dismissed the execution proceedings, but did not embody the terms of the compromise in its order:

Held, that the order made by the Court did not amount to a subsequent order directing payment of money at a certain date within the meaning of section 48 (1) (b) of the Civil Procedure Code, so as to extend the period laid down by the section after which a decree cannot be executed. *L. BANARSI DAS v. RAMZAN* 477

ss. 64, 115, O. XXI, r. 2—*Execution of decree—Attachment—Transfer with consent of decree-holder, effect of—Transferee of decree, whether bound—Refusal to exercise power—Revision.*

Section 64 of the Civil Procedure Code is intended for the benefit of the decree-holder and it is open to him to waive the benefit. There is no public policy making it incumbent on a Court to avoid an alienation pending an attachment.

An attaching decree-holder who, for valuable consideration, agrees with a purchaser of the attached property to withdraw the attachment is not entitled to go back on his agreement and a transferee from him with notice of the agreement is not entitled to apply for execution of the decree by attachment of the same property.

O. XXI, r. 2 of the Civil Procedure Code does not bar the purchaser in such a case from setting up the agreement as against the decree-holder's claim for execution.

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The transferee of a decree is not in a better position than the decree-holder himself and can put forward only such rights as the decree-holder himself had at the time of transfer and is bound by any agreement made by his transferor of which he had notice at the time of transfer.

P. S. Krishna Aiyar v. Saravimulhu Pillai, 50 Ind. Cas. 584; 36 M. L. J. 376; 9 J. W. 443; 42 M. 338; (1919) M. W. N. 248, distinguished.

Where a Court under an erroneous view of the law declines to give effect to its own findings and to release certain property from attachment it refuses to exercise a jurisdiction vested in it by law and its order is subject to revision under section 115 of the Civil Procedure Code. *M. NANDIGAM GANGAYYA v. MADUPALLI VENKATARAMAYYA*, 16 L. W. 988; 31 M. L. T. 423; 44 M. L. J. 80; (1923) M. W. N. 51; (1923) A. I. R. (M.) 230 839

s. 64, O. XXI, rr. 46, 51—*Negotiable*

Instruments Act (XXVI of 1881), ss. 9, 78—Attachment of pro-note—Prohibitory order, effect of—Endorsement in favour of one of several decree-holders—Holder in due course—Pro-note, whether extinguishes debt.

The proper method of attaching a promissory-note under O. XXI, r. 51 of the Civil Procedure Code is by actual seizure and by bringing it into Court and a mere prohibitory order issued to the judgment-debtor and the maker of the note forbidding the latter to pay and the former to receive the amount due does not create a valid attachment of the pro-note.

A number of decree-holders in execution of their respective decrees attached a promissory-note executed in favour of the judgment-debtor, but the attachment in every case was effected not by actual seizure but by mere prohibitory orders issued to the judgment-debtor and the maker of the note under O. XXI, r. 46 of the Civil Procedure Code. One of the decree-holders with knowledge of the prohibitory orders obtained an endorsement of the pro-note in his own favour from the judgment-debtor:

Held, (1) that though the attachments were invalid as not having been made in the manner prescribed by law, and section 64 of the Civil Procedure Code was not, therefore, applicable, the title of the judgment-debtor to the pro-note was defective on account of the prohibitory orders which imposed a disability on him with respect to the pro-note and the endorsee-decree-holder who took the note with notice of the defect was neither a holder in due course under section 9 of the Negotiable Instruments Act nor even a holder within the meaning of section 78 of the Act;

(2) that the conduct of the decree-holder was fraudulent, being designed to secure himself and to defeat the other creditors who had obtained prohibitory orders and amounted to an abuse of the process of the Court.

The execution of a promissory-note in satisfaction of a debt does not necessarily mean that the original debt is extinguished, the note may operate as a substitute for the debt and the original debt kept in abeyance pending the discharge of the pro-note, but it is also open to the parties to treat

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the original debt as discharged and substitute therefor the obligation under the pro-note. The question is one of fact and depends on the intention of the parties in each case. *M. SUBRAMANTIA IYER v. CHOKALINGA MUDALIAR*, 44 M. L. J. 206; 17 L. W. 314; (1923) M. W. N. 91; (1923) A. I. R. (M.) 317; 46 M. 415 189

—s. 73, O. XXXVIII, r. 5—"Assets held by the Court," meaning of—Rateable distribution—Attachment before judgment, effect of.

•The expression "assets held by the Court" in section 73 of the Civil Procedure Code does not include all money lying in Court to the credit of the judgment-debtor but only the assets levied in execution or paid into Court in satisfaction of the decree under execution and there is no receipt of assets within the meaning of the section until the Court holding the money comes to the conclusion that no objection exists and orders the money to be transferred to the credit of the first attaching creditor's suit; the decree in which it is engaged in executing.

Visvanadham Chetti v. Arunachalam Chetti, 60 Ind. Cas. 302; 44 M. 100; 39 M. L. J. 688; 12 L. W. 744; 28 M. L. T. 412; (1921) M. W. N. 14 (F. B.), relied on.

Umma Venkatratnam & Co. v. Melhewala Adamji Usman & Co., 50 Ind. Cas. 925; 42 M. 692; 26 M. L. T. 822; (1919) M. W. N. 623, overruled.

Bisheshar Das v. Ambika Pershad, 29 Ind. Cas. 622; 37 A. 578; 13 A. L. J. 732, dissented from.

Where on attachment before judgment in a suit certain moveables of the judgment-debtor were sold and the proceeds deposited to the credit of the suit and before any decree was passed, another creditor got a decree against the judgment-debtor in the same Court and in execution thereof applied in the first suit for payment of his decree amount but before any order was passed thereon, a third creditor got a decree against the same judgment-debtor and applied for payment and then the first creditor obtained a decree and applied for payment:

Held, that the money in Court had never been levied in execution or transferred to the credit of any other suit than that of the first attaching creditor and did not become "assets held by the Court" under section 73 until an order was made on application by him for execution of his decree; and that all the creditors who had applied were, accordingly, entitled to rateable distribution.

Per Schawabs, C. J.—*Quaere*.—Whether property which has been attached before judgment can be said to belong to the judgment-debtor within the meaning of section 60, Civil Procedure Code, and whether it can be taken in execution, so long as the custody Court holds it pending the decision of the suit before it, so as to defeat the right of the attaching creditor as against a subsequent decree-holder.

Per Wallace, J.—An attachment confers no sort of lien or charge on the attached property and is not effective to create any sort of legal rights in the attaching creditor to have the property earmarked for the satisfaction of any decree he has obtained or may obtain, and it is in no sense

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to be regarded as the inception of execution on behalf of the attachor. Much less does it enure to create any such right for the benefit of other creditors seeking for decrees or for execution of decrees or for rateable distribution under section 73 of the Code. It can then be used only for one purpose, namely, to defeat and render void any private alienation made during its continuance.

Annamalai Chettiar v. Palamalai Pillai, 43 Ind. Cas. 539; 41 M. 265; 22 M. L. T. 461; 33 M. L. J. 707; (1917) M. W. N. 882; 7 L. W. 208 (F. B.) and *Mina Kumari Bibi v. Bijoy Singh Dudhuria*, 40 Ind. Cas. 242; 44 C. 662; 1 P. L. W. 425; 5 L. W. 711; 32 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 424; (1917) M. W. N. 473; 44 I. A. 72 (P. C.), relied on.

In the ordinary case of assets realised by Court sale under a decree, the assets are held when the whole of the sale-proceeds are paid into Court and it is only when the assets are actually realised that any question of the title of anyone to rateable distribution can arise.

But when the sale-proceeds are actually in Court prior to decree, they become assets only (1) when the debtor becomes a judgment-debtor, and (2) execution is taken out against him either by a judgment-creditor entitled by decree and by his position as the plaintiff in the suit to the credit of which the money lies to put in a valid execution petition; or by a judgment-creditor entitled by an order of Court transferring the fund to the credit of his suit to put in a valid execution application. It is only then at the earliest that they can become assets held and received in execution. But the actual point of time when they do become so is when the Court says "I, as attaching Court, take this property of the judgment-debtor lying in this Court as custody Court and make it property available for distribution in satisfaction of decrees against him." *M. NACHIAPPACHETTIAR v. SUBBIER*, 44 M. L. J. 413; 17 L. W. 390; 32 M. L. T. 198; 46 M. 506; (1923) A. I. R. (M.) 505 820

—s. 80, scope of.

It is perfectly open to a Pleader, on instructions from his client to send a Magistrate notice under section 80 of the Civil Procedure Code, but whatever his instructions, it is his duty as a Pleader to send the notice strictly in accordance with the terms of that section. *B. GOVERNMENT PLEADER v. G. K. TATKE*, 25 Bom. L. R. 264; (1923) A. I. R. (B.) 234; 24 Cr. L. J. 353. 858

—s. 92, suit under, nature of—Dispute, whether can be referred to arbitration.

Matters in dispute between the parties to a litigation, which affect private rights can only be referred to arbitration.

Mahadeo Prasad v. Bindeshri Prasad, 30 A. 137; 5 A. L. J. 101; A. W. N. (1908) 51; 3 M. L. T. 208 and *Mohammad Ibrahim Khan v. Ahmad Sa'id Khan*, 6 Ind. Cas. 219; 32 A. 503; 7 A. L. J. 761, followed.

A suit under section 92 of the Civil Procedure Code is not a suit for the determination of private rights and matters in difference in such a suit cannot be referred to arbitration.

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Where the law has given jurisdiction to determine a matter to specific Tribunals only, determination of the matter by the other Tribunals, for instance, arbitrators, a Tribunal chosen by consent of parties, is excluded. *N GANORA v. NARAYEN*, (1923) A. I. R. (N.) 112

----- s. 99, applicability of. See PARTIES 68

----- s. 104 (2), O. XXI, rr. 90, 92, O. XLIII, r. 1 (j)—*Execution of decree—Sale—Application to set aside sale—Appeal, second, whether lies.*

An application to set aside an execution sale on the ground of material irregularity and fraud falls under O. XXI, r. 90 of the Civil Procedure Code and an order made thereon is appealable under O. XLIII, r. 1 (j) of the Code. Under section 104 (2) of the Code no second appeal is competent from an order passed in appeal under r. 1 (j) of O. XLIII. *L JAGAN NATH v. PIR MOHAMMED* (1923) A. I. R. (L.) 287

----- s. 105, O. IX, r. 13—*Order setting aside ex parte decree whether can be questioned in appeal.*

An order setting aside an *ex parte* decree cannot be questioned in appeal.

An error, made by a Court in setting aside an *ex parte* decree is not an error affecting the decision of a case within the meaning of section 105 of the Civil Procedure Code, and cannot, therefore, be set forth as a ground of objection in the memorandum of appeal from any decree passed in the case. *L SUNDAR SINGH v. NIGAHYA*, (1923) A. I. R. (L.) 425

----- s. 109 (c), scope of—*Issue of general importance—Leave to appeal—“Private importance,” meaning of—Value of subject-matter, determination of.*

Section 109 (c), Civil Procedure Code, contemplates a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance.

Banarsi Prasad v. Kashi Krishna Narain, 23 A. 227 at p. 231; 3 Bom. L. R. 154; 5 C. W. N. 193; 11 M. L. J. 56; 28 I. A. 111; 8 Sar. P. C. J. 447 (P. C.), *Hirjibhai v. Jamshedji*, 21 Ind. Cas. 783; 15 Bom. L. R. 1021 at p. 1022 and *Chinna v. Marhanda Kolhan*, (1921) M. W. N. 353, followed.

Where in a case the point in issue appears to be one of general importance, but not of sufficient importance to the proposed respondent to warrant putting him to the expense of an appeal to the Privy Council, leave to appeal should be refused.

Per *Coutts-Trotter, J.*—The expression “private importance” means, private importance to both parties to the litigation, and not only to one of them.

Per *Kumaraswami Sastri, J.*—For the purpose of determining the amount or value of the subject-matter of the suit and in the appeal, the question is not what the indirect consequences of the decree may be to the petitioner but what the value of the subject-matter is as between the parties when an application is made for leave on the ground

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that the pecuniary value is over the sum of Rs. 10,000.

In granting leave to appeal to the Privy Council, the High Courts in India have no power to impose a condition upon the appellant that, whatever may be the result of the appeal, he should pay the costs of the other party. The Privy Council alone have such a power. *M RAJESWARA SETHUPATHI v. TIRUNEL AKANTAM*, 44 M. L. J. 217; 32 M. L. T. 126; (1923) A. I. R. (M.) 232; (1923) M. W. N. 415; 17 L. W. 775

----- ss. 109 (c), 110—*Leave to appeal to Privy Council—Forfeiture on alienation of lands held on Karamkari and Adimayalana tenures, whether substantial question of law—Value less than Rs. 10,000—Leave, when can be granted—Custom establishment of, whether question of law.*

The question whether the permanent tenures known as *Karamkari* and *Adimayalana* in Malabar have the incident of forfeiture on alienation attached to them by custom or not is one of general interest in Malabar and is a substantial question of law within the meaning of section 110 of the Civil Procedure Code.

Where the above question arose in a number of suits but in two of them, the subject-matter was less than Rs. 10,000 in value, and all the suits could not be consolidated for purposes of pecuniary valuation under O. XLIV, r. 4 of the Civil Procedure Code on account of the suits having been determined in the Court of first instance by separate judgments, leave to appeal to His Majesty in Council was granted even in those suits in which the value of the subject-matter was less than Rs. 10,000 under section 109 (c) of the Civil Procedure Code, since there was a substantial question of law of general interest in the district concerned involved in the suits.

The question whether a custom has been established or not is a question of law though it has to be inferred from the facts proved. *M ZEMORIN RAJA AVERGAL OF CALCUT ESTATE v. KULAPURA VEETIL KANAN NAIR*, 17 L. W. 445; (1923) A. I. R. (M.) 443

----- s. 110—*Amount and nature of suit—Interest decreed, whether to be considered—Valuation of property—Date of valuation.*

In determining whether or not a case fulfils the requirements of section 110 of the Civil Procedure Code, as regards amount and nature, interest awarded on the amount decreed should be taken into consideration.

Subramania Aiyar v. Sellammal, 31 Ind. Cas. 296; 39 M. 843; 2 L. W. 1057; 18 M. L. T. 4501 (1915) M. W. N. 941; 30 M. L. J. 317, distinguished.

The point of time to be considered, as to the value of the property under the second paragraph of section 110 of the Civil Procedure Code, is the date of the judgment under appeal to the Privy Council. *N M AGAN MAI v. DARBARILAL CHOWDHURY*, (1923) A. I. R. (N.) 239

----- s. 110—*Appeal to Privy Council—Value of subject-matter of suit.*

Where the final order involves directly or indirectly some claim question relating to, or

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respecting property worth over Rs. 10,000, a certificate for leave to appeal to the Privy Council ought to be granted even though the value of the appellant's interest may be very much less than that amount. **B APPAYA PADADAYA GURU v. LAKHAM-GOWDA BASAVANPRABHU**, 25 Bom. L. R. 771 (1923) A. I. R. (B.) 176 127

s. 115—Burden of proof, wrong allocation of—Revision.

The mere wrong allocation of the burden of proof is not ordinarily a ground for interference in revision with the order of an Appellate Court.

Where, however, an Appellate Court shifts, in appeal, the burden of proof, without giving the party on whom it lays the burden an opportunity of producing additional evidence it commits an error of procedure and its order is open to revision. **PAT RAMPARICHAN SINGH v. BIRANJI PRASAD SINGH**, 4 P. L. T. 245; (1923) A. I. R. (Pat.) 295; (1923) Pat. 269 157

s. 115—Court assuming jurisdiction under wrong view of law—Revision.

Where a Court assumes jurisdiction on a wrong view of the law, its order is liable to be set aside by the High Court in revision under section 115 of the Civil Procedure Code. **M KRISHNAJI REDDIAR v. MUTHUVEERA REDDIAR**, 44 M. L. J. 344; (1923) M. W. M. 199; 18 L. W. 299; (1923) A. I. R. (M.) 490 449

s. 115—Decree contrary to law—Revision.

Where the decree of a Subordinate Court is obviously contrary to law, the High Court will interfere in revision. **M KOSALAI RAMA PILLAI v. PULOSTHAM PILLAI**, 17 L. W. 321; (1923) M. W. N. 86; (1923) A. I. R. (M) 330 774

s. 115—Government of India Act, 1915 (5 & 6 Geo. V. C. 61), s. 107—Interlocutory order—Refusal to exercise jurisdiction—Revision—Superintendence.

The general rule is that, except on proof of irreparable injury, the High Court will not interfere in revision when there is another remedy open to the applicant. The same rule applies to interlocutory orders.

There is no rule, however, that the High Court is not justified in interfering with an order even where there has been a refusal to exercise jurisdiction.

Chandi Roy v. Kirpal Roy 10 Ind. Cas. 308; 15 C. W. N. 682, distinguished.

Where a Court refused to strike an issue that clearly arose out of the pleadings of the parties:

Held, that the High Court had jurisdiction in the exercise of its powers under section 107 of the Government of India Act, if not under section 115 of the Civil Procedure Code, to direct the Trial Court to frame the issue. **PAT SHEO PRASAD SINGH v. SHUKHU MAHTO**, 4 P. L. T. 401 143

s. 115—Oudh Rent Act (XXII of 1886), s. 119, suit under—Assistant Collector, whether subordinate to High Court.

The Court of an Assistant Collector, when exercising jurisdiction under the Oudh Rent Act, over the class of cases in which the course of appeal lies to the High Court, is a Court subordinate to the High Court, within the meaning of section

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115 of the Civil Procedure Code. **O CHAUHARJA BAKSHSH v. KALAK PANDE**, 9 O. L. J. 543; (1923) A. I. R. (O.) 18 394

ss. 115, 152 O. XX, r. 3—Judgment dictated in open Court—Transcript, whether can be revised—Irregularity—Revision.

A Judge who pronounces his judgment by dictation to a shorthand-writer in open Court can revise the transcript only so far as to correct clerical or arithmetical mistakes arising from any accidental slip or omission. He cannot alter the effective part of the judgment or substitute a wholly new decision for the one which was originally pronounced.

Where a Judge corrects the shorthand transcript of his judgment so as to entirely change the effect of what he said in open Court, there is such material irregularity as will entitle the High Court to interfere in revision under section 115 of the Civil Procedure Code, notwithstanding the fact that the order relates to claim proceedings and another remedy is open to the aggrieved party in the form of a suit under O. XXI, r. 63 of the Code. **M HARI KRISHNA PILLAI v. ARUR PANDITHAR**, (1923) M. W. N. 354; 18 L. W. 105 688

s. 115, O. XXII, rr. 4, 9—Application to bring legal representatives on record—Delay—Sufficient cause—Petition to excuse delay, refusal of—Revision.

In an application to excuse delay in bringing on record the legal representatives of a deceased defendant or respondent, the essential point to consider is whether the petitioner's ignorance of the death of the defendant or respondent was justified and afforded sufficient cause for the belated application.

Where a Court in considering such an application comes to a conclusion on no evidence and even then omits to consider the one point which the law directs it to decide, namely, whether there was sufficient cause for delay in representation, it acts with material irregularity in the exercise of its jurisdiction and its order is liable to be set aside in revision if the aggrieved party has been seriously prejudiced thereby. **M GOPALASWAMI IYER v. RAMCHANDRA IYER**, (1923) M. W. N. 159; 44 M. L. J. 409; 32 M. L. T. 293; (1923) A. I. R. (M.) 503 137

s. 115, O. XXIII, r. 1—Withdrawal of suit—Costs of defendant—Discretion of Court—Revision.

Where a plaintiff is allowed to withdraw his suit, the ordinary rule is that costs follow the event and if a plaintiff finds he is unable to proceed with his suit and asks for leave to withdraw it, the opposite party is entitled to the costs which he has been put to in defending the suit.

The discretion of the Court as to the award of costs, so long as it is judicially exercised, should not be bound down by any artificial rules. A great deal must depend upon the facts of each case.

Although in a particular case of a withdrawal of a suit it may be a sound exercise of discretion to refuse costs where the suit is based on a state of law which has afterwards

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been altered, the most important thing to consider in all such cases is on which of the parties rests the responsibility for the litigation. Where the plaintiff has been in the wrong throughout, the defendant should not be deprived of his costs.

Ramaswami Naicken v. Venkateswami Naicken, 53 Ind. Cas. 7; 43 M. 61; 37 M. L. J. 271; 26 M. L. T. 219; 10 L. W. 326; (1919) M. W. N. 792, explained.

Where, in the matter of costs, there is an omission to consider the necessary circumstances, there is not a sound exercise of discretion, and the High Court is entitled to interfere in revision. *B KHMCHAND NAROTAMDAS v. SOBHAGCHAND*, 25 Bom. L. R. 242; (1923) A. I. R. (B.) 206; 47 B. 559 **324**

— **s. 115, O. XXIII, r. 1 (2)**—*Withdrawal of suit—Revision.*

Where, in granting an application for the withdrawal of a suit with permission to bring a fresh suit, the Court fails to consider whether the grounds alleged in the application came within r. 1 of O. XXIII of the Civil Procedure Code, the High Court will interfere in revision. *O PULAI v. RANA UMANATH SINGH*, 9 O. & A. L. R. **1084**

— **s. 141, O. IX, r. 2**—*Suit dismissed in default—Application for restoration dismissed for default in payment of process-fee—Appeal, whether lies.*

P's suit was dismissed in default of prosecution. He applied to set aside the order of dismissal, but on his failure to pay the process-fees in time, the application was dismissed for default:

Held, that the dismissal of the application was under O. IX, r. 2 of the Civil Procedure Code, and that against such dismissal an appeal did not lie, irrespective of whether or not section 141 of the Civil Procedure Code applied to the proceedings on the application for restoration. *N HIRASA v. SHEOKUWAR* **547**

— **s. 144—Limitation Act (IX of 1908), Sch. I, Arts. 181 182—Restoration, application for, nature of—Limitation—Mortgage by decree-holder—Sale in execution of mortgage-decree—Auction-purchaser, restoration application against, maintainability of.**

Although an application for restoration under section 144 of the Civil Procedure Code is not included in O. XXI of the Code, which lays down the rules of procedure in execution cases, in substance an application asking for restitution in consequence of a decree having been set aside is just as much an application in execution of that decree as any other application which seeks to have the actual declarations in the decree enforced.

Somasundaram Pillai v. Chokkalingam Pillai, 38 Ind. Cas. 806; 40 M. 780; 5 L. W. 267, relied on.

The result of setting aside a decree in favour of one party is to give the other the right to be restored to the same position as he was in before the decree was passed and to set aside any advantage that the decree-holder might have obtained by executing the decree.

An application for restoration under section 144 of the Civil Procedure Code, is, therefore,

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governed by Art. 182 of Schedule I to the Limitation Act.

Restitution can be enforced not only as against the decree-holder whose decree has been set aside but also as against any transferee from him.

A decree-holder obtained possession of the property in dispute in execution. He then executed a mortgage of the property. The mortgagee brought the property to sale in execution of mortgage-decree obtained by him on the mortgage and purchased it himself. The original decree was subsequently set aside, and the judgment-debtor in the original suit applied for restitution:

Held, that the mortgagee auction-purchaser was in no better position than his mortgagor and that the application for restoration was maintainable as against him. *PAT BASANTA KUMARI DASI v. BALMAKUND MARWARI*, (1923) Pat 1; 2 Pat. 277; (1923) A. I. R. (Pat) 371; 1 P. L. R. 338 **912**

— **s. 151—Appeal returned as not properly stamped—Certificate of renewal or refund of stamp—Inherent power of High Court—Practice.**

The High Court has inherent power under section 151 of the Civil Procedure Code to grant a certificate for renewal or refund of the value of stamps used on a memorandum of appeal which has been returned to the appellant on the ground that it is not properly stamped. *PAT BHUNESHWARI PARSAD v. KISHEN DAYAL*, 4 P. L. T. 504 **405**

— **s. 151, O. IX, r. 9—Dismissal for default—Inherent power to restore.**

A Court has inherent power to restore a suit dismissed for default.

Where a suit has been dismissed in the absence of both parties there is no prejudice to the opposite party if it is restored, and the Court ought to exercise its inherent power in such a case especially if the claim is a substantial claim and would become barred by time if the suit is not restored. *PAT RAM NARAIN v. RAMDHAN SINGH*, 4 P. L. T. 647 **668**

— **ss. 151, 152, O. VII, r. 11 (c) O. IX, r. 9, O. XX, r. 8, O. XLVII, r. 1—Failure of plaintiff to pay deficit Court-fees—Rejection of plaint—Review—Restoration—Inherent power of Court to set aside order.**

An order rejecting a plaint under O. VII, r. 11 (c) of the Civil Procedure Code operates as a decree, and once the order is perfected there is absolutely no power in the Court under its inherent jurisdiction either to alter or to add to that order save as provided by section 152 of the Code or on review. *P. RAMESHWARDHARI SINGH v. SADHU SARAN SINGH*, 4 P. L. T. 261; 2 Pat 504; (1923) A. I. R. (Pat) 354 **629**

— **s. 151, O. XXI, r. 92—Execution-sale—Suppression of material facts—Inherent power to set aside sale.**

A Court has an inherent power to refuse to confirm a sale made at Court-auction, if it is satisfied that it has been misled either in giving leave to bid or in fixing the reserve price. This is only an instance of the inherent power possessed by all Courts to prevent an abuse of the process of the Court, but the Court will not use that inherent

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power unless it has had all the facts fully before it and is satisfied that it has been misled.

In order to prove that it has been misled, it is necessary to show either actual mis-statements to the Court or non-disclosure to the Court of relevant facts unknown to the Court and which there was a duty to bring before the Court, and if a person professes to give information on any particular subject with a view to guide its discretion and obtain its approval, he is bound to lay before the Court all the material information he possesses on that particular subject.

Mahomed Miri Ramnagar v. Savasi Vijaya Raghunatha Gopalar, 23 A. 227; 2 Bom. L. R. 640; 4 C. W. N. 228; 27 I. A. 17; 10 M. L. J. 1; 7 Sar. P. C. J. 66; 8 Ind. Dec. (N. S.) 561 (P. C.), *Coaks v. Boswell*, (1886) 11 App. Cas. 232; 55 L. J. Ch. 61; 55 L. T. 32, followed.

Where on an application to fix the reserve price, the decree-holder suppressed the fact that on a previous occasion the Court itself had fixed a very high price as the reserve price and had refused to accept a high bid:

Held, that there had been a suppression of a material fact and that the Court was entitled to refuse to confirm the Court sale when the fact was subsequently brought to its knowledge. The fact that notice is served on all the parties at the time of the application does not relieve the decree-holder from his obligation to set out the relevant facts nor reduce the liability on him when he does state the facts, to lay before the Court all the material information he possesses about these facts.

Per Wallace, J.—Order XXI, r. 92 of the Civil Procedure Code is no bar to the Court interfering to cancel an auction-sale, even though no party has applied for cancellation, when the Court discovers in the course of the proceedings, that the decree-holder auction-purchaser deliberately misled it, and profited thereby to the disadvantage of the judgment-debtor or the judgment-debtor's creditors. *M. RAGHAVACHARIAR v. MURUGESA MUDALI*, (1923) M. W. N. 323; 32 M. L. T. 285; 44 M. L. J. 586; 17 L. W. 752; 46 M. J. 83; (1923) A. I. R. (M.) 635.

—s. 152—Property misdescribed in plaint—Court, power of, to correct.

Where through an accidental mistake the property in a suit is misdescribed in the plaint, and the misdescription is carried forward in the decree and *ilakhalnamaz*, the Court has jurisdiction under section 152, Civil Procedure Code, to correct the mistake. *A. SURJAN SINGH v. WAZIR SINGH*, 21 A. L. J. 329; (1923) A. I. R. (A.) 349.

—O. I. rr. 8, 10—Representative suit—Fresh plaintiffs' addition of, after decree.

It may be unusual to bring fresh plaintiffs on the record after a decree has been passed but there is authority for doing so in O. I. r. 8 of the Civil Procedure Code.

In a representative suit, all members of the class on whose behalf the suit is brought are in effect parties to the suit and O. I. r. 8 of the Civil Procedure Code expressly permits any person on whose behalf a representative suit is instituted to apply to the Court to be brought

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on the record, and the words of the rule are not limited as they are by O. I. r. 10 by the purpose being expressed as that of adjudication on the questions arising in the suit.

Where certain decree-holders who have obtained a decree in a representative capacity neglect to enforce it for a number of years, the Court can allow other persons interested to be added as party plaintiffs and to take out execution of the decree. *M. SWAMINATHA MUDALIAR v. KUMARA SWAMI CHETTIAR*, 44 M. L. J. 282; (1923) M. W. N. 239; 17 L. W. 422; 32 M. L. T. 212; (1923) A. I. R. (M.) 472.

—O. I. r. 9—Easement, declaration against—Some of several servient owners, whether can sue—Custom—Profit a prendre in gross, acquisition of—Right to take earth from waste land, whether reasonable.

Where some of several servient owners sue for a declaration that the defendants are not entitled to exercise a certain right the suit is not liable to be dismissed for non-joinder of the other servient owners and there is nothing to prevent the Court from adjudicating on the rights of the parties actually before it.

Madon Mohan Chattopadhyaya v. Akshoy Kumar Barui, 5 Ind. Cas. 23; 14 C. W. N. 15, relied upon.

There is nothing to prevent the acquisition by a fluctuating body, for instance, the residents of a particular village, of a *profit a prendre* in gross, by custom, provided the custom is not unreasonable and does not operate to destroy the subject-matter of the right.

Bhola Nath Nundi v. Midniabore Zemindary Co., 31 C. 503; 31 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 152; 8 Sar. P. C. J. 611 (P. C.) and *Maharaja Bhanadur Singh v. Gandaury Singh*, 39 Ind. C. s. 838; 2 P. L. J. 323; 2 P. L. W. 282, relied upon.

A custom by which earth is taken from a piece of waste land to repair houses in a village after inundations is not unreasonable. On the contrary, it is an eminently reasonable custom that the people of the village should take earth from a ditch which serves no other purpose in order to repair their houses. *Pat. BIKOO MAHTON v. NARAYAN SAHU*.

—O. I. r. 9—Non-joinder—Land entered as ghair mazrui am—Suit for title—General public, whether necessary parties—Batwara khasra, evidential value of.

Where the plaintiff claims that the land entered in the Survey *khattian* as *ghair mazrui am* appertains to his ancestral holding, it is not necessary to make the general public parties to the suit, as the decree will be good as against the parties to the suit and will not affect the general public.

A *khasra* prepared in an old *batwara* proceeding is admissible in evidence. It is evidence for what it may be worth, and where an entry in the *khasra* is in favour of the tenants, it is very good evidence and evidence on which the Court is entitled to rely. *Pat. TRILOKE PRASAD SINGH v. UMANAND LAL*, (1922) A. I. R. (Pat.) 147.

—O. I. r. 10—Suit against Hindu widow to recover properties on footing of adoption—Reversioners, whether can be made parties.

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In a suit by a plaintiff to recover certain properties against a Hindu widow on the footing of an adoption made by her, the reversioners of the latter's husband can be properly added as party defendants under O. I, r. 10 (2) of the Code of Civil Procedure.

Norris v. Beazley, (1877) 2 C. P. D. 80; 4 L. J. C. P. 169; 35 L. T. 846; 25 W. R. 320. *Sitaramaya v. Ramappaya*; 39 Ind. Cas. 160; 5 L. W. 207, distinguished.

The mere fact that the reversioners had failed to sue within six years from the date of the alleged adoption would not debar them from the benefit of an adjudication in proceedings, such as the above otherwise legitimately instituted. *MAJARAATNAM AIYAR v. KALASVASUNDARAM AIYAR*, 44 M. L. J. 320; 17 L. W. 329; (1923) A. I. R. (M) 521.

O. I, r. 10—*Suit concluded by preliminary decree for sale—Transferee prior to suit, addition of—Court, jurisdiction of.*

A Court cannot direct a transferee prior to the suit to be made a party after the suit has been concluded by the passing of a preliminary decree for sale and allow a suit to be thus re-opened without the decree being set aside in any of the modes provided by law.

Raghunath v. Sheolol, 39 Ind. Cas. 849; 13 N. L. R. 69, followed.

Jotindra Mohan Tagore v. Bejoy Chand, 32 C. 483; *Lakshmichand Rewachand v. Kachubai Gulachand*, 11 Ind. Cas. 559; 35 B. 393; 13 Bom. L. R. 517. *Keith v. Butcher*, (1884) 25 Ch D. 750; 53 L. J. Ch. 640; 50 T. 2 3; 32 W. R. 378 and *Debendra Narayan Singh v. Narendra Narayan Singh*; 54 C. W. N. 636; 24 C. W. N. 110; 30 C. L. J. 417, distinguished.

The law gives a wide discretion to add as a party to a proceeding a person interested in it so as to affect his prospective rights but not with retrospective effect. *O BENI MADHO v. YUSUF HUSAIN KHAN*, 10 O. L. J. 232; 9 O. & A. L. R. 82.

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O. II, r. 2.

If a plaintiff is not successful in his suit for the specific performance of a contract for sale, he is not precluded under O. II, r. 2 of the Civil Procedure Code from bringing a suit to recover the earnest-money paid. The claim for the earnest-money is based upon a different cause of action from that of the claim for specific relief. *A MUNNI BABU v. KOERKAMTA SINGH*, 21 A. L. J. 265; 9 O. and A. L. R. 429; (1923) A. I. R. (A) 321; 45 A. 378.

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O. II, r. 2—*Mortgage—Principal and interest payable separately—Suit for interest alone, whether bars subsequent claim for realisation.*

If a mortgage provides for an independent obligation to pay the principal and the interest, in a suit brought to obtain a personal judgment in respect of the interest alone, O. II, r. 2 of the Civil Procedure Code would not prevent a subsequent claim for payment of the principal, as in such a case the cause of action is distinct. The matter is, however, different if the non-payment of the interest causes the principal money to be-

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come due, as in that case the cause of action—the non-payment of interest—gives rise to two forms of relief which the Code of Civil Procedure provides, shall not be split. *P C KISHEN NARAIN v. PAL MAL*, (1922) A. I. R. P. C. 412; 44 M. L. J. 123; 25 Bom. L. R. 220; 32 M. L. T. 41; 4 L. 32; 27 C. W. N. 872; 18 L. W. 341; 50 C. 126; 6 P. W. R. 1923.

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O. II, r. 2—*Mortgage—Suit for possession on default in payment of interest—Subsequent suit for recovery of interest, whether barred—Interest, high rate of—Court, duty of.*

In a suit by a mortgagee for possession of the mortgaged property on default in payment of interest, the plaintiff is entitled to a decree for possession simpliciter and the matter of the amount of the lien should be left to be decided on redemption.

Kiman v. Sultant Mal, 13 Ind. Cas. 559; 66 P. R. 1912; 82 P. W. R. 1912; 148 P. L. R. 1912, relied upon.

Kundan Mal v. Sardar Ailah Dad Khan, 5 Ind. Cas. 821; 19 P. R. 1910; 36 P. W. R. 1910; 167 P. L. R. 1910 and *Aulia Khan v. Kanshi Ram*, 17 Ind. Cas. 677; 45 P. R. 1913; 25 P. W. R. 1913; 145 P. L. R. 1913, distinguished.

On a mortgagor making default in payment of interest the mortgagee sued for and obtained possession of the mortgaged property in accordance with the terms of the mortgage-deed. The mortgagor subsequently applied for redemption of the mortgage under the provisions of the Punjab Redemption of Mortgages Act. The Collector directed redemption on payment of the principal amount alone. The mortgagee thereupon brought a suit for a declaration of the mortgage amount, including interest:

Held, that the portion of the claim relating to the amount of interest which had fallen due at the date when the mortgagee sued for possession was not barred by the provisions contained in O. II, r. 2 of the Civil Procedure Code.

Jhhabil Das v. Massu, 19 Ind. Cas. 981; 4 P. R. 1914; 243 P. L. R. 1913; 14 and 207 P. W. R. 1913 distinguished.

Courts, as a general rule, are bound to award the interest agreed to be paid on a loan even if lapse of time and accumulation of interest may have swelled the principal sum enormously beyond its original figure. *L KHOTA RAM v. NAWAZ*, 4 L. 76; 5 L. L. J. 238.

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O. III, r. 2 (a), as altered by Bombay High Court Rule—*Recognised agent, appearance by.*

Order III, r. 2 (a) of the Civil Procedure Code, as altered by the rule made by the Bombay High Court, enables a person holding a general power-of-attorney from a party not resident within the local limits of the jurisdiction of the Court within which limits the appearance is made, authorising him to appear and act on behalf of the party, to so appear and act. *B ACHUT SITARAM v. TARACHAND*, (1923) A. I. R. (B.) 41.

1003

O. V, r. 17—*Service of summons on parda nashin lady, mode of.*

Where a *parda nashin* lady is not able to accept service personally and has no agent empowered to accept service on her behalf, and has also no

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adult male member in her family on whom service may be effected or who is willing to accept service, valid service may be effected on her under the provisions of r. 17 of O. V of the Civil Procedure Code by the serving officer affixing a copy of the summons on an outer door or some other conspicuous part of the house in which the lady ordinarily resides. *Pat NAJMUNNISSA v. JACMOHAN LALLU*, 4 P. L. T. 87; (1923) A. I. R. (Pat.) 433 910

— **O. VI, r. 6.** See *BENGAL CESS ACT (IX B C. OF 1880)*, s. 51 1

— **O. IX, r. 8, 13—Suit fixed for arguments on question of jurisdiction—Ex parte decree, whether justified.**

Where a case was fixed for arguments on the question of jurisdiction and on the defendant failing to appear the Court proceeded to hear the plaintiff's evidence and passed an *ex parte* decree:

Held, that the Court had no jurisdiction to pass an *ex parte* decree inasmuch as the case was not fixed for decision on the date on which the defendant absented himself but only for hearing arguments on the question of jurisdiction. *L KHUDA BAKSH v. GHULAM QADIR* 900

— **O. IX, r. 8, 13, O. XVII, r. 3—Dismissal for default—Appeal—Procedure—Jurisdiction, want of—Objection whether can be taken by way of appeal.**

Where after striking issues in a suit the Court passed the order, "The plaintiffs are absent. The suit is dismissed with costs:"

Held, that the order was one under O. IX, r. 8 and not under O. XVII, r. 3 of the Civil Procedure Code.

An order under O. IX, r. 8 of the Civil Procedure Code can be displaced only by an order under O. IX, r. 13, or by a successful appeal from an order under the latter rule.

Gikinson v. Subramania Ayyar, 22 M. 221; 8 M. L. J. 287; 8 Ind. Dec. (N.S.) 158 and *Parvati v. Toolai Kapri*, 20 Ind. Cas. 1; 18 C. L. J. 128; 18 C. W. N. 601, relied upon.

It is the practice of the Madras High Court to allow an objection to be taken to an order on the ground of want of jurisdiction by way of appeal. *M VELAYUDA MUDALIAR v. SUNDARASAM PILLAI*, (1922) M. W. N. 483; (1922) A. I. R. (M) 416 482

— **O. IX, r. 13—Ex parte decree, application to set aside—Absence owing to Vakils' mistake—Sufficient cause—Procedure.**

Where on an application to set aside an *ex parte* decree it appeared that defendants did not appear on the day of hearing partly owing to a mistake of their Vakils and partly owing to their not having received a telegram which had been sent by their Vakils in such time that if it had been received in the normal course, they could have been present at the hearing:

Held, that the defendants had shown sufficient cause for their absence and that the *ex parte* decree must, therefore, be set aside.

It is contrary to principles of natural justice that cases should be decided on the hearing of one side only if the other side is ready and willing to be heard. In such cases, as a rule, adequate punishment is to be found in the remedy of costs,

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which not only penalises the party in default but, theoretically, at any rate, indemnifies the other party from the expense which he has been put to by reason of that default. *M LAKSHMINARAYANA v. STANDARD OIL CO. OF NEW YORK*, 44 M. L. J. 488; 17 L. W. 627; 32 M. L. T. 296; (1923) A. I. R. (M) 581 689

— **O. XIII, rr. 1, 2—Admission of documents at late stage—Discretion of Court—Refusal to admit documents—Appeal; second, competency of.**

It is matter for the discretion of the Trial Court to admit a document produced at a late stage, but in such matters of procedure the Court should lean to an interpretation which advances justice rather than to a contrary interpretation.

Where the documents sought to be put in evidence; have an important bearing on the question at issue in the trial and there is no ground for supposing that they have been fabricated the Court should not reject them.

The refusal to admit a document produced at a late stage of the case is a ground for second appeal. *Pat JAGDIP PANDEY v. TAIBUNNISSA* 397

— **O. XXI, r. 2—Agreement pending appeal not to execute decree against certain defendants—Appeal dismissed as settled out of Court—Agreement whether can be pleaded in bar to execution—Payment mentioned in execution application whether amounts to certification—Order fixing upset price in sale proclamation—Appeal.**

An agreement pending an appeal from a decree by which the plaintiff agrees to forego a portion of the decree amount and to recover the balance from certain defendants only and not to proceed against others, and in pursuance of which the appeal is dismissed as having been settled out of Court, cannot be pleaded in bar to the execution of the appellate decree as against any of the defendants.

Arumugam Pillay v. Krishnaswami Naidu, 56 Ind. Cas. 576; 43 M. 725; 12 L. W. 39; 41 M. L. J. 222, followed.

Chidambaram Chettiar v. Krishna Valthiyar, 37 Ind. Cas. 836; 40 M. 233; 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 44; 32 M. L. J. 13, distinguished.

Order XXI, r. 2 of the Civil Procedure Code which relates to adjustments subsequent to the decree sought to be executed is inapplicable to the case of an adjustment of the decree of the Trial Court pending an appeal from it.

The fact that payments are mentioned by a decree-holder in his execution application as having been made towards the decree in pursuance of an adjustment of the decree does not amount to a certification of the adjustment within the meaning of O. XXI, r. 2 of the Civil Procedure Code.

Birao Gorain v. Jaimural Koer, 13 Ind. Cas. 63; 16 C. W. N. 923; 16 C. L. J. 174, dissented from.

An order fixing the upset price in a sale proclamation in execution proceedings cannot be questioned in appeal. *M K. V. R. R. M. V. RAMANATHAN CHETTIAR v. A. VENKATACHELIAM CHETTIAR*, (1923) M. W. N. 297; 17 L. W. 635; 44 M. L. J. 599; 32 M. L. T. 401; (1923) A. I. R. (M) 619 836

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O. XXI, rr. 2, 16—*Execution of decree—Transfer of decree to one of several judgment-debtors; effect of—Adjustment.*

The spirit of the second proviso to r. 16 of O. XXI of the Civil Procedure Code is that one judgment-debtor should not, by acquiring the interest of a decree-holder, be allowed to put himself in a position in which he can force the other judgment-debtors to pay the whole of the decree amount when his proper remedy is a suit for contribution, and for this purpose it does not signify whether the assignee decree-holder is one against whom a personal money-decree was passed, or one who has been directed to pay the decree amount out of the proceeds of the property in his hands.

Panachand v. Sundrabai, 31 B. 308, 9 Bom. L. R. 409, dissented from.

A transferee of a decree must first prove his right before he can be allowed to execute the decree and it is then only that any question of adjustment will arise. *M. SADA GOPA AYENGAR v. SELLAMMAL*, 16 L. W. 758, 48 M. L. J. 761, 31 M. L. T. 463, (1922) A. I. R. (M) 510. 861.

O. XXI, r. 19—*Cross-claims under same decree—Party, entitled to smaller sum, right of, to execute—Interest of decree-holder split up—“Two parties,” meaning of.*

Plaintiff obtained a decree in respect of certain properties, which she claimed as the heir of her mother, with a liability to pay a sum of Rs. 2,000 to the fourth defendant. Under the decree the fourth defendant was also liable to pay plaintiff a sum of Rs. 385 for past mesne profits. Plaintiff died after decree, and the lands passed to her brother, first defendant, by right of inheritance but the amount of mesne profits which was the plaintiff's *stridhanam* passed to her husband. On an application for execution of the decree for Rs. 385 by the plaintiff's husband:

Held, that under O. XXI, r. 19 of the Civil Procedure Code the plaintiff's husband was not entitled to take out execution for the smaller sum awarded to the plaintiff under the decree. Order XXI, r. 19 of the Civil Procedure Code does not exclude the case of a decree-holder on whose death his interest devolves on two different individuals.

The point of time when operation is to be given to the provisions of O. XXI, r. 19 of the Code, is when application is made for execution and the rule does not become inapplicable merely because, before the date of the application, the plaintiff's interest had become split up.

The words “two parties” in O. XXI, r. 19 refer to the parties to the suit and not to the different representatives of the same party. *M. KILLAPRAGADDA SRIRAMACHANDRA VENKA- TANAKANANA v. RUVVADA NARASIMHA ROW*, 17 L. W. 643, 44 M. L. J. 590, 32 M. L. T. 341, (1923) M. W. N. 474, (1923) A. I. R. (M) 638. 865.

O. XXI, r. 54—*Attachment—Proclamation—Fraudulent transfer—Substantial portion of consideration fictitious—Whole transfer, whether, affected.*

In order to constitute a valid attachment the proclamation described in the second portion

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of r. 54 of O. XXI, of the Civil Procedure Code must be carried out.

Sinnappan v. Arunachalam Pillai, 53 Ind. Cas. 207, 24 M. 844, 37 M. L. J. 375 (1919) M. W. N. 6, 8, 10 L. W. 391, 26 M. L. T. 28, (R. B.), relied upon.

Where it is found that a transfer made by a judgment-debtor was made in bad faith with the object of delaying, defeating and obstructing the decree-holder and that the transferee aided and abetted him and a substantial portion of the consideration is found to have been fraudulent and fictitious, the whole transfer must be treated as fraudulent and effected with the object of defeating the decree-holder. *L. MULA RAM v. JIWANDA RAM*, 5 L. L. J. 200, (1923) A. I. R. (L) 423, 4 L. 211. 852.

O. XXI, rr. 58, 89—*Application under r. 58—Subsequent application under r. 89, whether barred.*

The purpose of a petitioner who makes a claim under O. XXI, r. 58 of the Civil Procedure Code to a property attached is to have the attachment set aside. If the claim is negatived there is nothing to prevent the same person coming forward and applying unconditionally to have the sale set aside under r. 89 of the Order for the reason that he holds an interest in the suit property.

The dismissal of an application to stay a sale on payment of the decretal amount does not bar a subsequent application by the same person to set aside the sale under O. XXI, r. 89 of the Civil Procedure Code. *M. D'ANAMMAL v. VEE-RAGHAVALU NAIDU*, 44 M. L. J. 325, (1923) M. W. N. 116, 32 M. L. T. 175, 18 L. W. 296, (1923) A. I. R. (M) 487. 335.

O. XXI, rr. 69, 89, O. XXXIV, rr. 7, 8 (4)—*Decree, preliminary, for redemption—Mortgage-money not paid: within time allowed—Decree absolute for sale—Deposit of money before sale, effect of.*

A mortgagor who fails to deposit the mortgage-money within the time allowed by the decree for redemption in his favour is entitled to pay off the money and redeem the property even after the mortgagee has obtained a decree absolute for sale under O. XXXIV, r. 8, cl. (4) of the Civil Procedure Code and the sale has been ordered in pursuance thereof. Nor can this right of the mortgagor be deferred till the mortgagee chooses to take action and bring the property to sale.

Vallabha Vajia Rajah v. Vedapuratti, 19 M. 49, 5 M. L. J. 282, 6 Ind. Dec. (N. S.) 73, (R. B.), distinguished.

The provisions of O. XXI of the Code of Civil Procedure apply to sales after the passing of the decree absolute for sale under O. XXXIV, r. 8 of the Code. *O. HAYAT MUHAMMAD v. NAGESHWARI IRASAD*, 9 O. & A. L. R. 215. 290.

O. XXI, rr. 89, 90—*Application to set aside execution sale—Compromise—Sale to be set aside on deposit of amount by certain date—Conditional deposit—Condition: withdrawal before decree holder's application for payment—Deposit, validity of.*

Civil Procedure Code—1908—contd.

During the pendency of an application to set aside an execution sale the parties entered into a compromise whereby it was agreed that if the judgment-debtor paid a certain sum of money to the decree-holder before a certain date the sale would be set aside. The judgment-debtor deposited the sum in Court within the time fixed, but made an application to the Court that the money should not be paid to the decree-holder till the decision of a suit which the judgment-debtor was about to file. On the decree-holder's objection that the sale should not be set aside as the terms of the compromise had not been complied with within the time fixed, the judgment-debtor withdrew his objection and intimated that the decree-holder should be allowed to withdraw the money:

Held, that as the judgment-debtor withdrew the condition as soon as objection was taken by the decree-holder so that money became available for payment to the decree-holder before he had made any attempt to withdraw the amount from the Court, the deposit was a valid deposit under the law. *PAT SHAM SUNDAR SINGH v. MUSHAIHEB LAL*, (1923) A. I. R. (Pat.) 418 937

O. XXI, r. 90—Execution sale—Application to set aside sale—Fraud—Limitation. See LIMITATION ACT, 1908, s. 18 46

O. XXI, r. 90—Limitation. Act (I. X. of 1908), s. 18—Execution of decree—Sale, application to set aside sale—Fraud—Extension of limitation.

A sale in execution may be annulled on the ground of fraud even if it is not proved that the auction-purchaser has been a party to the fraud, and it is not necessary that fraud should be alleged against him.

Bipan Bihari Begal v. Kanti Chandra Mandal, 18 Ind. Cas. 715, followed.

In order to make limitation operate when a fraud has been committed by one who has obtained property, thereby it is for him to show that the injured complainant had had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought or the application to be made within limitation. In other words, the party guilty of fraud must show that the continuing effects of the fraud have been removed. *PAT MAHABIR RAM v. RAMBAHADUR DUBEY*, 4 P. L. T. 307, (1923) A. I. R. (Pat.) 435 625

O. XXII, rr. 3, 10—Legal representative—Trust properties—Amendment of plaint—Power of Courts to allow legal representatives to raise new pleas.

In a case where an institution is represented at different stages of the suit by different representatives, one not claiming under the other, the provision of law applicable is O. XXII, r. 10 and not O. XXII, r. 3 of the Civil Procedure Code, and the Courts have in such a case a wider discretion to allow amendments and new pleas to avoid multiplicity of suits, provided the character of the suit is not changed and the opposite side is not prejudiced and the trial embarrassed. *M. SUNDARESAM CAETIAR v. VISWANATHA PANDARASANNADHI*, 31 M. L. T. 66, 16 L. W. 83, 13 M. L. J. 147, (1922) M. W. N. 444, 45 M. 793, (1922) A. I. R. (M) 492 103

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O. XXII, r. 4—Appeal against several respondents—Death of one of them—Legal representative not brought on record—Abatement of appeal—Conflicting decisions.

Where in an appeal against several respondents one of them dies and his representatives are not brought on the record within time, the appeal abates in its entirety, if the success of the appeal would result in two conflicting decisions with regard to the same subject-matter. *C SHEIKH DENDOO v. SHAIKH SACHOO*.

O. XXII, rr. 4, 5—Death of party in suit—Representation of estate—Procedure.

According to the provisions of O. XXII of the Civil Procedure Code, it is not necessary to bring all the heirs of the deceased on record as his legal representatives.

Ghamandi Lal v. Amir Degam, 16 A. 211, A. W. N. (1894) 22; 8 Ind. Dec. (N. S.) 136, dissented from.

Where a person has been added as a legal representative by the Court and has, as a matter of fact, represented the estate throughout, and no objection to the effect that the estate has not been properly represented has been taken at the hearing, the requirements of O. XXII of the Civil Procedure Code are fulfilled and the orders passed are binding on the estate, subject to the right of any person, not a party, to sue to have those orders set aside on the ground of collusion or fraud. *U B MAUNG PO MYA v. MA GWAN BON*, 4 U. B. R. (1912) 150; (1923) A. I. R. (R.) 114 205

O. XXII, rr. 4, 11—Appeal against decree for possession in favour of several persons—Death of one of several respondents—Representative not brought on record within time—Appeal, whether entertainable.

Where an Appellate Court is called upon to set aside a decree for possession of land in favour of several persons one of whom has died and his representative in interest has not been brought on the record within the time allowed by law, the appeal is infructuous and cannot be entertained inasmuch as even if the appeal were to succeed, the representative in interest of the deceased respondent would not be bound by the judgment of the Appellate Court and would be at liberty to execute the decree in its entirety as one of several joint decree-holders. *C MIDNAPORE ZEMINDARY CO. LTD. v. ISHAN CHANDRA* 479

O. XXXII, r. 4 (3)—Guardian of minor—Consent, whether essential—Invalid appointment of guardian—Decree against minor, whether void or voidable.

No person can be appointed a guardian *ad litem* of an infant without his consent.

When a guardian has not been validly appointed in respect of a minor defendant, he is not a party to the suit and is not bound by the decree made against him. The decree is void and not merely voidable. *C UMARATI SAMANTA v. SHEIKH MOSEETULLA*, 37 C. L. J. 496 475

O. XXXII, r. 4 (3), provision of, whether mandatory—Guardian, appointment of—Consent,

Civil Procedure Code—1908—contd.

It is not competent to a Court to appoint a guardian without his express consent; where it does so appoint, it acts without jurisdiction.

Krishna Chandra Mandal v. Jogendra Narain Roy, 27 Ind. Cas. 139; 19 C. W. N. 537; 20 C. L. J. 469; *Mohan Krishna Dar v. Har Prasad*, 40 Ind. Cas. 2; *Arunada Prasad v. Upendra Nath Dey*, 65 Ind. Cas. 18; 34 C. L. J. 293; 26 C. W. N. 731, relied on.

Chhatler Singh v. Tej Singh, 59 Ind. Cas. 671; 18 A. I. R. 956; 2 U. P. L. R. (A) 384; 43 A. 104, dissented from.

The provision of O. XXXII, r. 4 (3) of the Civil Procedure Code, in respect of consent, is mandatory and there is nothing in the law to suggest that unless it is established that the minor is prejudiced, he cannot get relief. *Pat SAJJAD HUSAIN v. SAKAI RAI*, (1922) A. I. R. (Pat) 448; 2 Pat. 7; P. I. T. 575.

O. XXXII, r. 7—Compromise by minor—

Sanction, form of—Absence of sanction, effect of

In order to attract the provisions of O. XXXII, r. 7 of the Code of Civil Procedure it is enough to show that the attention of the Court was directly called to the fact that a minor was a party to the compromise and that the leave of the Court was obtained on petition or in some way not open to doubt. No particular formula is necessary to be used by the Court in order to grant the leave and when it is shown that an application was made by the guardian of the minor to the Court asking for leave to enter into the compromise and the Court made a note of that application and passed a decree in terms of the compromise, it must be held that the leave of the Court was expressly recorded within the meaning of O. XXXII, r. 7 of the Code.

Manohar Lal v. Jadunath Singh, 28 A. 585; 8 Bom. J. R. 489; 4 C. L. J. 8; 10 C. W. N. 898; 9 O. C. 219; 1 M. L. J. 2; 16 M. L. J. 291; 3 A. L. J. 710; 33 I. A. 28 (P. C.), followed.

Rangulam Sahu v. Durga Pershad, 60 Ind. Cas. 980; 6 P. L. J. 193; 2 P. L. T. 325; (1921) Pat. 235; 3 U. P. L. R. (Pat) 75, distinguished.

Where the leave of the Court is not obtained in respect of a compromise to which a minor is a party, the decree passed on the compromise is not a nullity but merely voidable at the option of the minor and so long as it is not avoided in a proper proceeding, no objection can be taken in execution proceedings as regards the validity thereof. *Pat. ISHAN CHANDRA KUNDU v. NILRATAN ADHIKARI*, 4 P. L. T. 311; 1 P. L. R. 217 (1923) Pat. 184; (1923) A. I. R. (Pat) 175.

O. XXXIII, r. 1—Application to sue in

forma pauperis—Part claim paid into Court by opponent, effect of.

On an application to sue as a pauper, whether a fee is prescribed for the plaint or not, the subject-matter of the suit cannot be taken into consideration in calculating the plaintiff's means. The mere fact that the opponent pays in or deposits in Court a part of the claim, is no ground for rejecting the application for leave to sue as a pauper. *B. BAI BALAGAVRI v. MOTILAL GHRELABHAI*, 25 Bom. L. R. 199; 47 B. 523; (1923) A. I. R. (B.) 247.

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O. XXXIV, rr. 4, 5—Mortgage, suit on—Compromise—Preliminary and final decrees, necessity of.

Rules 4 and 5 of O. XXXIV of the Civil Procedure Code, providing for the passing of a preliminary and a final decree in a suit on a mortgage lay down a mere rule of procedure and it is open to the parties to a particular litigation to waive this rule and to agree to a final decree being passed without a preliminary decree being passed in the first instance.

A consent decree directing payment by instalments, is a perfectly valid decree and is not covered by r. 4 of O. XXXIV of the Civil Procedure Code so that in a case where such a decree is passed it is not necessary to make a final decree under rule 5 of the order. *Pat. ISHAN CHANDRA KUNDU v. NILRATAN ADHIKARI*, 4 P. L. T. 311; 1 P. L. R. 217; (1923) Pat. 184; (1923) A. I. R. (Pat.) 375.

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O. XXXIX, r. 1, O. XL, r. 1, O. XLIII, r. 1

(s)—Order directing defendant to prepare inventory and keep accounts, nature of—Order declaring that appointment of Receiver is necessary—Appeal—Receiver, when to be appointed—Hindu Law—Joint family—Manager, whether necessary—Presumption.

An order directing a defendant to prepare an inventory of the property in dispute and to keep accounts falls under O. XXXIX, r. 1, of the Civil Procedure Code and is appealable.

An order of a Court that a Receiver should be appointed in a case, without appointing anybody by name as Receiver, and adjourning the case to a later date for so appointing one is an order under O. XL, r. 1 of the Civil Procedure Code and is appealable under O. XLIII, r. 1 (s) of the Code.

In a suit for partition of joint family property the Court should not appoint a Receiver except by consent or upon proof by the plaintiff that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in the plaint, and that the property in possession of the opposite party is in danger of being wasted.

In such a case, ordinarily, the defendant's share in the property would be ample security for any claim which plaintiff might be able to substantiate in any suit for damages.

A Civil Court should not appoint a Receiver in respect of agricultural land of which the plaintiff is not in possession and which the Court has no jurisdiction to partition, or to apportion the produce of.

Semle:—There can be no joint Hindu family without a manager. *L. FIRM RAGHIB SINGH-JASWANT SINGH v. NARINJAN SINGH*, (1923) A. I. R. (L.) 48.

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O. XLI, r. 1—Limitation Act (IX of 1908), s. 5—Appeal—Copy of decree filed after expiry of limitation—Delay, whether can be excused—Ex parte order excusing delay, whether can be vacated.

Order XLI, r. 1, of the Civil Procedure Code is imperative and it is a condition precedent to the valid presentation of an appeal that the memorandum of appeal should be accompanied by a

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copy of the decree appealed against. Where it is not filed, the appeal is incompetent.

Sitikantha Roy v. Bipra Das, 27 Ind. Cas. 447, *Khirode Sundari Debi v. Jnanendra Nath*, 6 C. W. N. 283, *Chamela Kur v. Amir Khan*, 16 A. 77; A. W. N. (1893) 223; 8 Ind. Dec. (N. S.) 51, relied on.

An Appellate Court has power to excuse delay in the presentation of a copy of the decree appealed against if it is satisfied that the discretion vested in it under section 5 of the Limitation Act should be exercised in favour of the appellant.

Bhinapani Debi v. Sashibhusnan Sinha, 17 Ind. Cas. 119; 16 C. L. J. 133, *Prosonno Kumari Debi v. Ram Chandra Singha*, 17 Ind. Cas. 155; 17 C. L. J. 66, relied on.

Where an *ex parte* order is passed excusing delay, it is open to the other party to apply to have it set aside. *M SUNDARAM AIYAR v. RAJESWARA MUTHURAMALINGA SETHUPATHI AVERGAL*, 44 M. L. J. 27; 17 L. W. 352; (1923) M. W. N. 164; 32 M. L. T. 232; 1923) A. I. R. (M.) 482 **308**

O. XLI, r. 10—Security for costs—Discretion of Court—Poverty of appellant.

As a general rule, a Court is loath to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty. But each case must be considered on its own merits. Where an appellant has lost his case in the Trial Court, and an attempt to recover costs by the successful party has failed, security should be taken for the costs of the appeal. *B GULABRAO MANYABA BHOITE v. VINAYAK BAPUSAHEB KADAM*, 25 Bom. L. R. 195; (1923) A. I. R. (B.) 64 **285**

O. XLI, r. 27—Appeal—Additional evidence.

Petitioner failed to adduce evidence on a particular issue in the Trial Court, on the assurance of the opposite party that that issue would not be pressed. On appeal the High Court allowed the opposite party to address arguments on that issue:

H. I., that the High Court had power, under the circumstances, to allow the petitioner to produce additional evidence on that particular issue under O. XLI r. 27, of the Civil Procedure Code. *PAT MAN SINGH v. NAWLAKHBATI*, 2 Pat. 607 **289**

O. XLI, r. 33—Appellate Court, powers of—Interference with portion of decree not included in appeal.

An Appellate Court does not exceed the powers given to it by O. XLI, r. 33 of the Civil Procedure Code by interfering with a portion of the decree not included in the appeal, where it adopts the principle on which the decision of the First Court was based, and makes an order which it considers ought to have been made by the said Court on the basis of that principle. *PAT GOBIND SINGH v. JAIGOPAL SINGH* **96**

O. XLVII, r. 1—"Any other sufficient reason," meaning of—Decision wrong on merits—Review, whether permissible.

Rule 1 of O. XLVII of the Civil Procedure Code must be read as in itself definitive of the limits within which a review is permitted, and the

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words, "any other sufficient reason" occurring in the rule, mean a reason sufficient, on grounds at least analogous to these specified immediately previously.

The fact that a judgment is wrong on the merits is no ground for granting a review. *P C CHHAJJU RAM v. NEKI*, 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 415; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 **566**

Sch. II, Paras. 14, 20, 21—Arbitration without Court's intervention—Court's power to file award in part—Refusal to file award—Effect.

The provisions of paragraphs 20 and 21 of Schedule II to the Civil Procedure Code give a Court power to file the award and, pass a decree in accordance with it or to refuse to file it. No other course is open to the Court. The Court has no power to file the award in part or to decide which part, if any, of the award is invalid. Unless the award is valid in its entirety, the only course open to the Court is to refuse to file it.

Where arbitrators have determined a matter not referred to arbitration, the Court to which an application is made to file the award, must refuse to do so, even though the portion of the award which is in excess of the reference is separable. The Court has no power to separate or amend the award in any way.

Ma Chaung v. Ma Aing, 2 U. B. R. (1897-01), 297, *Thiruwengadathengar v. Vaidnatha Ayyar*, 29 M. 303, *Dinabandhu Jana v. Chintamani Jana*, 26 Ind. Cas. 597; 19 C. W. N. 476, relied on.

Where the Court to which an application is made to file an award refuses to do so because it is in excess of the reference, that does not necessarily mean that the award is entirely invalid but merely that the procedure provided by paragraphs 20 and 21 of Schedule II to the Civil Procedure Code for enforcing the award is not open to the applicants. *U B MAUNG TIN v. MAUNG PO YA*, 4 U. B. R. (1922) 157; (1923) A. I. R. (R.) 130 **193**

Co-accused—Statement, admissibility of.

A statement made by one of two co-accused should not be used against the other, where later on their cases are tried separately. If such a statement is to be relied on as evidence the accused person who made it must be examined as a witness in the other case. *M RAMUDU AIYAR v. EMPEROR*, 44 M. L. J. 243; 17 L. W. 370; 32 M. L. T. 318; (1923) A. I. R. (M.) 365; 24 Cr. L. J. 426 **538**

Colonisation of Government Lands (Punjab) Act (V of 1912), s. 19—Registration Act (XVI of 1908), s. 17—Limitation Act (IX of 1908), Sch. I, Arts. 63, 115—Government tenant—Agreement to pay share of produce or certain sum of money, validity of—Registration, whether necessary—Suit to recover amount payable on default—Limitation.

Defendant, a Government tenant, agreed, for consideration received, to pay to plaintiff half the produce of certain land and in default to pay a sum of money annually. Defendant having

Colonisation of Government Lands (Punjab) Act—
concl'd.

made default plaintiff sued to recover the amount payable under the agreement:

Held, (1) that the agreement did not transfer any of the tenancy rights of the defendant to the plaintiff, nor could it be said to create a charge thereon, and that, therefore, it did not offend against the provisions of section 19 of the Colonisation of Government Lands (Punjab) Act; (2) that the agreement did not create any rights in the future produce of the land in the plaintiff and, therefore, did not require registration under section 17 of the Registration Act;

(3) that the suit was not one for the recovery of interest but for compensation for the breach of the agreement to pay a share of produce and fell within the purview of Art 115 and not Art. 63 of Schedule I to the Limitation Act. *L. WALLI v. KHUDA BAKSHI*, 5 L. L. J. 366 480

Companies Act (VI of 1882), s. 169—Ex parte order—Application to set aside—Limitation.

The limitation of three weeks prescribed in section 169 of the Indian Companies Act does not apply to an application to set aside an *ex parte* order. *A. SHAH MUHAMMAD EHSANULLAH v. PEOPLES' INDUSTRIAL BANK, LTD., ALLAHABAD*, (1923) A. I. R. (A) 429 106

Companies Act (VII of 1913), ss. 76, 77, 131—

Failure to hold general meeting under s. 76—Directors, liability of—Extraordinary meeting held on request of share-holders—Section, whether complied with.

A Company, registered in Bombay, held its statutory meeting under section 77 of the Companies Act on 30th March 1921, and also a general meeting on the same day. Under section 76 of the Act the Company had to hold a general meeting before 30th June 1922; no such meeting was held, but on a requisition of certain share-holders an extraordinary meeting was held on 29th June 1922. On the complaint of a share-holder the Directors of the Company were prosecuted for failing to comply with sections 76 and 131 of the Act, and it was argued on their behalf that the holding of the meeting on 29th June 1922, was a compliance with the provisions of section 76; they were, however, convicted. On appeal:

Held, that the conviction was right, as the meeting held on the requisition of the share-holders on 29th June 1922 was not a general meeting within the meaning of the term in section 76 of the Companies Act. *B. NASURBHAI ABDULABHAI I. ALJI v. EMPEROR*, 25 Bom. L. R. 224; (1923) A. R. (B.) 194; 24 Cr. L. J. 349 349

Compromise—Compounding offence—Magistrate, duty of.

When parties to a criminal case who are nearly related to one another succeed in patching up their quarrels, the Magistrate should not refuse to do what he can to restore peace and good will if the case is not compoundable without his approval. *C. AMINULLAH v. EMPEROR*, 35 C. L. J. 353; 25 C. W. N. 336; (1923) A. I. R. (C.) 191; 24 Cr. L. J. 355 355

Construction of contract—Implied terms—Agreement permitting certain things to be done—Prohibition as to others, whether implied.**Construction of contract—concl'd.**

The Court ought not to imply a term on a contract unless there arises from the language of the contract itself and the circumstances under which it is entered into such an inference that the parties have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied.

The Moorcock, (1889) 14 P. D. 64; 58 L. J. P. 73; 60 L. T. 654; 37 W. R. 437; 6 Asp. M. C. 373, *Hamlyn v. Wood*, (1891) 2 Q. B. 488; 60 L. J. Q. B. 734; 65 L. T. 286; 40 W. R. 24, relied upon.

Where the parties have entered into a contract relying upon a certain interpretation of the law, it is not open to the Court, when the law has been differently interpreted or possibly altered, to imply as a term in the contract what the parties would have stipulated for at that time, if they had thought about it or if the law had been otherwise.

Where the trustees of two rival temples between whom certain disputes existed as to processions and festivals entered into an agreement promising not to interfere with certain processions and festivals of each temple:

Held, that it could not be necessarily implied from the terms of the agreement that all other processions and festivals except those mentioned in the agreement had been prohibited. *M. GOVINDACHARIAR v. NATTU KESAVA MUDALIAR*, 17 L. W. 79; (1923) M. W. N. 180; (1923) A. I. R. (M) 344 243

Construction of decree—Mortgage-decree—Subrogation—Priority set up negatived—Language of decree defective—Property, whether liable to be sold in execution.

A mortgage of a village was executed subject to the alienations of the *kudiwaram* interest in certain items of land therein. The mortgage was executed in order to pay off a decree on a prior mortgage. In a suit to enforce the mortgage, the mortgagee claimed priority, on the basis of subrogation, as against the alienances of the *kudiwaram* interest. One of such alienees who had purchased the *kudiwaram* interest in three items set up his prior right as to one of the items only and not as to the other two. The finding was against him, but the decree directed the sale only of the "right, title and interest of the judgment-debtor." On objection being taken in execution proceedings to the items being sold in execution under the decree:

Held, (1) that there having been a final adjudication in regard to the claim as to the item specifically set up by the alienance, and having regard to the form of the rest of the decree, the item was liable to be sold in execution notwithstanding the defective language of the decree;

Sri Gopal v. Pirihi Singh, 24 A. 429; 20 I. A. 118; 4 Bom. L. R. 827; 1 C. W. N. 889; 8 Sar. P. C. J. 293 (P. C.), followed.

(2) that in the absence of any adjudication negating the alienee's admitted right of priority in respect of the other two items, the decree must be construed strictly and the items must be held not to have been included in the decree. *M. SAMI GURUKKAL v. THIRUPATHIA PILLAI*, 18 L. W. 288 288

Construction of document—Bill of exchange drawn in foreign currency—Amount payable in rupees at exchange rate "on date of payment"
—Exchange rate, calculation of.

In a suit upon a bill of exchange drawn in a foreign currency and payable in rupees, "at the current rate for Bank Drafts at the date of payment," the rate of exchange to be applied is the one prevailing on the due date and not the one prevailing on the date when the bill is actually paid. *B. MULLER MACLEAN & Co v KADERBHOY MULLA ESMAILJI*, 25 Bom. L. R. 177; 47 B. 493; (1923) A. I. R. (B) 241 246

Bill of lading—Shortage—Burden of proof.
Where a bill of lading expressly states "weight, contents and value when shipped unknown," the onus of proving shortage in the goods shipped is on the person asserting it. *M. SUBRAHMANYA CHERRY v. BRITISH INDIAN STEAM NAVIGATION CO. LTD.*, 17 L. W. 363; (1923) A. I. R. (M.) 523 478

Contract for sale of goods—Breach—Frustration of contract—Business bargain, interpretation of.

Where an agreement for the sale of future goods, to be manufactured at and obtained from named Mills, provides that "the same are to be taken delivery of as and when the same may be received from the Mills," these words cannot be construed as if they were "the same are to be taken delivery of, if and when the same may be received from the Mills," for that is to convert words, which fix the quantities and times for deliveries by instalments, into a condition precedent to the obligation to deliver at all and virtually to make a new contract.

If a contract is for the sale of a fixed quantity of goods, to be manufactured and obtained from named Mills, and less than that quantity is delivered within the time fixed, the sellers must either find in the contract some matter of excuse or discharge or they must pay damages. If sellers fail to perform the contract, because the Mills execute an order placed with them by the Government in preference to the one by the sellers, it does not amount to a discharge or frustration of the contract.

To interpret a business bargain, expressed in the language of commerce, it is no doubt important to appreciate the methods and the point of view of business-men, but this is merely a prudent way of qualifying the mind to construe their words, and so to determine their meaning, and is a very different thing from postulating that reasonable men would have been likely to agree to one kind of liability and not to another, and from thus concluding that, whatever the words of the contract say, that kind of liability, and that alone, is the obligation of the contract. *P. C. HURNANDRAI FULCHAND v. PRAGDAS BUDHSEN*, (1923) A. I. R. (P. C.) 51; 44 M. L. J. 498; 32 M. L. T. 171, 5 Bom. L. R. 37; 47 B. 314; (1923) M. W. N. 547 2. C. W. N. 873; 38 C. L. J. 248 18 L. W. 441 483

Exchange, deed of—Suit for possession of property received in exchange—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 113, 144.

Construction of document—contd.

A suit was compromised and the compromise recited that the parties had exchanged certain properties and that the exchange would be effected on a certain date. Plaintiff sued to recover the property which under the compromise had been agreed to be transferred to him;

Held, (1) that, read as a whole, the meaning of the compromise was that the exchange would take place on a future date;

(2) that, therefore, the suit was one for specific performance of a contract to hand over the ownership rights in the property in suit on a certain date and not for possession of property in which the ownership rights had passed completely by the deed of compromise;

(3) that the suit was, consequently, governed by Art. 113 and not by Art. 144 of Schedule I to the Limitation Act. *L. KHUSHI MUHAMMAD v. HAYAT* 1040

Gift in favour of wife—Estate taken—"Malik," meaning of.

Deeds in favour of females must be interpreted in the same way as any other deeds.

The words "malik" and "milkiyat" in a formal document imply an absolute estate unless there is something in the context to qualify it.

Surajmani v. Rabi Nath Ojha, 30 A. 841 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17 (P. C.), *Gurmukh Singh v. Makhan Singh*, 11 Ind. Cas. 846; 61 P. R. 1911; 147 P. W. R. 1911; *Wazir Devi v. Ram Chand*, 58 Ind. Cas. 988; 1 L. 413; 75 P. W. R. 1920, followed.

Rallia Ram v. Veil Kaur, 27 P. R. 1893, dis-sented from.

Where a husband purported to sell a house to his wife in lieu of dower and stated in the deed that he had given proprietary possession to her and that she had the full powers of a proprietor to alienate the house:

Held, that the intention of the husband was to confer an absolute estate upon the wife and the latter was, therefore, entitled to make a gift of it to whomsoever she pleased. *L. MUHAMMADI v. KARAM BAKSH* 977

Grant—Grantee to hold on condition of conducting Vazhipadu—Tenure, whether resumable—Burden of proof.

Where under the terms of a grant the grantee was to hold and enjoy the properties for ever conducting "Vazhipadu to the deity," i.e., offering of rice of which the greater part returns to the donor:

Held, that the obligation to make the show of an offering was a nominal and a purely moral one and the words of the grant were too vague to connote a condition on breach of which the lands could be resumed and the grant was, therefore, not a service-grant liable to be resumed.

The burden of proving a resumable tenure is on the grantor. *M. MATHOOR GRAMAN v. MANUKURISI VARIATI LAKSHMI*, 17 L. W. 14; (1923) M. W. N. 343 32 M. L. T. 399; (1923) A. I. R. (M.) 572 827

Hindu joint family—Deed of union with stranger—Co-parcenary, severance of.

Construction of document—contd.

By a "deed of union" two brothers forming a joint Hindu family entered into an agreement with another brother who had been adopted away into another family by which the properties of the joint family and those of the adopted brother were put together and it was agreed that when a division took place in the future, the properties were to be divided into three shares equally and that if any uterine brothers were born they were also to take jointly with them and that three brothers were to treat themselves as members of a joint family. It was urged that the legal effect of the deed was to sever the co-parcenary on the ground that the two members of the joint family could not constitute themselves into a unit and take in a stranger without themselves being treated as united.

Held, that the intention of the deed was clearly not to divide but to unite and if it had failed to do that it had failed of its purpose, but that its legal effect was not to result in a severance of the co-parcenary interest between the two brothers of the joint family. *M. VENKATACHELLA PILLAI v. ARUNTHAVATHACHI*, (1923) M. W. N. 225; 17 L. W. 755; (1923) A. I. R. (M) 568 **548**

Hindu Will—Widow made full owner—Son to succeed on her death—Estate taken by widow—Death of son—Reversioners, right of.

A Hindu testator by his Will appointed his wife to be the owner of his property which she was to take into her possession after his death, and consume, enjoy or do what she liked with what remained out of the property after performing his funeral and obsequious ceremonies, and declared that after her death his son, who was a lunatic, would be the owner of the estate and could do what he liked with the property. The testator's son died before the widow, and a suit was brought by the reversioners to restrain the widow from wasting the estate. The question was whether the widow took an absolute estate.

Held, that having regard to the ordinary notions of Hindus, it was obvious that the testator did not intend that the widow should have absolute powers of disposition during the lifetime of the son; that the son took a vested interest in his lifetime which on his death, went to his mother who, under the Hindu Law took only a limited interest, and, that if the disposition in her favour did not give her an absolute interest in the first instance, the fact that she succeeded as heir of her son would not enlarge that estate. *B. MULCHAND JERISONDAS v. BAI RUKSHMANI*, 25 Bom. L. R. 189; (1923) A. I. R. (B.) 216 **282**

— "Jalkar", meaning of—Right of fishery—Sub-soil rights—Pleadings.

The term "Jalkar" is ambiguous. It may mean either a grant of a mere right of fishery or it may mean the grant of a sheet of water together with the sub-soil. The question whether what was intended to be granted in a particular case was restricted to a right of fishery or included a grant of a sheet of water together with the sub-soil must depend upon the construction of the original grant if available or must be determined with

Construction of document—contd.

regard to the subsequent history of the property. *O. PRAN KISHORE TARAFDAR v. SARODA PROSAD PAKRASTI*, (1923) A. I. R. (C) 358; 57 C. L. J. 580 **55**

— Mortgage-deed—Mortgage of village—Residential house, inclusion of.

In a mortgage document, an entire village, with stated boundaries, was declared to be the subject of the mortgage. At the foot of the document a description of the mortgaged property was given, which included "lands, waste lands, poramboke, tanks, fruit trees, timber trees, etc." The residential buildings of the mortgage within the village were not specifically mentioned:

Held, (1) that the document must be read subject to the more precise description at its foot which must be taken as controlling the general words in the earlier portion;

(2) that the word "etc." should be restricted to things of the same nature as those immediately preceding and that the residential buildings were not *ejusdem generis* with the things enumerated;

(3) that the residential buildings were excluded from the mortgage.

The theory that an alienation of a *zemindari* includes also the buildings situate within it is applicable only in the absence of evidence indicating an intention to exclude them from the transaction. *M. RAJAGOPALA PANDURATHAR v. THIRUPATHIA PILLAI*, 44 M. L. J. 285; (1923) M. W. N. 230; (1923) A. I. R. (M) 511 **258**

— Mortgage—Interest and public charges—Charge on property—Transfer of Property Act (I V of 1882), s. 72, applicability of.

Under the terms of a mortgage with possession the rents and profits were to be set off against the interest stipulated and any deficiencies were to be recovered by the mortgagee from the mortgagors month by month. The mortgagee was also entitled to recover any public charges he may have to pay and the document ended with the recital, "we shall pay the aforesaid principal to you or to your order, redeem this mortgaged property and take back the document."

Held, (1) that the remedy which the mortgagee had for any interest not discharged by the rents and profits, was a personal remedy and that such interest was not a charge on the mortgaged property;

(2) that in the absence of any evidence of refusal by the mortgagors to pay the public charges when they occurred, which compelled the mortgagee to discharge them to save the mortgaged property from sale, section 72 of the Transfer of Property Act did not create a charge on the properties for the sums paid by the mortgagee and that the covenant as to payment of charge in the document was also a personal one. *M. BYSANI MADHAVA CHETTIAR v. KRISHNASWAMY CHETTY*, 16 L. W. 743; (1923) A. I. R. (M) 71 **987**

— Policy of Fire Insurance—Provision to refer dispute as to amount due to arbitration—Rejection of claim—Cause of action.

A Fire Insurance Policy provided, *inter alia*, that if a claim made by the insured was rejected, and

Construction of document—contd.

an action or suit not commenced within three months after such rejection all benefit under the policy would be forfeited, and, further, that if any difference arose as to the amount of any loss or damage, such difference should be referred to arbitration, and that it should be a condition precedent to any right of action or suit upon the policy, that the award of the arbitrator should be first obtained. In a suit to recover the amount of loss suffered in consequence of the destruction of plaintiff's goods by fire, it appeared that, after some correspondence between the parties, the Insurance Company informed the plaintiff that it was their considered opinion that, under the conditions of the policy, they could not admit liability on the policy, and the question was, whether there had been a rejection of plaintiff's claim by the Company, and whether such rejection gave to the plaintiff a right of action, or whether no cause of action could accrue to the plaintiff until the amount of loss had been ascertained by arbitration.

Held, that there had been a rejection of the plaintiff's claim by the Company, and that such rejection gave him a cause of action in order that it might be decided by the Court whether such rejection was right or wrong, and it was only in the event of that question being decided in his favour that it would become necessary that the amount of loss or damage should be ascertained. **B EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO. v. DINANATH**, 25 Bom. L. R. 161; 47 B. 509; (1923) A. L. R. (B.) 249. 666

Property, transfer of, conflict between two descriptions—Principles applicable.

Where, in a deed of transfer, the premises conveyed are sufficiently described, as by giving the particular name of the close or otherwise, an erroneous additional description will be rejected as a 'false demonstration', but if there is not this certainty in the first description, as if it is expressed in general terms, and a particular description is added, the latter controls the former and limits the generality of the earlier description.

The test is that, if the first description is sufficient in itself to identify the land which is conveyed, then, if there is a conflict between the first description and the second description, the second description ought to be rejected as a false description; but if the first description is not sufficient by itself to identify the lands intended to be conveyed then the second description ought to be read as restricting the operation of the grant. **PAT GOPAL MISSEER v. PARTAP MANDAL**, 4 P. L. T. 652. 648

Sale of land—Agreement to re-transfer—Mortgage—Registration—Registration Act (X V I of 1908), s. 17.

A plot of land was sold by a registered sale-deed. On the very day of the sale, the purchaser executed a document which after referring to the previous sale-deed, "There are terms the parties wished to include in the said deed, but which they left out. They are as follows:—That the creditor shall receive and enjoy the profits, rent and crops, and shall pay the land revenue in full satisfaction annually; that the creditor shall transfer with

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outright possession, if the owners of the lands redeem them for the principal sum within three years; and that if the owners of the lands could not redeem the same at the expiration of three years, they shall have no further right to possession and enjoyment, and forfeit the same to the creditors." This document was unregistered. The seller sued for specific performance of the agreement embodied in the document:

Held, that the intention of the parties was that the transaction should be a mortgage and that, therefore, the document required registration. **L B C. CHAING KYWAN v. MA OO**, 11 L. B. R. 457; (1923) A. I. R. (R) 52. 34

Sale of portion of joint land—Agreement to pay compensation if land sold not allotted to vendor on partition—Vendor allotted lesser land than area sold—Compensation, suit for—Cause of action.

Where a person sells his share in a certain land to another and agrees to pay compensation to the latter if the land sold does not come to his share at the time of partition, the agreement must be interpreted as meaning that the compensation would be payable, if by an order in the partition proceedings subject to any modification on appeal, the vendor is not allotted, or is allotted a lesser area than that sold by him. Limitation for a suit claiming compensation is to be reckoned from the date of such an order and not from the date when the different co-sharers take possession of the shares allotted to them. **L. RUKAN DIN v. HASSAN DIN**, (1923) A. I. R. (L) 23. 897

Construction of grant—Charity. Inam—Commutation of waram into fixed money rent by trustee, whether binding on trust—Estoppel.

An inam grant of a village was confirmed by the Inam Commissioner "for the support of a mosque and Chatra on the undertaking that the whole village will be resumed unless two-thirds of the proceeds are appropriated to the support of the above purposes."

Held, that the fact that a third share of the proceeds could be appropriated by the *Inamdar* for his private use did not make it any the less a charity inam since the grant was only one and could not be split up into two parts; a personal grant of a third and a charity grant of the remaining two-thirds.

Ramnandan Chelliar v. Vava Leivas Murakayar, 39 Ind. Cas 235; 40 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. T. 2151; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 I. A. 21 (2 C.), followed.

A permanent grant to the *Kudivaramdar* by a trustee of a charity by which the waram is commuted into a fixed money rent is not binding on the charity, and a succeeding trustee is not estopped from repudiating such a transaction, even though he himself may have recognised it for some time inasmuch as the charity cannot suffer from the conduct of the trustees. **M. SUNDARARAJA CHARIAR v. ALI MUHAMMAD**, 44 M. L. J. 649. 690

Contempt of Court—Newspaper article—Apology.

Accused, being the Editor, Printer and Publisher of a newspaper, published an article in his paper which was a gross libel on the Judges of the High Court. A few days afterwards he published an apology for the offensive expressions contained in the article. In a proceeding calling on him to show cause why he should not be committed for contempt of Court:

Held, that the apology could not be accepted, as, while it might be to some extent a reparation, it could not overtake and counteract the mischief already done by the original publication. **B MARMADUKE PICKTHALL, In re, 25 Bom. L. R. 107; 24 Cr. L. J. 313** 73.

—Newspaper articles—Journalistic privilege—Imputation of dishonesty.

In determining whether an article published in a newspaper constitutes a contempt of Court, the point to be considered is the natural and probable effect of the article, and not only the avowed intention of the Editor. Where the article, as a whole, would leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done in the trial of a case, the publication of such an article would constitute a contempt of Court.

Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the King. It is a jurisdiction, however, to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt.

The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from Statute Law his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful, but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

A journalist may say that a Judge is wrong, or ignorant of law, but if he accuses a Judge of dishonesty or corruption he transgresses the limit. **B M. ARMADUKE PICKTHALL, In re, 25 Bom. L. R. 107; 15 (1923) A. I. R. (B.) 8; 24 Cr. L. J. 289** 17.

Contract—Class of persons—Capacity to enter into contract—Suit to enforce contract—Procedure—Civil Procedure Code (Act V 1908), O. I, r. 8.

An indefinite body, for instance, a particular community consisting of a fluctuating body of persons, is capable of owning property and can enter into a contract to receive money.

An agreement to pay a sum of money to such a body can be enforced in a suit brought under

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O. I, r. 8 of the Civil Procedure Code. **M. BUDAVARAM NARASIMHALU CHETTY v. NOOTA IBBUNDRAM NAGASAM VARU, 44 M. L. J. 240; (1923) M. W. N. 237; (1923) A. I. R. (M.) 434** 95.

—Offer and acceptance—Auction-sale of Government property, subject to Collector's confirmation—Highest bidder, rights of—Refusal of Collector to confirm, effect of.

An auction-sale was held by a Tahsildar of a house belonging to Government under a sale notification containing a stipulation that the sale would be subject to confirmation by the Collector. The highest bidder at the auction duly paid the sale price and the report of the sale was forwarded by the Tahsildar to the Collector with a note that the auction was concluded in favour of the highest bidder. The latter was allowed to occupy the house on condition that he would quit it when required. More than two years after the sale the Collector passed an order declining to confirm the sale. In a suit to eject the highest bidder from the house:

Held, that there was no concluded contract of sale and that the transaction amounted merely to an offer which was never accepted by the Collector; and that the order of the Tahsildar that the auction had been concluded in favour of the highest bidder had not the effect of altering the original condition of the sale which was subject to the Collector's confirmation. **M MUTHU PILLAI v. SECRETARY OF STATE FOR INDIA, 17 L. W. 531; (1923) M. W. N. 317; 32 M. L. T. 399; 45 M. L. J. 67; (1923) A. I. R. (M.) 582** 436.

Contract Act (IX of 1872), s. 16—Undue influence—Distress of mind.

The fact that at the time of executing an agreement to sell the vendor was in a distressed state of mind and was anxious to dispose of the property does not amount to proof of undue influence. **LINDER SINGH v. DYAL SINGH** 1032.

ss. 23, 21—Rules framed by Government to control sale of certain goods in interest of public—Agreement to sell in contravention of rules—Public policy—Money paid under agreement, whether can be recovered—Fraud—In pari delicto potior est conditio possidentis, applicability of.

Under the rules framed by the Madras Government relating to control of import and transport of rice, the defendant obtained a license from Government under the terms of which he was forbidden to sell rice to wholesale merchants in the port of entry and was only allowed to sell to retail dealers approved by the Collector of the District. In violation of the terms of that license the defendant entered into a contract for the sale of rice to the plaintiff who had notice of the rules and who was not an approved retail dealer within the rules. Plaintiff paid the purchase amount to defendant and the rice was delivered to the plaintiff, but, shortly after, the rice was commandeered by Government and plaintiff received only the actually controlled price which was far less than the amount paid by him to the defendant. In a suit by the plaintiff to recover the difference from the defendant as loss sustained by the fraudulent representations of the defendant:

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Held, (1) that the contract being in contravention of the Regulations imposed by the Government in the interests of the country and of the general public was opposed to public policy and under sections 23 and 24 of the Contract Act was void, and no claim could be legally based upon such a contract;

(2) that no claim could be based upon the fraud of the defendant apart from the contract, the plaintiff being aware of the conditions of the sale of rice; and that both parties being *in pari delicto*, the maxim *in pari delicto potior est conditio possidentis* applied, and the Court would not assist the plaintiff to recover in such a case. *M. JANU SAIR v. RAMASWAMI NAIDU*, (1923) M. W. N. 335; 32 M. L. T. 30; (1923) A. I. R. (M.) 626; 18 L. W. 564. 785

— s. 25 (2)—*Subsequent promise to subscribe for expenses of festival already incurred, whether enforceable.*

A subsequent promise by the defendant to subscribe for expenses already incurred by the plaintiff in conducting a festival is purely voluntary and for no consideration. Section 25 (2) of the Contract Act does not apply to such a case. Payment under such a promise is not enforceable as payment of money due under a contract, and a Village Munsif under section 13 of the Madras Village Courts Act has no jurisdiction to entertain a suit upon it. *M. KOSALAI RAMA PILLAI v. POLUSTHIAM PILLAI*, 17 L. W. 321; (1923) M. W. N. 86; (1923) A. I. R. (M.) 330. 774

— s. 25 (3)—*Limitation Act (IX of 1908), ss. 19, 20—Borrowing fresh sum and signing old account—Promise to pay—Acknowledgment.*

A debtor's conduct in borrowing a fresh sum and making up and signing an old account must be taken as a promise which is the foundation of a new contract and not as an acknowledgment. Such promise is applicable as much to the sum borrowed on that day as to the sum found due on adjustment of account.

Where there are debts due on both sides and the accounts are gone through by the parties and a balance struck, this in effect constitutes a payment to the amount of the smaller debt. But it is the striking of the balance that constitutes the payment not the mere existence or even statement in writing of cross demands.

Where on an adjustment of accounts on a certain date between a borrower and the lender it was found that the debtor was liable for a certain sum, and on that date the debtor took a fresh advance in cash and executed a *hatchita* for the aggregate amount, which was duly stamped and signed by the debtor:

Held, that as the entry in the *hatchita* was made in respect of an aggregate sum, with regard to a portion whereof there could only be a promise to pay and not an acknowledgment, the legitimate interpretation of the entry was that there had been a promise to pay the fresh advance taken on the date of the execution of the *hatchita* as also a promise to pay the amount found due on adjustment of account on that date. Consequently, the liability of the debtor must be determined on the basis that there was a legally enforceable

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debt recoverable by the lender on the date of the execution of the *hatchita*, to the extent of the aggregate amount. *O. GUJJAR MANDAL v. SRIMAN MANDALINI*, 36 C. L. J. 228; (1923) A. I. R. (C.) 71. 692

— ss. 128, 134—*Principal and surety—Merger of estates of creditor and debtor—Liability of surety—Civil Procedure Code (Act V of 1908), s. 145.*

Pending an appeal against a decree for mesne profits, stay of execution was ordered on security being furnished. A security bond was executed by a surety. The appeal was dismissed. The judgment-debtor died and the decree-holder succeeded to his estate. On an application by the decree-holder to enforce the security bond against the surety:

Held, that the debt due by the judgment-debtor was extinguished in consequence of the merger of his estate with that of the decree-holder and, that under sections 128 and 134 of the Contract Act, the decree-holder could not proceed against the surety.

Ordinarily, the liability of a surety is co-extensive with that of the principal debtor, unless it is otherwise provided for; and the liability ceases when the principal's debt has been extinguished by an act which causes the merger of the estate of the creditor and the debtor.

Subroya Chetty v. Kangammall, 28 M. 161; 14 M. L. J. 482; *Brojendaro Kisser v. Hindusthan Co-operative Insurance Society*, 59 Ind. Cas. 705; 44 C. 978; 25 C. L. J. 238; 21 C. W. N. 482; *Jambu Ramaswamy Bhagavathar v. Sundaraja Chetti*, 26 M. 209; 12 M. L. J. 267, distinguished.

The principle of merger applies whenever rights devolve either by inheritance or are acquired under a valid transfer if the result of such devolution or acquisition is that the estates of the creditor and debtor or of the mortgagee and mortgagor become united wholly or in part in the person of a single individual; and the question whether merger takes place depends on the intention actual or presumed of the person in whom the interests become united.

Banarsi Das v. Maharani Kaur, 5 A. 27; A. W. N. (1882) 140; 3 Ind. Dec. (N. S.) 5; *Kudhai v. Sheo Dajal*, 10 A. 570; A. W. N. (1888) 231; 13 Ind. Jur. 275; 6 Ind. Dec. (N. S.) 383 relied on.

Though a surety bond may be executed in favour of the Court, the Court holds it for the benefit of the decree-holder; and in proceedings instituted under section 145 of the Civil Procedure Code the surety can put forward all defences that are open to him as against the decree-holder. *M. JEKKANNU SAMI AIYAR v. MUTHUKUMARA RAMASWAMI CHETTIAR*, 44 M. L. J. 171; 17 L. W. 473; (1923) M. W. N. 253; (1923) A. I. R. (M.) 340. 194

— s. 238—*Payment by debtor to agent of creditor—Misappropriation by agent—Debtor, whether entitled to recover amount from agent.*

Where a debtor pays the amount of his debt to the agent of his creditor, and the latter misappropriates it, the debtor is not entitled to recover the same from the agent because of the

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absence of privity between him and the agent. **M. KULANDAIVÉLU PILLAI v. RAMASAMI NAICKER**, (1923) M. W. N. 235; 17 L. W. 448; 44 M. L. J. 495; (1923) A. I. R. (M.) 551. 770

—s. 235—*Purchases by agent on behalf of principal—Repudiation by principal—Agent's liability.*

Where an agent as representing his principal purchases goods on his behalf and the latter repudiates his liability to pay therefor, the law will hold the agent liable for the price. **O. RATAN SINGH v. HAFIZULLA, G.O. & A. L. R. 820.** 1011

—ss. 24th, 248—*Partnership—Minor member—Benefit to minor—Repudiation.*

In order to decide whether the admission of a minor to a partnership was for his benefit, the Court has to consider not the benefit to the minor of an isolated clause of the partnership agreement, but the total benefit which would result to him.

A clause in a partnership agreement restraining a minor partner from starting a business in competition with the business of the firm does not amount to making the minor personally liable for any obligation of the firm within the meaning of section 247 of the Contract Act.

Section 248 of the Contract Act is directed primarily to the protection of the creditors of a firm. Where, however, one set of partners is indebted to another for the provision of capital, it is for a minor member liable under the deed of partnership to repudiate his membership if he is to escape liability to the other partners.

The mere omission by a minor partner to take part in the execution of an agreement by certain members of the firm does not amount to a public notice of repudiation as contemplated by section 248 of the Contract Act. **Pesh MIR AHMAD SHAH v. MUSHARRIF SHAH** 996

Converts—Hindu converts to Islam—Halai Memons of Porebunder—Succession of females.

There are among the Muhammadans certain groups whose ancestors were Hindus and professed the Hindu religion and were then converted to Islam. Among these groups may be reckoned Khojas, Suni Bohras, Molesalam Girasias, Cutchi Memons, Nassaporias Memons and Halai Memons.

The Halai Memons in Porebunder are governed by the Hindu Law with regard to the succession of females. **P. C. KHATUBAI v. MAHOMED HAJI ABU**, (1922) A. I. R. (P. C.) 414; 43 M. L. J. 35; 25 Bom. L. R. 127; 17 L. W. 268; 3 C. L. J. 131; 32 M. L. T. 45; 27 C. W. N. 774; 47 B. 146. 802

Co-operative Societies Act (II of 1912), s. 43 (2)

(1), *scope of—Dispute between officer and Society, whether can be referred—"Disputes touching business of Society," interpretation of.*

Under a resolution of a Co-operative Stores, a purchase committee was constituted consisting of a certain number of members and one of them was entrusted with a sum of money for the purchase of certain articles. The Stores claimed a balance, and the liability was disputed by the member. The Secretary of the Stores thereupon made a reference in writing under section 43 (2) (1) of the Co-operative Societies Act to the Assistant Registrar of Co-operative Societies who held an inquiry

Co-operative Societies Act—concl.

and passed a decree against the member. On an objection by the member that the whole reference was outside the scope of the section and was invalid:

Held, (1) that the dispute which arose out of a particular transaction of the Society was a dispute "touching the business of the Society" and, therefore, within the scope of the section;

(2) that a dispute between a member who happened to be an officer, on the one hand, and the Committee or an officer, on the other, fell within the purview of the section;

(3) that the reference was, therefore, valid. The expression "disputes touching the business of a Society" in section 43 (2) (1) of the Co-operative Societies Act is not confined to disputes regarding the internal management of the affairs of the Society or the regulation of the conduct of its business, but includes all disputes arising out of any transaction of the Society. **M. POKKUNURI DASARATHA RAO v. CHEVURU SUBBA RAO**, 17 L. W. 316; 44 M. L. J. 382; (1923) M. W. N. 222; 32 M. L. T. 321; (1923) A. I. R. (M.) 481. 833

Co-sharers—Stranger in possession on behalf of one co-sharer—Adverse possession—Notorious exclusion.

In a suit for recovery of possession on declaration of title to a property belonging to a Muhammadan who had died 40 years before the date of the suit, the plaintiff and defendant No. 2 were his daughters and defendant No. 1 was the husband of defendant No. 2. The plaintiff was out of possession since a few years after her father's death and the defendants were in possession for over 12 years before suit. The question was whether the principle that possession by a co-sharer is not ordinarily adverse to the other co-sharers applied to the facts of the case:

Held, that though defendant No. 1 was not a co-sharer with the plaintiff, before he could be treated as a stranger it must be shown that he was possessing the land asserting his own right. If he was in possession openly asserting his own right and not that of his wife for a period of 12 years in such a manner as to amount to what is called notorious exclusion, then the plaintiff's case would fail. But if this defendant possessed the land without any such assertion of title in himself and the facts were such that the plaintiff could not be expected to know that he was not possessing it on behalf of the plaintiff's sister, then the plaintiff's suit would not be barred by limitation. **JOYTUN BIBI v. SOLIMUDDIN** 33

Court Fees Act (VII of 1870), s. 19-H, proceedings under—Costs, award of.

A Court has no power to award costs in a proceeding under section 19-H of the Court Fees Act for ascertaining the valuation of properties in respect of which Letters of Administration have been granted. There is no provision for the realisation of any costs which may be incurred in connection with such an enquiry. **O. HRIDOV MOHINI DASI v. SECRETARY OF STATE FOR INDIA**, (1923) A. I. R. (C.) 406; 50 C. 239. 472

Criminal Law Amendment Act (XIV of 1908), s. 17, (2) 875

Criminal Procedure Code (Act V of 1898), s. 5 (2), Ch. XIV—Madras Abkari Act (I of 1886), ss. 40 to 47, 55—Offence under Abkari Act—Investigation—Procedure.

Section 5 (2) of the Criminal Procedure Code governs and controls Chapter XIV of the Code. *Lahshmi Narasayya v. Narasimnachari*, 21 Ind. Cas. 685; (1913) M. W. N. 1000; 25 M. L. J. 577; 14 Cr. L. J. 637, relied on.

Under the Madras Abkari Act, the accused person has the right to a special procedure regulating the course of investigation and from the moment the suspected person is arrested and produced before the Abkari Officer, the Abkari Department alone has the conduct of the proceedings.

The Police have, therefore, no right to file a charge-sheet or otherwise to proceed under Chapter XIV of the Criminal Procedure Code in respect of an offence under the Abkari Act, and proceedings so instituted by a charge-sheet by the Police, are without jurisdiction and liable to be set aside by the High Court in revision. *M. KUPFUSWAMY NAIDU, In re*, 44 M. L. J. 231; 17 L. W. 308; (1923) A. I. R. (M.) 334; 24 Cr. L. J. 335.

ss. 54, 202—Complaint filed before Magistrate—Police, power of, to investigate.

The Criminal Procedure Code draws a clear distinction between jurisdiction to try and jurisdiction to investigate a case, and it is possible to conceive of cases where, although a Magistrate may distrust a complaint or delay in passing orders, the Police would be failing in their duty, if they did not arrest an offender against whom a cognizable offence had been made out. Much more so would this be the case where the Magistrate after recording the complaint finds that a regular Police investigation would be more suitable and intentionally keeps the complaint pending in order that the Police may exercise their powers of investigation and arrest independently of the Magistrate.

In practice, the Police will not ordinarily take independent action in respect of a complaint which has already been distrusted by a Magistrate, but it is neither correct nor expedient to lay down the general proposition that an order made by a Magistrate under section 202 of the Criminal Procedure Code, debars the Police from exercising their power of arrest and investigation. *PAT EMPEROR v. BHOLA BHAGAT*, 2 Pat. 379; 4 P. L. T. 521; 24 Cr. L. J. 375.

s. 106, application of.

A *Patwari* was doing his duty in making a *partial* accompanied by two tenants of the village, when the accused emerged from his house followed by two servants. An altercation issued between him and the *patwari* resulting in grievous hurt being caused to the latter:

Held, that there was nothing in the circumstances to suggest that the grievous hurt was caused in a manner or under conditions which would either necessarily or likely cause a breach of the peace. *O. DURGA BHARATHI v. EMPEROR*, (1923) A. I. R. (O.) 37; 24 Cr. L. J. 491.

s. 106—Security order—Conviction under s. 323 Penal Code—Attack in public place—Breach of the peace.

Criminal Procedure Code—contd.

As an attack in a public place involves a breach of the peace, an order requiring security under section 106, Criminal Procedure Code, is justified against a person convicted under section 323, Indian Penal Code, for striking with a *lathi* and kicking and cuffing another in an open public place. *O. EMPEROR v. SH. O. RAM*, 9 O. & A. L. R. 191; 24 Cr. L. J. 319.

s. 106 (2)—Penal Code (Act XLV of 1860), s. 323—Order requiring security on conviction—Finding as to breach of peace whether necessary—"Other offence involving breach of the peace," meaning of.

In order to give jurisdiction to a Court to take action under section 106 (1) of the Criminal Procedure Code, it is not necessary that the Court should record a finding that a breach of the peace was actually caused. If the offence of which the accused is convicted is one which does not of itself necessarily involve a breach of the peace such as criminal trespass, mischief or unlawful assembly, it is proper that the Court should make it clear in its order that a breach of the peace was committed, but where the offence is one which implies the use of violence it is unnecessary to say more.

The expression "other offences involving a breach of the peace" in section 106 of the Criminal Procedure Code embraces all offences *ejusdem generis* with the offences of assault and rioting mentioned in the section.

Where the offence of voluntarily causing hurt includes an assault on the person to whom the hurt has been caused, the Court has jurisdiction to pass an order under section 106 of the Criminal Procedure Code when convicting the accused. *M. RAMASWAMI THEVAN v. EMPEROR*, 4 M. L. J. 485; 17 L. W. 499; (1923) M. W. N. 314; 32 M. L. T. 297; (1923) A. I. R. (M.) 618; 24 Cr. L. J. 455.

s. 106 (2), (3)—Bond to keep the peace—Appellate Court, jurisdiction of.

An Appellate Court cannot exercise the power given by section 106 (3), Criminal Procedure Code, where the conviction has not been by a Court specified in sub-section (2). *C. EUSAF ALI AHMAD v. EMPEROR*, 24 Cr. L. J. 308.

s. 107, proceedings under—Proceedings by Subordinate Magistrate under order of District Magistrate, propriety of.

A District Magistrate should not direct a Subordinate Magistrate to draw up proceedings under section 107 of the Criminal Procedure Code. If he considers it necessary in order to prevent a breach of the peace to take proceedings under that section, he should himself draw up such proceedings and may transfer the case to a Subordinate Magistrate for hearing. Proceedings drawn up by a Subordinate Magistrate merely because the District Magistrate has ordered him to do so are improper and will be set aside by the High Court. *C. HANIF SHEIKH v. JAHANI MANDAL*, 24 Cr. L. J. 367.

ss. 123, 124, 125, 128, 423—Obstruction to public way—Question of title—Duty of Magistrate—Revision—Mode of service of notice—"Forthwith", in s. 128, meaning of.

Criminal Procedure Code—contd.

Under section 133 of the Criminal Procedure Code the duty of determining whether the site of an obstruction is a public place or a public way is cast on the Magistrate in the first instance, and under no circumstances can it be left to the Jury. If the Magistrate finds, on the parties appearing before him to show cause against the conditional order, that a question of title to the *locus in quo* is involved, he must refuse to act in that particular case unless he comes to the conclusion that the claim of title is not *bona fide*; and unless he finds that the place or way, as the case may be, is public, he has no power to proceed with the investigation.

Dharam Mandal v. Gossain Das Mandal, 6 Ind. Cas. 271; 14 C.W.N. 544; 11 Cr. L. J. 365 and *Dularam Deb v. Baishnab Charan Deb*, 10 C.W.N. 845; 1 Cr. L. J. 42, relied upon.

Where the question as to the public nature or private ownership of the *locus* of an obstruction is left to a Jury under Chapter X of the Criminal Procedure Code, the order of the Magistrate referring the determination of such a question to the Jury is bad and should be quashed.

In the matter of the petition of Chundarnah Sen, 5 C. 875; 6 C. L. R. 379; 2 Ind. D.C. (N.S.) 1165 *Matuk Dhari Tewari v. Hari Madhab Das*, 31 C. 979; 9 C.W.N. 72; 2 Cr. L. J. 11, *Nasaruddi v. Akiluddi*, 3 C.W.N. 345 *Dularam Deb v. Baishnab Charan Deb*, 10 C.W.N. 845; 4 Cr. L. J. 42 and *Churaman v. Emperor*, 26 Ind. Cas. 172; 12 A.L.J. 1024; 15 Cr. L. J. 724, relied on.

Where an order under section 133 of the Criminal Procedure Code has been communicated to those concerned it is immaterial that the method in which it was served on them is not strictly in accordance with the provisions of section 134 of the Code.

Nur Jan v. Queen-Empress, 2 P.R. 1900 Cr. P. L. R. 1900, p. 24, followed.

The word 'forthwith' in section 138 of the Criminal Procedure Code must be interpreted in a reasonable way. It merely means that the Magistrate shall appoint a Jury as soon as he reasonably can. *L. KHUSHI RAM v. EMPEROR* (1923) A.I.R. (L.) 525; 4 L. 22, 24 Cr. L. J. 457 617

s. 133—Public nuisance—Encroachment—

Bona fide dispute—Procedure.

Where there is a *bona fide* dispute as to whether an encroachment exists or not, section 133 of the Criminal Procedure Code should not be applied in order to relieve the Government of the necessity of filing a civil suit. This is particularly the case where the encroachment has been in existence for a large number of years at the time the notice is issued under section 133 of the Code. *O. RAM LAKHAN v. EMPEROR*, (1923) A.I.R. (O) 22; 24 Cr. L. J. 494 958

ss. 133, 135, 141—Proceedings for removal of public nuisance—Jury, appointment of—Failure to return verdict—Procedure.

Where a person against whom a conditional order under section 133 of the Criminal Procedure Code is made obtains the appointment of a Jury but the Jury fails to return a verdict within the time fixed by the Magistrate, the latter has jurisdiction to make the order absolute under section 141 of the Code.

Criminal Procedure Code—contd.

Where, however, the Jury fails to perform its duty through no fault of the person against whom a conditional order has been passed, he should be allowed to revert to the other alternative given him by section 135 of the Code and to show cause against the conditional order. *PAT JIBLAL TELI v. GENA SAHU*, 4 P.L.T. 15, (1923) A.I.R. (Pat.) 229; 1 P.L.R. 164; 24 Cr. L. J. 402 956

ss. 138, 137, 140 (2)—Order for removal of nuisance—Application for enforcement made to successor of Magistrate—Jurisdiction to go behind order.

In dealing with an application to enforce an order under section 137 of the Criminal Procedure Code, made by his predecessor, a Magistrate acts in excess of his powers and without jurisdiction in going behind that order, and coming to a decision as to its legality. *G. KIRAN CHANDRA v. RAMESH CHANDRA*, 27 C.W.N. 459; 24 Cr. L. J. 317; (1923) A.I.R. (C.) 589 77

ss. 144, 195 (1) (a) (6) (7)—Order under s. 144 whether by public servant or Court—Sanction by Sub-Divisional Magistrate for prosecution for disobedience of order under s. 144—Revocation by Sessions Judge, legality of.

A Magistrate passing an order under section 144, Criminal Procedure Code, does so only as a 'public servant' and not as a 'Court' and sub-section (7) of section 195 is, therefore, inapplicable to a case where the Magistrate making the order sanctions the prosecution of persons disobeying it.

Arunachalam Pillai v. Ponnuswami Pillai, 48 Ind. Cas. 878; 35 M.L.J. 454; (1918) M.W.N. 824; 8 L.W. 422; 24 M.L.T. 395; 20 Cr. L. J. 78; 42 M. 64, dissented from.

Where a Sub-Magistrate passed an order under section 144, Criminal Procedure Code, prohibiting certain persons from interfering with the performance of a certain religious ceremony, and the Magistrate later on sanctioned their prosecution for an offence under section 188 of the Penal Code for having disobeyed the order and the Sessions Judge purporting to act under sub-section (6) of section 195 of the Code, revoked the sanction:

Held, that the case fell under clause (a) of sub-section (1) of section 195 and the power of revocation lay with the District Magistrate and not with the Sessions Judge, and that, therefore, the order of the Sessions Judge revoking the sanction was without jurisdiction.

Section 144 of the Criminal Procedure Code merely empowers certain Magistrates to pass temporary orders in urgent cases. These orders need not be based on any record outside the Magistrate's own knowledge or observation, and it is not even necessary that the party against whom any such order is directed should first be given a chance of being heard. *M. NATARAJA PILLAI v. RANGASAMI PILLAI*, 14 M.L.J. 328; (1923) M.W.N. 240, 17 L.W. 409, 32 M.L.T. 214; 21 Cr. L. J. 424; (1923) A.I.R. (M) 473 536

s. 144 (4)—Jurisdiction to rescind or alter order, nature of.

The jurisdiction conferred by clause (4) of section 144 of the Criminal Procedure Code upon a Magistrate to rescind or alter an order made

Criminal Procedure Code—contd.

under the section by himself or by any Magistrate subordinate to him or by his predecessor-in-office is neither Appellate nor Revisional jurisdiction. It is a special jurisdiction conferred by a special provision in a Statute. *PAT SATURHAN DAS v. MAKHAN DAS*, 1 P. L. R. 53; 24 Cr. L. J. 331

s. 145—Dispute concerning land—Magistrate, dealing with larger area—jurisdiction, excess of.

In a proceeding under section 145 of the Criminal Procedure Code as regards a dispute concerning land, a Magistrate acts in excess of his jurisdiction if he deals with a larger area of land in his order than what is included in the proceeding, and his order is liable to be set aside. *PAT SUKHARI NONIA v. RAMKHELAWAN*, 4 P. L. T. 372; 24 Cr. L. J. 309

ss. 145, 439—Failure to consider evidence—Revision.

A general remark in an order under section 145 of the Criminal Procedure Code that the documentary evidence is not relevant and that the oral evidence is not satisfactory, without referring to the evidence and without giving reasons, is not a disposal of the evidence upon the record. It amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision. *PAT BAKHPAT GOPE v. EMFEROR*, 1 P. L. R. 152; 24 Cr. L. J. 432; 4 P. L. T. 579

s. 145—Order restoring possession, validity of.

All that a Magistrate is empowered to do under section 145 of the Criminal Procedure Code is to declare that a certain party is entitled to possession of the property in dispute. He has no jurisdiction to order restoration of possession.

Kaku v. Harnaman, 40 Ind. Cas. 308; 4 P. R. 1917 Cr.; 18 Cr. L. J. 660; 28 P. W. R. 141 Cr.; *Emperor v. Ramshar*, 27 A. 300; 1 A. L. J. 619; A. W. N. (1904) 261; 1 Cr. L. J. 104; *Tulshi Ram v. Alwar Ahmad* 30 Ind. Cas. 1002; 37 A. 654; 13 A. L. J. 922; 16 Cr. L. J. 714 and *Moore v. Monoranjan Guna*, 12 C. W. N. 696; 7 C. L. J. 547, relied upon.

At the same time, if a party is declared to be entitled to possession, and the world at large is forbidden to disturb his possession, he would be entitled to take possession and no one would have any right to interfere with his doing so. *L. BAHAWALA v. DUNI CHAND*, 24 Cr. L. J. 461

s. 145, proceedings under—Police report, absence of—Statement of interested party—Magistrate, jurisdiction of.

Where in a proceedings under section 145 of the Criminal Procedure Code, there is no Police report, the statement of interested parties as to a probable breach of the peace ought to be received with great caution, but if the Magistrate has reason to believe such a statement, he does not act without jurisdiction in taking proceedings under the section. *G. JOYMANCAL SINGH v. KANTA GOPE*, 24 Cr. L. J. 304

s. 145, proceedings under—Possession delivered under decree of Civil Court, value of—Procedure.

Criminal Procedure Code—contd.

Proceedings may be taken with jurisdiction under section 145 of the Criminal Procedure Code before the Magistrate comes to know that one party has a decision of the Civil Court in his favour and the proceedings will not be without jurisdiction. But when in the course of the proceedings he finds that there is such an order of the Civil Court, it is his duty to maintain that order and possession granted under that order, if such possession has been given within a reasonable time from the initiation of the proceedings under section 145. It will then be proper for him not to stay the proceedings, but to pass an order under section 145, declaring the party which has the Civil Court decree in its favour, or which has been put in possession by the Civil Court to be in possession and to forbid the other party to interfere with the possession of that party.

This is not, however, an invariable rule and the evidentiary value to be attached to the fact that the Civil Court has given possession to one party must depend upon the particular circumstances of each case. *PAT KEDAR NATH v. JALESWAR RAM*, 4 P. L. T. 248; (1923) A. L. R. (Pat) 364; 1 P. L. R. 165 Cr.; 24 Cr. L. J. 467

ss. 145, 439—Proceedings under s. 145—Magistrate, duty of—Refusal to proceed—Revision—Possession, delivery of, on written statement of party—Magistrate, jurisdiction of.

A Magistrate, who has initiated proceedings by a preliminary order under section 145 of the Criminal Procedure Code, can pursue one of three courses; he can cancel the preliminary order under sub-section (5) if he is satisfied that no dispute of the nature mentioned in the section exists or he can find who is in possession and issue an order under sub-section (6) or he can attach the property under section 146 of the Code.

Where a Magistrate starts proceedings under section 145 of the Criminal Procedure Code, he cannot refuse to proceed with the enquiry on the ground that proceedings had already been taken by another Court in which the question of possession had been incidentally decided. The High Court has jurisdiction to set aside such an order in revision.

Sreeman Kumara Tirumala Raja Bahadur, Rajah of Kavethanagar v. Sowcar, Ladd Govind Dass Krishna Dass, 23 M. 561; 16 M. L. J. 419; 1 M. L. T. 405; 5 Cr. L. J. 91; *Velayuda Kone v. Narayana Kone*, 31 Ind. Cas. 645; 2 L. W. 1208; 16 Cr. L. J. 789, *In re Dyawappa Basgunda Patil*, 29 Ind. Cas. 66; 17 Bom. L. R. 382; 16 Cr. L. J. 434 and *Juthan Singh v. Ram Narain Singh*, 22 Ind. Cas. 98; 18 C. W. N. 700; 19 C. L. J. 356; 15 Cr. L. J. 202, relied upon.

Manindra Chandya Nandi v. Barada Kanta Chowdhury, 30 C. 112, 6 C. W. N. 417; *Kamulaman Avargal v. Vavu Rowthai*, 33 Ind. Cas. 314; 17 Cr. L. J. 138; 4 L. W. 57, distinguished.

In a proceeding under section 145 of the Criminal Procedure Code, the Magistrate has no jurisdiction to hand over the possession of the property in dispute to one of the parties to the proceeding merely on the basis of his written statement without

Criminal Procedure Code—contd.

taking evidence. *M PALANI GOUNDAN v. KULAN-DAVELU GOUNDAN*, (1922) M. W. N. 484; (1922) A. I. R. (M) 437; 43 M. L. J. 716; 24 Cr. L. J. 429

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ss. 145, 147, 192, 528—*Transfer of proceedings under ss. 145, 147—Magistrate, power of—Local inspection—Inspection, whether can be made by presiding Magistrate—Inspection, note of.*

Proceedings under sections 145 and 147 of the Criminal Procedure Code are criminal cases and a Magistrate has power to transfer such cases under sections 192 and 528 of the Code. Consequently, where a District Magistrate, on receipt of a Police report to the effect that there is likelihood of a breach of the peace in certain locality, makes an order to draw up proceedings under section 147 of the Criminal Procedure Code and serve notices on the parties, ordering them to appear before another Magistrate, the order is not without jurisdiction.

The rule that in criminal cases a Court is only justified in holding a local inspection in order to explain the facts appearing in the evidence does not apply to section 147 of the Criminal Procedure Code. Special provision is made in the Code for local inspection in these cases. In cases where rights of irrigation and rights of taking water through particular channels from particular reservoirs are concerned, a local inspection is eminently necessary. Although, as a rule, it is better to have such an inspection made by some other person, there is nothing in law to prevent the presiding Magistrate from making it himself provided he records what he sees and does not act upon hearsay evidence.

A Court's finding must be based upon evidence duly recorded by it and not upon the impression formed by the Judge on a local inspection of the locality. He can, in order to elucidate the evidence, make a local inspection and the object of a local enquiry would be only with a view to understand the evidence actually adduced in the case. But it is absolutely necessary that if a Magistrate makes a local enquiry he must make a note of what he sees and must place it on the record, so that the parties may be in a position to know his impression and correct it if it is wrong. *PAT ABDUL HAMID v. HASAN RAZA*, 4 P. L. T. 297; (1923) A. I. R. (Pat) 366; 1 P. L. R. 195; 24 Cr. L. J. 487

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s. 145 (3)—*Omission to serve notice—Grave irregularity—Prejudice to parties—High Court, interference by—Procedure.*

When a proceeding is drawn up under section 145 of the Criminal Procedure Code, the omission to serve it upon the parties or their Pleaders or affix it on some place in the locality, amounts to grave irregularity and in case of failure of justice or prejudice to any party vitiates the order under section 145 of the Code.

A High Court has jurisdiction to set aside the order of a Magistrate when the provisions of section 145 (3) of the Criminal Procedure Code have not been complied with and the parties are prejudiced thereby.

Criminal Procedure Code—contd.

The procedure laid down in section 145 of the Criminal Procedure Code is indeed summary, but should not be cut too short. *PAT BASAWAN PANDEY v. TILAK GOPE*, (1922) A. I. R. (Pat) 77; 1 P. L. R. 130 Cr.; 24 Cr. L. J. 345

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ss. 164, 364—*Evidence Act (I of 1872), ss. 24, 80—Confession—Mode of recording—Inquiry from accused, nature of—Failure to read statement to accused, effect of—Voluntary nature of confession, proof of—Retracted confession, value of—Corroboration—Conduct, evidence of, value of.*

The Legislature, in section 364 of the Criminal Procedure Code, has made it obligatory upon a Magistrate examining an accused person to show or read the record to the accused person; and the reason is that he is at liberty to explain or add to his answers until he puts his signature to the record. In the absence of evidence that the record was shown or read to the accused person, a statement made by him to the Committing Magistrate cannot be used as evidence against him at his trial.

There is no real conflict between section 24 of the Evidence Act and section 80 of that Act. Whenever the conditions specified in section 80 are complied with it must be presumed that the document is genuine, and that the confession was duly taken; but, nevertheless, the Court is bound to treat it as irrelevant if it should appear to the Court that it was procured by any inducement, threat or promise. It is not possible for a Court to say that the making of a confession appears to it to have been caused by any inducement, threat or promise except upon evidence which is before it. The inference may be suggested by the confession itself, or by the evidence of the prosecution or by the evidence adduced by the accused person, or by the surrounding circumstances which the Court is always bound to take into consideration; but the conclusion cannot be reached on surmise or conjecture.

There is no rule of law which compels a Court to raise an inference of improper inducement from the mere fact that a confession is retracted; but, as a rule of prudence, the Courts in India have consistently declined to act on a retracted confession, unless, after consideration of the whole evidence in the case, the Court is in the position to come to the unhesitating conclusion that the confession is true.

This procedure practically effects the same result as a rule requiring proof of the voluntary character of a confession, inasmuch as, though the decisions require evidence of the truth of the confession and not of its voluntary character, the truth of voluntariness may not unreasonably, though not necessarily, be inferred where the truth of the confession is established.

Evidence which itself requires explanation cannot, however, be used as corroboration of a confession.

Evidence of the conduct of an accused person unless it is incompatible with his innocence is, in fact, a make-weight and nothing more, and care should be taken that it may not have an exaggerated effect. It depends upon temperaments, surroundings and other circumstances as to how

Criminal Procedure Code—contd.

a man would act in a particular situation, and all these combine to form a most fallacious basis for assured conclusions.

Jojiban Ghose v. Emperor, 2 Ind. Cas. 681, 13 C. W. N. 851; 9 C. L. J. 663; 10 Cr. L. J. 125; followed.

An admission or confession must be taken and considered as a whole; the Court is not entitled to ignore a portion of the admission or confession and act upon what remains of it.

Section 164 of the Criminal Procedure Code lays down very emphatically that no Magistrate shall record any confession unless upon questioning the person making it he has reason to believe that it was made voluntarily. No particular form of questions is indicated by the Code, for each case depends on its own facts, and just as there are cases which, on the face of them, attract the suspicion of a Magistrate, there are others which do not attract the suspicion of the Magistrate, so that no hard and fast rule can be laid down on the subject.

The Court must in each case satisfy itself that the Magistrate recording the confession honestly believed that the confession was a voluntary one. If the Court is so satisfied then the failure on the part of the Magistrate to put any particular question to the accused person would not involve the rejection of the confession.

It is desirable that a Magistrate recording a confession should put various questions to the accused person to enable him to decide whether the confession is a voluntary one or not, but there is nothing in law which lays down that a Magistrate cannot satisfy himself as to the voluntariness of a confession by putting a single question to the accused person.

It is highly irregular for a Magistrate recording a confession to peruse the alleged statement of the accused person made to and recorded by the Police before recording the confession. *PAT EMPEROR v. DEWAN KAHAR*, 4 P. L. T. 186; (1923) A. I. R. (Pat.) 13; 24 Cr. L. J. 497

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ss. 179, 182—Defamatory letter sent by post—Offence, where triable.

Where a letter containing defamatory matter is posted at one place in order that it may be read at another, the offence of defamation is triable; under sections 179 and 182 of the Code of Criminal Procedure, either at the place where the letter was posted or at the place where it was intended to be read. *M. KRISHNAMURTHY AYYER v. PARASURAMA*, 32 M. L. T. 164; 44 M. L. J. 648; 24 Cr. L. J. 309

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s. 195—Penal Code (Act XLV of 1860),

ss. 193, 465, 467—Sanction to prosecute—Duty of Trial Court—Discretion, exercise of—Appellate Court, duty of—"Produced or given in evidence" in s. 195 (1) (c), meaning of.

The expression "produced or given in evidence" in section 195 (1) (c) of the Criminal Procedure Code means tendered or admitted in the antecedent judicial proceeding. The mere fact that a document is mentioned in the affidavit of documents filed by a party and is filed in the office of the Court Translator for purposes of translation does not amount to its being "produced or given in evidence" within the meaning of the section.

Criminal Procedure Code—contd.

Per Oldfield, J.—The duty of a Court granting sanction is discharged if it exercises a judicial discretion, and, similarly, the duty of the Appellate Court if it satisfies itself that such a discretion has been exercised. The former Court must, therefore, be required, whatever the extent to which the investigation undertaken for its own satisfaction has been carried, to put on record sufficient to demonstrate to the latter that its exercise of discretion has been judicial; and it is undesirable in fairness to the accused that it should do more. In case it does less the Appellate Court will have no choice but to ascertain the necessary facts for itself and base its conclusions on them.

The Court granting a sanction cannot be regarded as having exercised a judicial discretion when it has satisfied itself only that a *prima facie* case has been made out, if by that is meant only that formal evidence of the ingredients of the offence is available, without reference to defects which may deprive that evidence wholly or to a material extent of value.

The procedure laid down in section 195 of the Criminal Procedure Code is necessary in order to avoid the risk of frivolous or vexatious charges designed, not to vindicate justice, but to harass and annoy the persons against whom they are directed. Unless this has been borne in mind, the Court's use of its discretion cannot be regarded as judicial. The remoter the prospect of any public purpose being served the greater is the degree to which the Court should insist on ordinary evidence in support of the charge.

Per Coult's Trotter, J.—A Court in sanctioning a prosecution arising out of facts which have come before it during the trial of a civil case should not be supposed to be discharging that which is the task of the Committing Magistrate at a later stage and usurping his functions by explicitly or tacitly pronouncing that there is a *prima facie* case.

A Court which allows sanction does no more than say that, on the materials before it, it is not apparent that a prosecution would be against the public interests or a mere indulgence of private spite. On the other hand, a Court which refuses sanction does no more than express the opinion that public interest would not be served by such a prosecution and it is not debarred from acting upon that view even where there is a strong *prima facie* case.

A Court before whom an application for the grant of a sanction is made is invested with a very wide discretion with the exercise of which an Appellate Court should be extremely slow to interfere.

It is not a necessary ingredient of an offence under section 193 of the Penal Code that the evidence alleged to be fabricated should actually have been produced in the antecedent judicial proceeding; but in considering the advisability of sanctioning a prosecution, its production or non-production in the Court is a circumstance to which the Court might attach very considerable importance, in deciding whether it is against the public interest to allow criminal proceedings to be instituted.

A Court to whom an application for the grant of a sanction is made has no jurisdiction to direct

Criminal Procedure Code—contd.

the respondent to produce a document for the sole purpose of considering whether or not a prosecution should be launched upon it.

Per Schwabe, C. J.—If a Court is clearly of opinion, on the evidence before it, that no reasonable jury would convict on it, it is its duty to refuse sanction. But the mere fact that a Court sanctions a prosecution is no intimation to the Magistrate who is to enquire into the case that it thinks that there is a case to go to a jury or that he thereby is in any way relieved from his duty of considering whether the accused ought to be committed for trial or not. *M. V. K. MUNUSWAMY MUDALIAR v. RAJARATNAM PILLAI*, 16 L. W. 505; (1922) A. I. R. (M.) 495; 45 M. 928; 44 M. L. J. 774; 24 Cr. L. J. 340. 340.

s. 195.—Sanction to prosecute—Jurisdiction to grant sanction.—Notice, issue of, whether necessary.—Notice, omission to issue.—Revision.

A Magistrate has no jurisdiction to sanction prosecution for a statement made before another Magistrate.

Before sanction to prosecute a person is granted under section 195 of the Criminal Procedure Code, a notice should be issued to him asking him to show cause against the grant of sanction. Such notice may not be legally necessary but it is desirable it should be given. The omission to give notice taken into consideration with other circumstances, for instance, the fact that the sanction is vague and not in specific terms or is in excess of the Magistrate's power, is a sufficient ground for setting aside, on revision, an order granting the sanction. *CHARAN DAS v. ROYU*, (1923) A. I. R. (L.) 36; 24 Cr. L. J. 506. 970

s. 195.—Sanction to prosecute—Order made by Munsif set aside by Sub-Judge—District Judge, jurisdiction of, to interfere—Delay in making application, effect of.

For the purposes of section 195 (7) (a) of the Criminal Procedure Code, appeals from a Subordinate Judge's Court must be regarded as ordinarily lying to the District Court; and a District Judge is competent to revoke or grant a sanction granted or refused by a Sub-Judge in a case in which sanction had originally been refused or granted by a Munsif.

Proceedings under section 195 are not appellate proceedings though they may in some respects resemble them. At each stage they are constituted by the grant or revocation of the sanction which some inferior Court has refused or granted and not with direct reference to the setting aside of that inferior authority's order.

Where an application for sanction is made after considerable delay, and no satisfactory explanation is offered for the delay, it is a good ground for refusing sanction. *M. A. R. M. N. NARAYANAN CHETTIAR v. KADIRAYA GOUNDAN*, 44 M. L. J. 320; 17 L. W. 311; (1923) M. W. N. 223; 24 Cr. L. J. 337; (1923) A. I. R. (M.) 504. 337

s. 195.—Penal Code (Act XLV of 1860), s. 471.—Using forged document—Offence, when complete.—Sanction to prosecute—Court empowered to grant sanction.

Criminal Procedure Code—contd.

The offence of using as genuine a forged document is complete once the document is produced or given in evidence.

The words "or of some other Court to which such Court is subordinate" as used in section 195 of the Criminal Procedure Code and read with sub-section (7) of that section do not cover and include the High Court where the case has been tried in any Court other than that of a District and Sessions Judge or an Additional District and Sessions Judge.

Dina Nath Gaitam v. Muhammad, Abdulla, 61 Ind. Cas. 53; 2 L. 57; 22 Cr. L. J. 325, followed.

Under section 195 (c) of the Criminal Procedure Code it is either the Court of first instance, or the Court to which it is immediately subordinate in the sense given in sub-section (7) of that section, that can grant sanction. The High Court is not empowered to grant sanction by virtue merely of having heard the appeal in the case. *L. FAZAL ILAHI v. MOHAN LAL*, (1922) A. I. R. (L.) 346; 24 Cr. L. J. 383. 383

s. 195 (b).—Sanction to prosecute—Township Court, granting sanction.—Revocation, of sanction by District Court—Divisional Court, jurisdiction of, to interfere—Costs, whether allowable.

A Divisional Court in Lower Burma has no jurisdiction, appellate or revisional, to interfere with an order of a District Court revoking under section 195 (6) of the Criminal Procedure Code, a sanction to prosecute granted by a Township Court, the only Court having jurisdiction in such a case being the High Court.

Muthuswami Mudali v. Veenu Chetti, 30 M. 382; 17 M. L. J. 266; 2 M. L. T. 239; 6 Cr. L. J. 102 (F. B.). *Ram Devi v. Nand Lal Raj*, 30 A. 109; 4 A. L. J. 803; 6 Cr. L. J. 454; A. W. N. (198) 28; 3 M. L. T. 115 and *Emperor v. Serh Mah*, 30 A. 243; A. W. N. (1908) 102; 3 M. L. T. 377; 7 Cr. L. J. 389; 5 A. L. J. 247, relied on.

Costs ought not to be allowed in a proceeding under section 195, Criminal Procedure Code, even though the inquiry for the purposes of that section is made by a Civil Court. *L. B. KARUPPIAH NAIDU v. MUTHUSWAMI*, 11 L. B. R. 418; (1923) A. I. R. (R.) 12; 24 Cr. L. J. 511. 975

s. 195 (b).—Sanction to prosecute—Sanction refused by primary Court—District Judge, power of—Remand, whether justified.

A District Judge, acting under section 195 of the Criminal Procedure Code, has no jurisdiction to remand a case to the subordinate Court for further inquiry. He ought himself to decide whether the sanction refused by that Court should be granted, and for this purpose has power to take evidence himself. *G. MATHURA NATH v. RAJENDRA KUMAR*, 24 Cr. L. J. 319. 79

s. 197, application of.—Canal Zilladar, prosecution of.—Sanction, whether necessary.

A Canal Irrigation Department Zilladar, appointed by the Local Government, before the right to appoint such Zilladars was given to the Chief Engineer of the Department, cannot be prosecuted without the previous sanction of the Local Government under section 197 of the Code of Criminal Procedure. *EMPEROR v. KHAN CHAND*, (1922) A. I. R. (L.) 337; 24 Cr. L. J. 411. 523

Criminal Procedure Code—contd.

ss. 202, 203.—*Postponement of, issue of process—Notice to show cause, to accused—Improper and irregular procedure.*

The petitioner made a complaint to a Magistrate against the opposite party with regard to the cutting and removal of certain paddy. The Magistrate directed notice to be served upon the opposite party to show cause why process should not issue against him. Thereupon the opposite party put in a petition and a Pleader appeared for him and showed cause why process should not issue. The result was, that no process was issued and the complaint was dismissed.

Held, that the Magistrate did not act in accordance with the provisions of the Criminal Procedure Code as laid down in sections 202 and 203 and the procedure adopted by him was improper and irregular. *C CHANDI CHARAN MITRA v. MANINDRA CHANDRA ROY*, 36 C. L. J. 414; 27 C. W. N. 196; (1923) A. I. R. (C). 198; 24 Cr. L. J. 333. 173

ss. 203, 339.—*Order disposing of case—Jurisdiction to revive case.*

Unless it can be shown that there is a legislative enactment giving a power to that effect, cessation by the order of a Magistrate of any criminal proceeding must, until that order is set aside, operate not only as staying the proceedings but as destroying them.

Tarini Charan Chaudhry v. Amulya Ratan Roy, 20 C. 867; 10 Ind. Dec. (N. S.) 583, relied on.

A Magistrate took cognisance of a case under section 190 (c) of the Criminal Procedure Code and sent it to the Police for investigation. On receipt of the report of the Police he made the following order: "Enter false. Mistake of law." Subsequently, on application by the complainant the Magistrate revived the proceedings.

Held, (1) that the first order of the Magistrate was an order finally disposing of the case, and had the effect of destroying the proceedings.

Birnarayan Singh v. Emperor, 67 Ind. Cas. 195; 3 P. L. J. 239; (1922) A. I. R. (Pat.) 97; 23 Cr. L. J. 371, distinguished.

(2) that under section 369 of the Criminal Procedure Code the Magistrate had no jurisdiction to alter or review his first order and his subsequent order reviving the proceedings was, therefore, illegal. *PAT GAJO CHAUDHURY v. DEBI CHAUDHURY*, 1 P. L. R. 97; 24 Cr. L. J. 481. 945

ss. 233, 234.—*Falsification of accounts*

—*Each entry, whether separate offence—Joinder of more than three charges at one trial—Illegality.* The joinder of more than three charges at a single trial is fatal to the trial.

Subrahmanya Ayyar v. King-Emperor, 25 M. 61; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 11 M. L. J. 233; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.) relied on.

Each false entry which amounts to an act of falsification constitutes a separate offence, although a number of false entries might be proved to cover one defalcation.

Queen-Empress v. Mali Lal Lahiri, 26 C. 560; 3 C. W. N. 412; 13 Ind. Dec. (N. S.) 959 and *Ramon Behary Das v. Emperor*, 22 Ind. Cas. 729; 41 C. 722; 18 C. W. N. 1152; 15 Cr. L. J. 153, followed.

Criminal Procedure Code—contd.

Where under one of three charges against an accused person in the same trial, there were two acts of defalcation covered by two false entries and the only thing to connect them together was the fact that the goods were received the same day from the same depositor:

Held, that this amounted to a joinder of really more than three charges in a single trial and was fatal to the trial and that the convictions were liable to be quashed. *M. CHAKRAKODI SHAMA SHASTRI v. EMPEROR*, (1922) M. W. N. 476; (1922) A. I. R. (M.) 435; 44 M. L. J. 67; 24 Cr. L. J. 462 622

ss. 237, 238.—*Charge under s. 380, Penal Code—Conviction under s. 54 A, Calcutta Police Act, legality of.*

An accused person can be tried under the provisions of section 236 of the Code of Criminal Procedure on charges of offences punishable under section 380 of the Penal Code and section 54 A of the Calcutta Police Act, and under section 237 of the Criminal Procedure Code he can be convicted of the offence punishable under the latter section, although no charge under that section was framed against him. *C. TULSI TOLINI v. EMPEROR*, 24 Cr. L. J. 372; 50 C. 564; (1923) A. I. R. (C) 596, 372

s. 247.—*Warrant-case—Procedure adopted in summons case—Absence of complainant—Procedure.*

Section 247 of the Criminal Procedure Code is intended to lay down a general principle that a person charged with a summons case offence is entitled in law to an acquittal if the complainant is absent, and this right cannot be denied him simply because the Magistrate adopts a warrant case procedure for the trial of a summons case offence.

The right of the accused to benefit under section 247 of the Criminal Procedure Code does not depend on the procedure which the Magistrate chose to adopt and was constrained to adopt by the complaint as laid, but on the nature and the class of the offence for which he is being tried at the time of the complainant's failure to appear in Court.

When running through the trial of a warrant case a Magistrate is satisfied that only a summons case charge will stand; the rest of the trial though technically a continuation of the warrant case trial is really a summons trial.

Queen-Empress v. Papadu, 7 M. 454; 2 Weir 551; 2 Ind. Dec. (N. S.) 500, relied upon.

Rajnarain Koonwar v. Lala Tamoli Raut, 11 C. 91; 5 Ind. Dec. (N. S.) 819. *Ganga Saran v. Emperor*, 59 Ind. Cas. 850; 19 A. L. J. 6; 22 Cr. L. J. 146, distinguished.

When any conflict arises between technicalities and the legal rights of an accused person, the latter must prevail. *M. VENKATARAMA AYYAR v. SUNDARAM PILLAI*, 44 M. L. J. 119; 17 L. W. 229; (1923) A. I. R. (M.) 439; 24 Cr. L. J. 469. 885

s. 250.—*Person, meaning of—Municipal Committee, whether can be directed to pay compensation.*

The word "person" in section 250 of the Criminal Procedure Code includes not only a natural person but also a juristic person, for instance, a Municipal Committee.

Criminal Procedure Code—contd.

A Municipal Committee is, therefore, not exempt from the operation of section 250 of the Criminal Procedure Code. **L. MUNICIPAL COMMITTEE, LAHORE v. RATTAN CHAND**, (1923) A. I. R. (L.) 31; 24 Cr. L. J. 463 **623**

s. 256—Provision, whether imperative—Failure to comply with section—Illegality.

The provisions of section 256 of the Criminal Procedure Code are imperative and the failure to ask an accused person, after a charge has been framed against him, whether he desires to re-call any of the prosecution witnesses for cross-examination, involves a re-trial of the case from the point of drawing up of the charge. **L. MAHAN SINGH v. EMPEROR**, 24 Cr. L. J. 371 **371**

s. 264—Summary trial—Appealable sentence awarded—Judgment, contents of.

Where in a summary trial under section 264 of the Criminal Procedure Code, the Magistrate passes a sentence upon the accused which is appealable, the judgment ought to embody the substance of the evidence on both sides. Merely stating that the prosecution witnesses support the statement of the complainant, and that the defence evidence is very conflicting and cannot be believed, is not a sufficient compliance with the requirement of the law, and the conviction and sentence are liable to be set aside by the High Court in revision. **O. SALIM v. EMPEROR**, 9 O. & A. L. R. 115; 24 Cr. L. J. 484 **948**

s. 288—Evidence Act (I of 1872), s. 157—"Testimony," meaning of—Deposition before Committing Magistrate—Corroboration by previous statement.

The object and effect of section 288 of the Criminal Procedure Code is to place the deposition in the committal inquiry on exactly the same footing as the deposition in the Sessions Court. Such a deposition is "testimony," within the meaning of section 157 of the Evidence Act, which a prior statement by the witness is admissible in evidence to corroborate. **M. VELLIAH KONE v. EMPEROR**, 16 L. W. 239; 43 M. L. J. 222; (1922) M. W. N. 506; 31 M. L. T. 175; 45 M. 766; (1923) A. I. R. (M.) 20; 24 Cr. L. J. 417 **529**

s. 297—Jury trial—Supplementary trial—Charge—Reference to former trial—Trials, original and supplementary—Punishments, uniform, principle of, application of.

Where there are two trials—one original and the other supplementary—the duty of the Judge at the supplementary trial is to warn the Jury that the accused must have a perfectly fair trial, and that they are not to be biased by the result arrived at in the previous trial. It is neither necessary nor desirable for him to tell the Jury the offences of which the first batch of the accused were convicted.

It is impossible to apply the principle of uniformity in convictions and punishments in all cases where there are two trials—one original and the other supplementary—one batch of prisoners being tried by one Judge and one Jury and the other batch by a different Judge and different Jury. **O. MOFIZUDDI v. EMPEROR**, 24 Cr. L. J. 505 **66**

Criminal Procedure Code—contd.

ss. 297, 438, 439—Trial by Jury—Charge to Jury—Opinion on evidence—Misdirection—Revision.

In a trial by Jury whether the evidence has been adequately criticised by the Judge in his charge to the Jury must depend upon the special circumstances of each case, such as the constitution of the Jury, their intelligence and education, the elaboration with which the case has been conducted on both sides, the skill of the defence and a variety of other circumstances.

It is open to a Judge in his charge to the Jury to express his own opinion of the evidence provided he cautions the Jury that they are not bound by that opinion.

Although a motion for revision lies against an order of a Sessions Judge passed in an appeal from a conviction by an Assistant Sessions Judge in a trial by Jury, it is not the intention of the law that the motion should be heard as an appeal. All that a petitioner can claim in an application for revision of this kind is a right to show that the Sessions Judge has decided wrongly, and he starts with a heavy onus. **FATGAJO SINGH v. EMPEROR**, 4 P. L. T. 265; 1 P. L. R. 25 Cr.; (1923) Pat 10; (1923) A. I. R. (Pat) 238; 24 Cr. L. J. 495 **959**

s. 342—Failure to examine accused at close of trial, effect of.

The failure to examine an accused person under section 342 of the Criminal Procedure Code vitiates the proceedings. **PAT BAIJNATH SAHAY v. EMPEROR**, (1923) Pat 96; 4 P. L. T. 231; 1 P. L. R. 31 Cr. (1923) A. I. R. (Pat.) 292; 24 Cr. L. J. 311 **71**

ss. 342, 421—Examination of accused after close of prosecution, necessity of—Appeal, dismissal of—Appellate Court, duty of.

An accused person was examined under section 342 of the Criminal Procedure Code before the prosecution witnesses had been cross-examined. After the examination of the latter, he applied for an adjournment to enable him to properly prepare the cross-examination of these witnesses and this was granted. He was not then examined at the close of the prosecution case:

Held, that, technically, the fact of the adjournment being given at the instance of the accused did not relieve the Magistrate from the necessity of examining the accused under section 342 of the Criminal Procedure Code after the close of the prosecution case.

A Criminal Appellate Court ought not to dismiss an appeal because nobody appears for the appellant, it is the duty of that Court to examine the matter and to come to some sort of decision on the merits. **PAT BALDEO DUBEY v. EMPEROR**, 1 P. L. R. 29 Cr.; 24 Cr. L. J. 475 **831**

ss. 343, 435—Case submitted by inferior Magistrate to superior Magistrate—Procedure—Discharge, order of, set aside—Notice to accused, whether necessary.

It is a general principle of the Code of Criminal Procedure that evidence taken by one Magistrate is not evidence in a trial before another Magistrate unless some provision of law expressly makes it so. The mere consent of the parties is not sufficient for the purposes.

Criminal Procedure Code—contd.

In re Kottammal Kolathingal Ummay Hajee, 69 Ind. Cas. 636; 16 L. W. 697; (1922) M. W. N. 644; 43 M. L. J. 659; (1923) A. I. R. (M) 32; 23 Cr. L. J. 748, followed.

Jainab Bibi Saheba v. Hyderally Saheb, 56 Ind. Cas. 957; 43 M. 609; 12 L. W. 64; 38 M. L. J. 532; 23 M. L. T. 23; (1920) M. W. N. 360 (F. B.), distinguished.

Where a Second Class Magistrate, who was not competent to try a case, submitted it to a superior Magistrate under section 346 of the Criminal Procedure Code, and the latter Magistrate made an order of discharge merely after hearing arguments on the evidence already taken by the inferior Magistrate:

Held, that it could not be said that the superior Magistrate had tried the case himself within the meaning of section 346 clause (2) of the Criminal Procedure Code, and the order passed by him was, therefore, illegal.

Though as a general rule notice should go to an accused person before an order is made to his prejudice, where the question arising is one of law and the accused has not been prejudiced by want of notice, an order without notice which is otherwise correct will not be set aside. *M. PARAVADA CHINA VENKU NAIDU*, 17 L. W. 247; (1923) A. I. R. (M) 327; 24 Cr. L. J. 473 525

— s. 350—*Transfer of Magistrate—Judgment written after transfer—Delivery of judgment by successor—Jurisdiction.*

Section 350 of the Criminal Procedure Code does not give a Magistrate jurisdiction to deliver a judgment written by his predecessor.

Where a Magistrate after hearing evidence in a case is transferred and sends a written judgment to his successor, the latter acts without jurisdiction in delivering it. Even if the Magistrate himself delivers it after his transfer, he would be acting without jurisdiction. *C. BAISHNAV CHARAN DAS v. AMIN ALI*, 50 C. 664; 38 C. L. J. 202 953

— s. 367—*Judgment of Criminal Court, contents of:—Appellate Court, duty of.*

Where a Magistrate does not dismiss a criminal appeal summarily but gives a hearing to the Pleaders of the parties and writes a judgment in which all he says is that he is satisfied that the judgment of the Trial Court is substantially right, the judgment is not in accordance with the provisions contained in section 367 of the Criminal Procedure Code and is liable to be set aside by the High Court. *C. BAISHNAV CHARAN DAS v. EMPEROR*, 24 Cr. L. J. 311 71

— s. 403—*Penal Code (Act XLV of 1860), ss. 408, 477 A—Criminal breach of trust—Acquittal—Falsifying accounts—Subsequent trial on same facts, whether competent.*

An accused was entrusted with three sums of money on various dates. He committed criminal breach of trust by dishonestly misappropriating them and was tried under section 408 of the Penal Code. It was a part of the prosecution case at the trial that the accused had made false entries in the account book for the purpose of carrying out the alleged misappropriation and with the intention of concealing his alleged breach of trust. He was unanimously acquitted by the Jury and was

Criminal Procedure Code—contd.

subsequently charged under section 477 A of the Penal Code for having made false entries in the account-book in respect of the said three sums of money;

Held, that, on the facts of the case, the accused ought not to be put on his trial in respect of these charges, as it would in effect amount to trying him again in respect of the same evidence and in respect of the same matters upon which he had already been tried and acquitted by the Jury. *C. EMPEROR v. JHABBAR MULL*, 49 C. 925; (1921) A. I. R. (C) 179; 24 Cr. L. J. 599 978

— ss. 420, 421—*Jail appeal dismissed by Vacation Judge—Appeal second, whether maintainable—Review in criminal cases—Powers of Vacation Judge—Constitution of Benches.*

Where an appeal presented by a convict under section 420 of the Criminal Procedure Code through the officer in charge of the jail is dismissed under section 421 by the Vacation Judge of the High Court, a second appeal to the High Court against the same conviction is barred and is not maintainable.

Per Oldfield, J.—There is no power of revision under the Criminal Procedure Code against the judgment of one or more Judges of the High Court in a criminal appeal. The High Court is a Court of Record and can direct any mistake of the Court Clerk in making up the record and in general slips in legal proceedings, to be amended by an order of the Court to be obtained in a summary way. But there is no power of review in a criminal case vested in the High Court either by virtue of any power conferred by the Criminal Procedure Code or of the position of the High Court as a Court of Record or any general inherent power.

Rajjab Ali v. Emperor 50 Ind. Cas. 25; 46 C. 60; 25 Cr. L. J. 265, distinguished.

In the matter of Gibbons, 14 C. 42; 7 Ind. Dec. (N. S.) 29, *Queen-Empress v. Durga Charan*, 7 A. 672; A. W. N. (1885) 177; 4 Ind. Dec. (N. S.) 867; and *Queen-Empress v. Fox*, 10 B. 176; 5 Ind. Dec. (N. S.) 502, relied on.

Rang Row v. Emperor, 16 Ind. Cas. 518; 12 M. L. T. 350; 23 M. L. J. 371; 13 Cr. L. J. 710; (1912) M. W. N. 982, relied on.

The powers of the Vacation Judge of the High Court are not to be looked for in the Registrar's Notification as though it was a self-contained and exhaustive advertisement to the public of their scope and nature. Such a Notification is no more than a general statement of the powers which a Vacation Judge will ordinarily exercise and cannot be read as derogating from those which by virtue of Statutes and Rules he possesses and of which he cannot consistently with them be deprived.

Per Devadoss, J.—Under section 14 of Charter, 24 and 25 Victoria, Chap. 104, it is the function of the Chief Justice to determine what Judges in each case shall sit alone and what Judges shall constitute a Division Bench. When once work has been assigned, the Judge or Judges have full jurisdiction to dispose of all matters except those which by Statute they could not dispose of. A Vacation Judge has, therefore, jurisdiction to dispose of not only urgent matters but also all other matters coming up.

Criminal Procedure Code—contd.

In the case of a criminal appeal or a criminal revision petition, there is no provision in the Code of Criminal Procedure for dismissal for default of appearance. In a criminal case the matter is not between party and party and it is the duty of the Court to go into the case and dispose of it on the merits. Where a criminal appeal or a revision is dismissed without hearing, there is no judgment at all and the Judge or the Bench which disposed of the matter for default of appearance can re-hear the matter.

The order of dismissal for default in such cases is no judgment at all and the order is tantamount to an adjournment of the case till some one appears and moves the Court to hear him.

The High Court, although it is not bound to hear Counsel in support of a criminal revision petition is not entitled to dismiss it for default of appearance but can only dispose of it on the merits.

Ranga Row v. Emperor, 16 Ind. Cas. 518; 12 M. L. T. 350; 23 M. L. J. 371; 13 Cr. L. J. 710, (1912) M. W. N. 982, dissented from.

The exception contained in section 369 of the Criminal Procedure Code in favour of the High Court is with reference to the power of review in regard to cases decided by a Judge of the High Court presiding over the Sessions when points are reserved for consideration by the Full Bench or on the certification of the Advocate-General.

A Division Bench of the High Court has no power to revise its judgment pronounced in a criminal revision case or a criminal appeal.

Where a Judge or a Bench of Judges is properly asked to dispose of a certain matter he or they have jurisdiction to dispose of it.

The constitution of Benches is the province of the Chief Justice and if the Judges refuse or neglect to be constituted into Benches arranged by him and choose to dispose of cases as they please they would be acting without jurisdiction. *M. KUNHAMMAD HAJI v. EMPEROR*, (1922) M. W. N. 94; 44 M. L. J. 450; (1923) A. I. R. 1426; 46 M. 382; 24 Cr. L. J. 439 599

s. 421—Summary dismissal of appeal—Powers to be exercised with caution—General principles.

The powers which are capable of being exercised under section 421 of the Criminal Procedure Code should be exercised with considerable caution, and where there has been a dispute as to facts and where the credibility of witnesses for the prosecution has been, even though it may be not very successfully, impugned, it is proper for the Appellate Court to call for the records and look at the evidence. It is also desirable that in dismissing an appeal summarily, although it is not necessary for the Appellate Tribunal, which is thus acting, to compile any elaborate judgment, some indications should be recorded which may be a guide to any Court which may be asked to act in revisional jurisdiction. *PAT PADARATH KURMI v. EMPEROR*, (1922) A. I. R. (Pat) 552; 24 Cr. L. J. 477 893

s. 423—Appeal, disposal of—Appellate Court, duty of, to write judgment.

Where a criminal appeal is once admitted it cannot be disposed of summarily without considering the whole evidence in the case and writing

Criminal Procedure Code—contd.

out a judgment under section 423 of the Code of Criminal Procedure. If Counsel for the appellant does not appear, it is the duty of the Appellate Court to go through the record and write out a proper judgment according to law. *PAT NEWA JAL RAI v. EMPEROR*, (1923) A. I. R. (Pat) 368; 4 P. L. T. 552; 24 Cr. L. J. 453 813

s. 423—Appellate Court, duty of—Evidence, consideration of.

The Court of a Sessions Judge is the final Court on facts, and it is incumbent on a Sessions Judge in appeal to go into the evidence and to refer to it in such a manner as to show that he has applied his mind intelligently and carefully to the consideration of the evidence.

In a case of riot where a conflicting account of the occurrence is given by the prosecution and the defence and each party asserts that the opposite party was the aggressor, the Sessions Judge, in appeal, is bound to examine the evidence carefully so as to show that he is fully convinced on a consideration of the *pros* and *cons* of the case and the criticisms advanced on behalf of the defence that the account given by the prosecution is true and that the accused were the aggressors. *PAT JIWAN RAUT v. EMPEROR*, 1 P. L. R. 55; 4 P. L. T. 502; 24 Cr. L. J. 407 519

s. 437—Discharge, order of—Further enquiry.

Where a person has been prosecuted before a competent officer, and has, after a fair trial before that officer, been found not guilty and discharged, the Magistrate finding definitely that the Crown had failed to make out a case against him, it is very improper, in the absence of some positive allegation of impropriety of conduct against the trying officer, for the accused person to be placed on his trial a second time for the same offence. *PAT RAKTU SINGH v. EMPEROR*, 1 P. L. R. 28 Cr. L. J. 485 950

s. 437—Further enquiry—Magistrate, duty of.

When a Magistrate has passed an order discharging an accused person, further enquiry should not be directed unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. *L. KARAM CHAND v. MATHRA DAS*, (1923) A. I. R. (L) 129; 24 Cr. L. J. 369 369

s. 437, scope of—Discharge, order of, based on complete evidence—Further enquiry, whether justified—Order directing further inquiry, contents of.

Where the judgment of a Trying Magistrate is neither perverse nor foolish and is based on evidence which is obviously complete, further enquiry should not be ordered. Further enquiry in such a case means a re-hearing of the same evidence by some other Magistrate, that other Magistrate being practically constituted a Court of Appeal and this is not contemplated by section 437 of the Criminal Procedure Code.

An order of a Sessions Judge under section 437 of the Criminal Procedure Code directing a further inquiry, without stating proper grounds for directing such further inquiry, does not comply with

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the provisions of the law and is liable to be set aside. *L DOST MUHAMMAD v. ASA RAM*, (1922) A. I. R. (L) 409; 24 Cr. L. J. 474. **390**

— ss. 439, 476—*Direction to prosecute—Revision.*

The High Court will not in revision interfere with a direction to prosecute under section 476 of the Criminal Procedure Code unless it is satisfied that the direction was given on merely fanciful grounds, or on grounds so empty and so obviously wrong that the Court giving the direction could not be said to have formed a serious judicial opinion. *B PARSHOTAMDAS M. SHAH*, *In re*, 25 Bom. L. R. 282; 24 Cr. L. J. 359. **359**

— ss. 439, 494—*Withdrawal of case—Failure to record reasons—Revision—Penal Code (Act XLV of 1860), s. 174—Non-attendance in obedience to summons, what constitutes.*

Section 494 of the Criminal Procedure Code does not require the Public Prosecutor to state his reasons for withdrawing a case.

A Magistrate when giving his consent to the withdrawal of a case under section 494 of the Criminal Procedure Code should record his reasons, but the failure to do so does not vitiate the order so as to entitle the High Court to interfere in revision with what is virtually an order of acquittal.

Umash Chandra Roy v. Satis Chandra Roy, 41 Ind. Cas. 958; 26 C. L. J. 208; 8 Cr. L. J. 886; 22 C. W. N. 63, not followed.

The High Court will not ordinarily set aside an order of acquittal in revision.

In re Sinnu Gounden, 23 Ind. Cas. 188; 38 M. 1028; 26 M. L. J. 160; (1914) M. W. N. 273; 15 Cr. L. J. 236, relied upon.

Obiter:—What is made punishable by the law under section 174 of the Penal Code is an intentional disobedience to the summons of a Court, that is to say, non-attendance which amounts to wilful disobedience. *L MUL SINGH v. EMPEROR*, 24 Cr. L. J. 177. **593**

— s. 488—*Maintenance of child—Buddhist monk—Able-bodied men—Means of subsistence—Presumption.*

Under the Criminal Procedure Code a father cannot get rid of his statutory obligation to support his child, on the plea that he is a Buddhist monk.

The Criminal Procedure Code overrides the personal law where it conflicts with it.

The presumption is that an able-bodied man has sufficient means to support his child as well as himself and it is for him to prove the contrary.

U B U THIRI v. MA PWA YI, 4 U. B. R. 1922) 138; (1923) A. I. R. (R) 131; 24 Cr. L. J. 363. **388**

— s. 488—*Maintenance—Father having means, liability of—Buddhist priest, liability of.*

Section 488 of the Criminal Procedure Code applies to the case of a father who has sufficient means to maintain his child but neglects to do so.

A member of the Buddhist priesthood dies a civil death when he enters the priesthood and the presumption is undoubtedly that he does not possess any property, except such as is necessary for his religious life and which is held under conditions which do not make it available for other

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purposes, for instance, maintenance of a child. *U B MA F SHI v. U. ADITSA*, (1922) A. I. R. (U. B.) 15; 24 Cr. L. J. 510. **974**

— s. 494 (a)—*Order of withdrawal—Judicial order—Reasons, record of.*

In according or withholding consent to an application for withdrawal of a case by the Public Prosecutor under section 494 (a) of the Criminal Procedure Code the Court acts in a judicial capacity and for its order, as for every order judicially made, the Court must give and record its reasons, so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised. An order omitting to give such reasons is liable to be set aside in revision. *N SUGANCHAND v. CHUNNILAL*, 24 Cr. L. J. 361; (1923) A. I. R. (N.) 260. **361**

— s. 498, scope of—*Special leave to appeal to Privy Council—Bail, grant of, during pendency of application—High Court, jurisdiction of.*

After a High Court has dealt with the case of an accused in revision it is *functus officio* and has no jurisdiction under section 498, Criminal Procedure Code, to grant bail in order that a petition for leave to appeal may be made to His Majesty in Council or until the petition for leave to appeal to His Majesty in Council is disposed of. *C TULSI TELINI v. EMPEROR*, 24 Cr. L. J. 362; 50 C. 585. **382**

— s. 522—*Breaking open lock and taking possession of house during owner's absence—Order of restoration of possession to owner, whether proper.*

Accused taking advantage of the temporary absence of the complainant from his house, broke open the outer lock of the house and entered into unlawful possession and the complainant when he returned was driven out by force.

Held, that, under the circumstances, an order of restoration of possession to the complainant passed under section 522 of the Criminal Procedure Code, on conviction of the accused for trespass was a proper order. *M MARUTHAYER v. APPAVU PILLAI*, 31 M. L. T. 388; (1923) A. I. R. (M) 237; 24 Cr. L. J. 476. **892**

— s. 522, proceedings under—*Conviction set aside—Property, restoration of.*

Once it is held that no offence has been committed the consequences arising from the commission of the offence must automatically cease to be. Consequently, where a conviction is set aside, an order under section 522 of the Criminal Procedure Code resulting therefrom must also be set aside. But the order regarding the proceedings taken under section 522 of the Code should follow on the order disposing of the appeal from conviction and not precede it. *L LAL CHAND v. DASONDHI*, (1923) A. I. R. (L) 15; 24 Cr. L. J. 493. **957**

— s. 528—*Conviction of accused—Remand to same Magistrate, whether desirable—Magistrate having tried similar case between parties previously—Subsequent case, transfer of.*

Where a Magistrate has already convicted an accused person of an offence and the latter, for some reason or other, has to be re-tried, that Magistrate is competent to try the case over again. But

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where it is possible, it is desirable that such a re-trial should not be taken by an officer who has already expressed his final opinion upon the matter.

The mere fact, that a Magistrate has tried some other case involving somewhat similar facts possibly between the same parties, does not by itself necessarily constitute any ground why a case should not be tried by that Magistrate. *PAT, MAHINDER, MARWARI v. KISHUN LAL MARWARI*, (1922) A. I. R. (Pat.) 99, 3 P. L. T. 147, 24 Cr. L. J. 339, 339.

s. 523—*Proceedings instituted in Court having no jurisdiction—Transfer, whether, can be directed—Proper order.*

Proceedings instituted in a Court which has no jurisdiction in respect of them cannot be regarded as legally instituted at all, and the High Court has no power to transfer them to any other Court. The High Court can, however, in such a case, in the exercise of its inherent powers of superintendence, direct the Court not to proceed further in the matter. *M. SIKKA GOUNDAN, In re*, 17 L. W. 99, (1923) A. I. R. (M.) 325, 24 Cr. L. J. 351, 351.

s. 523—*Transfer of case—District Magistrate, whether, must, be moved—Procedure.*

Ordinarily, the High Court will not transfer a case pending before a Magistrate unless the party applying for transfer has moved the District Magistrate before coming to the High Court. *L. GHULAM NABI v. JAMALA*, 882.

Custom—Adoption of brother's son—Muhammadan Bhatti Rajputs of Dasuya Tahsil, District Hoshiarpur.

Among Muhammadan Bhatti Rajput Ja's of the Dasuya Tahsil in the Hoshiarpur District a sonless proprietor is entitled by custom to adopt his brother's son. *L. AMIR v. WAZIR*, 305.

Alienation—Necessity.
Where it is necessary to purchase food and clothing and pay for it subsequently, and such payment becomes technically necessary, it is equally regular to borrow the sum necessary to purchase such supplies and it is not absolutely essential that a man should first run into debt and then borrow to pay his debts.

Radha Ram v. Knushi Ram, 65 Ind. Cas. 243; (1922) A. I. R. (L.) 204, followed.

Where a small sum, which formed part of the consideration of an alienation was borrowed by the alienor in times of scarcity and it was not shown that he owned sufficient land to support himself, and a suit was brought to contest the alienation thirteen years after its date:

Held, that under the circumstances, no further proof of necessity was required for the sum borrowed. *L. RAMJI LAL v. RAM SARUP*, 48 P. L. R. 1922, (1922) A. I. R. (L.) 368, 448.

Alienation by widow—Reversioners, right of, to contest, in presence of daughter.

The existence of a daughter does not preclude even a distant reversioner from contesting a widow's alienation, especially where the *Rivaj-i-am* declares the reversioners to be preferential heirs to the daughters. *L. LUDHAR v. BANSI*, (1922) A. I. R. (L.) 28, 873.

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—*Marumakkattayam, Mappillas of North Malabar—Tarwads managed exclusively by females—Males, right of, to participate in income and management.*

Among the Marumakkattayam Mappillas of North Malabar, there is no custom or usage excluding males from the right to participate in the income of certain tarwads or tavazhis, managed exclusively by females or from the right of being consulted in the management of the affairs of those tarwads or tavazhis. *M. MOHAMMAD KUNHI v. PACHKROTH UMMA*, 46 M. L. J. 50, 18 L. W. 502, 671.

v. *Personal law—Succession—Beri Khatri of Jagraon.*

The Beri Khatri of Jagraon are governed by Hindu Law and not by custom in matters of succession. *L. BAL MUKAND v. KISHEN DEVI*, (1923) A. I. R. (L.) 6, 445.

v. *Personal law—Test—Kalals of Kot Sialkot District.*

One of the most important tests to be applied in determining whether a particular caste is or is not governed by agricultural custom, is to ascertain whether or not they form a compact village community, or, at least, a compact section of the village community. If they do so, the presumption is strongly in favour of the applicability of custom.

This presumption in favour of custom has been applied even in cases of Brahmins and must be still stronger when applied to a tribe whose social and religious status is much inferior, for instance, the Kalals.

Once this presumption has been established the onus is shifted on to the party who relies upon personal law.

The Kalals of Kot Kalalan in the Sialkot District are governed by the Customary Law in matters of succession. *L. PREM SINGH v. DARBARA SINGH*, (1923) A. I. R. (L.) 557, 776.

proof of—Migration, effect of—Hindu converts to Islam—Law applicable—Presumption—Sheikh converts to Islam in Jullundur Doab—Succession—Daughters v. Sons—Family migrating from one place to another—Presumption.

Custom is not always logical and Courts should guard against the danger of seeking to extend custom by logical processes, e.g., by analogy.

Custom is not a matter of inference but of proof and it is the evidence adduced in support of the custom set up that can and must alone be looked at to ascertain whether or not it has been proved to exist.

Proof of custom is not confined to judicial precedents alone and the fact that no contest has taken place in the past may well raise a presumption that the custom was so well recognised that no one thought of contesting it.

The presumption in the case of a family descended from Hindu converts to Islam is that they follow Muhammadan Law. The presumption is, however, a rebuttable one.

Where a person migrates from one place to another but maintains a close connection with his family and brotherhood at his original home, the presumption is that the members of his family are governed in matters of succession by the same

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rules as are in force in the original home of the family.

Parbati Kumari Debi v. Jagadis Chunder Dhabal, 29 C. 433; 229 I.A. 82; 16 C.W.N. 490.
4 Bom. L.R. 395; 88 Sar. P. C. 1205 (P.C.), followed.

Among the Sheikhs, converts to Islam from Hindu Khatris, residing in the Jullundur Doab, a custom prevails whereby sons exclude daughters in the succession to their maternal estates, and brothers exclude sisters in the succession to the estate of a childless brother. *ILAN KAMUD-DIN v. ABDUL HAMID*, (1923) A. I. R. (L.) 175. 845

User of vacant land—Ramila performances—Marriage processions—Cattle, tying of, during rainy season—Owners of land, rights of.

A custom whereby the residents of a village claim to use a certain piece of land for playing Ramila for putting up marriage processions, for keeping *khathaw* and for tying cattle during the rainy season is neither too general nor unreasonable nor uncertain.

Where such a right as the above is established the owner of the land is not prevented from settling or developing it, so long as he does not interfere with the rights established by the villagers. *PAT RAMDAS SHAIYAMODAR PRASHAD v. P. L. T. 223*; (1923) A. I. R. (Pat.) 346. 218

Declaratory suit—Property in custody of Court—Court-fees.

Where property is in the custody of the Court a person who lays claim to it need do no more than sue for a declaration of his title to it and pay Court-fee accordingly.

A suit by the heir of a lunatic for a declaration that he is entitled to the property of the lunatic which is in the custody of the manager is a suit of this description and need bear a Court-fee requisite for a suit for declaration. *PAT SABURI PADNE v. RAM KHELAWAN PANDE*. 495

DEFINITIONS—

Acquire. See BENGAL TENANCY ACT, s. 22. 705

Any other sufficient reason. See CIVIL PROCEDURE CODE, O. XLVII, R. I. 586

Assets held by the Court. See CIVIL PROCEDURE CODE, s. 74. 820

Cause of action. See CIVIL PROCEDURE CODE, s. 16 (b). 920

Chairman. See MADRAS DISTRICT MUNICIPALITIES ACT, s. 18. 902

Directing payment of money. See CIVIL PROCEDURE CODE, s. 48, (1) (b). 477

Disputes touching business of Society. See CO-OPERATIVE SOCIETIES ACT, s. 43. 838

Forthwith. See CRIMINAL PROCEDURE CODE, s. 133. 617

In the same case. See SPECIFIC RELIEF ACT, s. 35. 321

Jhal kar. See CONSTRUCTION OF DOCUMENT ACT, s. 26. 555

Kadims. See GRANT. 795

Kin. See BENGAL MUNICIPAL ACT, s. 261. 356

Lawful rate payable. See MADRAS ESTATES LAND ACT, s. 26. 131

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Loss. See RAILWAYS ACT, s. 72. 440

Malik. See CONSTRUCTION OF DOCUMENT ACT, s. 261. 356

Matters matrimonial. See LETTERS PATENT (PAT.) CL. 27. 857

Manza. See GRANT. 795

Milkiat. See CONSTRUCTION OF DOCUMENT ACT, s. 261. 356

Offence. See PENAL CODE, s. 149. 230

Origin of tenancy. See LANDLORD AND TENANT ACT, s. 177. 177

Other offence involving breach of the peace. See CRIMINAL PROCEDURE CODE, s. 166. 615

Package. See RAILWAYS ACT, s. 72. 133

Panja. See BENGAL MUNICIPAL ACT, s. 261. 356

Person. See CRIMINAL PROCEDURE CODE, s. 250. 623

Person aggrieved. See PROVINCIAL INSOLVENCY ACT, s. 5. 225

Plying for hire. See BOMBAY PUBLIC CONVEYANCES ACT, s. 2. 70

Poundage fee. See LIMITATION ACT, SCH. I, ART. I. 938

Private importance. See CIVIL PROCEDURE CODE, s. 100 (c). 2250

Produced or given in evidence. See CRIMINAL PROCEDURE CODE, s. 195. 240

Rent. See BENGAL TENANCY ACT, s. 3 (5). 603

Rescue. See CATTLE PRESSAGE ACT, s. 24. 616

Ride. See MADRAS CITY POLICE ACT, s. 278. 258

Shop. See PUNJAB PREEMPTION ACT, s. 55 (A). 591

Such Court. See LEGAL PRACTITIONERS ACT, s. 14. 521

Such offender. See PENAL CODE, s. 397. 517

Ta mayad. See EVIDENCE ACT, s. 91. 931

Taking part in ballot. See MADRAS DISTRICT MUNICIPALITIES ACT, s. 18. 902

Testimony. See CRIMINAL PROCEDURE CODE, s. 288. 529

Thicca mokra. See LEASE. 1047

Trust. See PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 18. 212

Trust for specified purpose. See LIMITATION ACT, s. 10. 842

Two parties. See CIVIL PROCEDURE CODE, O. XXI, R. 19. 585

Violence. See PENAL CODE, s. 146. 356

When arrears become due. See CAUSE OF ACTION. 5

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 22 (2)—Deeds against agriculturists—Death of judgment debtor—Property in hand of his heirs, whether can be proceeded against.

Where an agriculturist judgment debtor dies, it is not open to the decree holder to obtain a direction from the Court, under section 22 (2) of the Dekkhan Agriculturists' Relief Act, to the Collector to take possession of the deceased's property in the hands of his heirs. *B HIRACHAND MOTILAL v. HANSABAI GANPATRAO*, 25 Bom. L.R. 76, (1923) A. I. R. (B.) 199; 47 B. 527. 562

Divorce Act (IV of 1869), ss. 7, 10—Application for divorce—Evidence.

In an application for divorce, under the Indian Law, which conforms with the English Law, the evidence of the husband or wife alone must never be accepted without some corroboration either by a witness or by strong surrounding circumstances. *M. ARULANANDAM v. ARUL PRAKASAM*. 17 L. W. 235; 32 M. L. T. 245; (1913) A. I. R. (M.) 375; 44 M. L. J. 385. 134

Easement—Quia timet action—Decree for injunction—Form of decree—Easements Act (V of 1882), s. 33—Civil Procedure Code (Act V of 1908), Appendix D, Form 15.

Having regard to section 33 of the Easements Act, Form 15 of Appendix D of the Civil Procedure Code, although the prescribed Form, is not the proper Form for a decree for an injunction in a *quia timet* action against a building higher than old level. The decree should restrain the defendant from disturbing the easements to which the plaintiff is entitled in respect of his windows and not ask him not to darken, injure or obstruct those windows, for a darkening, injuring, or obstructing of the windows might or might not, according to its intensity, amount to an actionable disturbance of the easement which alone would give a cause of action to the plaintiff under section 33 of the Easements Act. *B. BAI KASHIBAI v. PURSHOTTAM KESHAVJI*, 25 Bom L. R. 279; (1923) A. I. R. (B.) 196. 406

Right to light and air—Right to privacy or prospect—Principles applicable—Severance of tenement by partition—Implied reservation of easement.

Every one may build upon or otherwise utilise his own land, regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and building of another person. On the other hand, every man may open any number of windows looking over his neighbour's land, for the interference with a neighbour's privacy or with his prospect, does not, by itself, give the latter a cause of action, in the absence of other circumstances. If windows are so opened, the neighbour may, by building on his own land, obstruct the light which would otherwise reach them. The problem, therefore, which really arises in a suit for declaration of the plaintiff's right to obstruct the doors and windows of the defendant is, whether the latter has acquired the right to use unobstructed the doors and windows.

Whether a grant of an easement arises by implication on a conveyance of land depends on the intent of the parties, which must clearly appear; in order to determine the intent, the Court will take into consideration the circumstances attending the transaction, the particular situation of the parties and the state of the thing granted. This principle holds only where there is no express contract relating to the matter; for, where there is a valid express agreement fairly made, the law does not indulge in presumptions, and the rights of the parties will be upheld according to the terms of such agreement; in such circumstances, no question arises as to grant of easement by implication.

On a severance of tenements by a partition of joint property, and in the absence of a contrary

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intention, expressed or necessarily implied, all such easements as are apparent, continuous and necessary for enjoying any of the undivided shares when the partition was effected, pass to the coparceners to whom such shares are respectively allotted in severalty.

Roley Chunder Sen v. Lalmoni Das 14 C. 797; 7 Ind. Dec. (N. S.) 527, *Dwarka Nath Paul v. Sunder Lal Seal*, 3 C. W. N. 407, *Ratanji v. Idalji*, 8 B. H. C. R. 181, *Purshottam Sakharam v. Durgoji Tukaram*, 14 B. 452; 7 Ind. Dec. (N. S.) 762 and *Krishnamarazu v. Marraju*, 28 M. 495; 15 M. L. J. 255, relied on.

Although, generally speaking, the modes in which a right to the access of light and a right to the access of defined air can be acquired are similar, the grounds upon which the Court will restrain the obstruction of light may sometimes differ widely from the grounds upon which it will restrain the obstruction of air.

There is no easement for the free access of wind. *Vetb v. Bird*, (1861) 10 C. B. (N. S.) 268; 30 L. J. C. P. 384; 4 L. T. 445; 9 W. R. 899; 128 R. 707; 14 E. R. 455, affirmed on appeal (1863) 13 C. B. (N. S.) 841; 31 L. J. C. P. 335, 8 Jur. (N. S.) 621; 134 R. R. 756; 153 E. R. 332 and *Goodman v. Gore's case*, (1612) Godbolt 189; 78 E. R. 115, relied on. *C. SAROJINI DEBYA v. KRISTA LAI HALDAR*, 36 C. L. J. 406; (1923) A. I. R. (C.) 576. 578

Easements Act (V of 1882), s. 13—Easement—Absolute necessity—Right of way—Apparent and continuous easement—Alternative means of access.

An easement of necessity contemplates that there must be an absolute necessity, not removable by anything which the dominant owner can be reasonably expected to do before the law will compel an adjacent proprietor to submit to so detrimental a right as an easement on his land imposed against his will.

Daroga Lal v. Devi Lal, 48 Ind. Cas. 670, relied on.

A right of way is not an apparent and continuous easement as contemplated by section 13 of the Easements Act.

An absolute necessity for the exercise of a right of way vanishes where an alternative means of access is possible to a person as for instance, by opening a door or passage on his own land. *O. KUNJ BEHARI v. BHUTA*. 199

s. 15 (5)—Easement—Statutory prescriptive title, acquisition of.

Section 15 (5) of the Easements Act seems to render it impossible to acquire statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit brought within two years of a continuous enjoyment of the easement for twenty years. *O. BASDEO SINGH v. BHAGWAT PRASAD* (1931) A. I. R. (O.) 29. 909

Ejectment, suit for—Possession, persons in—Necessary parties.

In a suit for ejectment, it is neither necessary nor proper to join any person who is merely in receipt of the rents and profits of the property sought to be recovered. But it is necessary that

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all persons who are actually in physical possession of it should be made defendants. **PAT POONIT SINGH v. KAMAL SINGH** 1038

Escheat—Burden of proof—Tenure—Death of grantee—Reversion to landlord.

The burden of establishing title by escheat is on the person who asserts it. Where a tenure granted by a *Zemindar* is anything less than a permanent and heritable tenure, the property reverts to the *Zemindar* on the failure of the heirs of the grantee **PAT JAG SAH v. SRIKANTA PRASAD** 401

Estoppel—False representation—Knowledge of true facts—Estoppel, if arises.

A person who knows the truth cannot be allowed to rely upon an estoppel arising from a false representation and no estoppel can arise where the truth is known to the party who claims the estoppel. **M VENCATACHELLA PILLAI v. ARUNTHAVATHACHU**, (1923) M. W. N. 225; 17 L. W. 755; (1923) A. I. R. (M.) 568 548

Order of Court—Acceptance of benefit under order—Appeal, if rendered incompetent—Principles applicable.

Where a person accepts a benefit under an order of a Court, which he would not have obtained otherwise than under that order, he is precluded subsequently from challenging the validity of that order. But this principle is not applicable where the benefit accepted would in any case be his whether the appeal succeeded or failed.

Banku Chandra Bose v. Marium Begum, 37 Ind. Cas. 804; 21 C. W. N. 232 and **Mani Lal Guzrati v. Havendra Lal Roy**, 8 Ind. Cas. 79; 12 C. L. J. 556, distinguished.

Where in a suit on a money-bond payable with compound interest, the Court awards simple interest only, an appeal against the decree is not rendered incompetent, where subsequent to the filing of the appeal, the decree-holder accepts costs deposited by the judgment-debtor on the basis of simple interest. **C JOGENDRA NATH v. KHODA BUKSHA BISWAS** 554

Voluntary statement about title of another—Admission of claim.

Where a person makes a statement in a Revenue Court that another person and himself are entitled to certain property and asks for mutation of names to be made accordingly, such statement does amount to an admission of the claim of the other person, where there has been no claim on the part of the latter, and the person making the statement is not prevented from asserting his right to the entire property in a Civil Court subsequently. **O RAM RATAN v. BINDA**, 9 O. & A. I. R. 832

Evidence Act I of 1872, ss. 11 (2), 21 (3), 32 (5), 159—Statement in document not inter partes, admissibility of.

The plaintiff brought a suit against his son for recovery of possession of a land which stood in the name of the latter, alleging that the same was acquired *benami* by him. The defendant alleged that the land was purchased for him by his paternal grandfather. The plaintiff answered that his father had died before the property

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was acquired, and he produced a mortgage-bond executed by him long before the date of the purchase in which he described his father as dead:

Held, that the statement made by the plaintiff in the mortgage-bond to which the defendant was not a party might be admissible in evidence as against the latter either under section 21, clause (3), read with section 11, clause (2) of the Evidence Act, or under section 32, clause (5), or under section 159 of the Act. **C SAVERUDDIN AKONDA v. SAMIRUDDIN AKONDA**, (1923) A. I. R. (C) 378 985

s. 30—Trial of several accused for major offence—Confession by one as to minor offence, whether admissible against others—Corroboration.

Per *Oldfield* and *Odgers*, J. J., (*Ramesam J.*, dissenting):—Under section 30 of the Evidence Act where two accused are tried jointly for a major offence, a confession by one of them implicating himself in a minor offence is admissible in evidence against the other accused.

Per *Ramesam*, J.—A confession of guilt of a lesser offence in the course of a trial for a major offence does not satisfy the requirements of section 30 of the Evidence Act.

Per *Oldfield*, J.—Persons under trial for a major offence are also being charged with and tried for any minor offence or offences constituted by the particular ingredients of the major offence which may be proved, and it makes no difference that the conviction of one accused of a minor, after trial for a major offence takes place only in appeal when the course of the proceedings has been the same against them both.

A conviction cannot be based exclusively on the testimony of a person, who cannot be cross-examined, if he is uncorroborated or corroborated only by an accomplice.

The corroboration of a confession must be on material particulars and taken with the confession must justify belief in the substantial truth of the latter. **M MANICKA PADAYACHI, In re**, 14 L. W. 474; 24 Cr. L. J. 385 497

ss. 35, 124—Land acquisition proceedings—Report made by Tahsildar, whether relevant—Objection under s. 124 not taken in Trial Court—Objection, whether can be taken in appeal—Market-value of buildings—Method of determination.

The report of a Tahsildar and his valuation statement in land acquisition proceedings are admissible in evidence under section 35 of the Evidence Act as reports made in obedience to orders passed by his Superior Officers and in discharge of his official duty.

Where, in a Land Acquisition proceeding, private and correct copies of the report of the Tahsildar and his valuation statement were taken by a claimant and filed in Court and exhibited without objection on the part of the Government:

Held, that it was not open to Government in appeal to claim privilege as regards the documents under section 124 of the Evidence Act as communications made in official confidence.

Evidence Act—contd.

In determining the market value in a Land Acquisition case, a plot consisting of buildings and a garden is more satisfactorily valued by capitalising the rental value rather than by separately valuing the buildings and the land on which the buildings stand. *M. RATHNAMASARI v. SECRETARY OF STATE FOR INDIA*, 44 M. L. J. 132; 17 L. W. 445; 32 M. L. T. 279; (1923) A. L. R. (M.) 332. 214

s. 57 (7)—Signature of Chief Secretary to Government, judicial notice of—Criminal Procedure Code (Act V of 1898), s. 428—Appeal—Additional evidence.

Under section 57 (7) of the Evidence Act, a Court can take judicial notice of the signature of the Chief Secretary to Government just as of his accession to office, name, title and functions and the genuineness of his signature is not a matter which, unless the Court deems it necessary, need be proved.

Where there is no doubt as to the fact of a particular gentleman's appointment as Chief Secretary and its notification in the Gazette, the exhibition of a copy of the Gazette is not a necessary legal preliminary to the Court taking judicial notice of the genuineness of his signature.

It is open to an Appellate Court under section 428 of the Criminal Procedure Code to admit a document as additional evidence to cure a formal defect. *M. CHOLANCHERI AYAMMAD v. EMPEROR*, 44 M. L. J. 557; 17 L. W. 615; (1923) M. W. N. 290; 32 M. L. T. 300; 24 Cr. L. J. 403; (1923) A. L. R. (M.) 600. 515

ss. 91, 92, 93, 94, 115—Construction of document—Oral evidence, when admissible—Estoppel—Mortgage—Mortgagee represented as owner—Redemption—"Ta mayad," meaning of. Sect. 92 of the Evidence Act must be read with sections 91, 93, and 94 of the Act.

Section 115 of the Evidence Act overrides sections 91 to 94 of the Act inasmuch as the law of estoppel must prevail against a mere rule of procedure. So that, in construing a document, evidence of the conduct of the parties is relevant when such conduct operates as an estoppel.

For instance, if one party to a document has by his conduct permitted the other party to believe that the agreement between them is other than that embodied in the document, and has caused him to act upon that belief, he cannot fall back upon the provisions of section 92 of the Evidence Act and thereby escape from the consequences of his own actions.

Where, however, such conduct does not amount to an estoppel it cannot be proved in evidence in order to show that the intention of the parties was something other than that expressed by them in the written document.

If the written document is perfectly clear in its terms and applies to existing facts, evidence to show that it was not meant to apply to such facts is excluded by section 94 of the Evidence Act.

Balkishen Dass v. W. F. Legge, 22 A. 140; 4 C. W. N. 153; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N.S.) 1130, (P. C.), *Pakshu Lakshman v. Govinda Kanji*, 4 B. 594; 5 Ind. Jur.

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527; 2 Ind. Dec. (N.S.) 1003, *Ali Sheikh v. Imam Ali Sarkar*, 35 Ind. Cas. 102; *Abdul Gafur v. Abdul Kadir*, 72 P. R. 1901; 114 P. L. R. 1901 and *Bulaki Mal v. C. J. Floyd*, 10 Ind. Cas. 1004; 27 P. R. 1911; 118 P. W. R. 1911; 191 P. L. R. 1911, considered.

Where the exact status of the parties is not in dispute and a mortgage holding under a long and onerous mortgage is described for the moment as a person with full title, it does not in any way amount to an admission that his title is something more than that of a mortgagee and cannot estop the other party from subsequently showing that the title was one of mortgagee only.

When a period is specified in a mortgage deed, the right of redemption can only arise on the expiration of that period, in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage was created. So that, where nothing more than a period is specified the onus lies on the mortgagor to prove that he can redeem before that period, and not upon the mortgagee to show that the mortgagor cannot do so.

Bakhtawar Begam v. Husaini Khanam, 23 Ind. Cas. 355; 36 A. 195; 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 380; 16 Bom. L. R. 344; 1 L. W. 813; 41 I. A. 84 (P. C.) followed.

In the North-Western Frontier Province it must be taken as settled law that the expression "*ta mayad*" or "*ba mayad*," without qualification, in a mortgage deed, means that time is of the essence of the contract and that the mortgagor cannot redeem before the expiry of the term mentioned in the deed.

A mortgage deed executed in respect of a house stated that the mortgage was created for a term of fifty years, and that the mortgagees would remain in possession till payment of the principal and interest. It then concluded "*Mayad-mandarija bala tak agar asal wa sud ada ho jawe to bihtar, warna bad mayad makan mazkur pas murtahinan basigha bai bil wafa ho jagga*."

Held, that the mortgage could not be redeemed before the expiry of the fifty years. *Pesh DHANNA RAM v. CHHABIL DAS* 1931

s. 96—Latent ambiguity—Extrinsic evidence, admissibility of—Evidence of intention and user—Principle applicable—Instruments, ancient and modern.

When an instrument appears, on the face of it to be free from ambiguity, but upon the endeavour being made to apply it to the persons or things indicated, it transpires that the words are equally applicable to two or more persons or to two or more things, there is what is called a latent ambiguity. This class of ambiguity, sometimes called an equivocation, is not discovered till the instrument comes to be applied to external circumstances. In such a case as extrinsic evidence has created the ambiguity, extrinsic evidence is admissible to resolve it; and direct evidence of intention may be given for the purpose of ascertaining which of the several per-

Evidence Act—contd.

sons or things, to whom the words are applicable was intended to be denoted.

The principle that when an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it is latent. *C. CHAIRMAN, SERAJGUNJ MUNICIPALITY v. CHITTAGONG CO. LTD.*, 37 C. L. J. 242; (1923) A. I. R. (C) 32. 696

s. 114—Receiving stolen goods—Guilty knowledge—Proof—Presumption.

Where stolen property is traced to the accused's possession nearly two months after the theft, the presumption of guilt under section 114 of the Evidence Act can hardly be applied. *M. RAMUDU ARKAR v. EMPEROR*, 44 M. L. J. 243; 17 L. W. 376; 32 M. L. T. 318; (1923) A. I. R. (M) 363; 24 C. L. J. 426. 538

s. 116—Landlord and tenant—Tenant not let into possession—Landlord's title, denial of—Lease from co-sharer—Lessee when can deny lessor's title.

The rule that no tenant can deny his landlord's title only applies where the tenant has been let into possession by such landlord and not where the tenant has been in possession previously.

Yerraguntla Seshachari v. Mikkumalla Chiniah, 23 Ind. Cas. 721; relied on.

The rule that a person who takes a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment is also subject to the abovementioned qualification. *N. LAXMI v. DEVI*. 855

s. 154—Scope of—Hostile witness, declaration of—Court's power of.

There is nothing in section 154 of the Evidence Act as to declaring a witness hostile; that section merely provides that the Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. *P. C. BAIKUNTHA, NATH CHATTORAJ v. PRASANNA MOYI DEBYA*, (1922) A. I. R. (P. C.) 409; 44 M. L. J. 699; 27 C. W. N. 797. 286

s. 163—Inspection of documents—Burden of proof, whether affected—Civil Procedure Code (Act V of 1908), s. 115—Interlocutory order—Revision.

Where one party calls for and inspects documents with the other party the latter is entitled, under section 163 of the Evidence Act, to have such documents exhibited, but such exhibiting is always subject to proof of execution and genuineness.

Section 163 of the Evidence Act does not render proof of the documents to be exhibited unnecessary or alter the normal incidence of that burden. A Court which diverts from the normal course in such a case and wrongly throws the burden of proof on the party inspecting instead of on the party relying on the documents commits a material irregularity and the order is liable to be set aside in revision under section 115 of the Civil Procedure Code.

Quære.—Whether section 163 of the Evidence Act is applicable to documents produced under

Evidence Act—concl.

the discovery procedure or only after the trial has begun. *M. RAJAGOPALA AYYANGAR v. RAMANUJA AYYANGAR*, (1923) M. W. N. 292; 18 L. W. 165; (1923) A. I. R. (M) 607. 459

Execution of decree, application for—Continuation of previous application—Conditions requisite—Test.

In order to entitle a decree-holder to claim that an application should be regarded as a continuation of a previous application, two conditions must be satisfied, first, that the previous application was dismissed for no fault or default on his part; and secondly, that the subsequent application is similar in scope and character to the previous application. To determine this latter a fair test to apply would be to see if the decree-holder could have got the relief in the previous application which he subsequently claims. *Pati DHAROHAR SINGH v. RAM PRASAD NARAYAN SAHAI*, 1 P. L. R. 139. 862

Beneficial owner of decree, whether entitled to join in pending execution proceedings.

Parties should be allowed to join the record when their rights are in danger.

A person beneficially entitled to the fruits of a decree is entitled to be made a party in pending execution proceedings instituted by the benamidar decree-holder. *M. RUKMANI AMMAL v. RAMACHANDRA THONDAMAN SAHIB*, 17 L. W. 67; 44 M. L. J. 122; (1923) A. I. R. (M) 317. 874

Decree directing payment during fixed period—Court closed on last date—Payment into Court on re-opening day, validity of—General Clauses Act (X of 1897), s. 10, applicability of—Limitation Act (IX of 1908), s. 4, applicability of.

Where a person is required under a decree to make a payment in favour of another, a payment into Court is a valid compliance with the decree.

Wana Raji v. Nattu Mirha, 7 Ind. Cos. 992; 35 B. 35; 12 Bom. L. R. 818, followed.

The law does not compel a man to do that which he cannot possibly perform and the closing of a Court cannot prejudice a man in doing an act required to be done in Court.

A decree for joint possession was passed subject to the payment of a fixed sum by one decree-holder to the other by a certain date. The period expired while the Court was closed and the money was deposited into Court on the day it re-opened. The question was whether the payment was good.

Held, (1) that the payment under the decree could validly be made into Court;

(2) that the Court being closed on the last day of payment, the payment was in time, on the general principle that the law does not compel a man to do that which he cannot possibly perform;

(3) that the fact that the payment could be made out of Court would not affect the case.

Balkrishna v. Timay, 12 Ind. Cas. 810; 7 N. L. R. 176; followed.

Sheodas Dautram v. Narayan Asaji, 12 Ind. Cas. 811; 36 B. 268; 13 Bom. L. R. 153; not followed.

(4) that section 10 of the General Clauses Act or section 4 of the Limitation Act had no application to the case.

Execution of decree—contd.

Wana Raji v. Natu Murha, 7 Ind. Cas. 992; 35 B. 35; 12 Bom. L. R. 818, not followed. *N DHANUSINGH v. KESHO PARSHAD*, 19 N. L. R. 116; (1922) A. I. R. (N.) 246 388

Instalment decree—Entire sum payable on default—Acceptance of instalment after default—Waiver—Limitation, operation of.

Plaintiff obtained a decree on 29th February 1916, for Rs. 6,562-8-0 payable by monthly instalments of Rs. 50. It was provided that in case of failure to pay any six instalments the whole amount due under the decree would become payable. No payments were made till 9th April 1917 when defendant paid Rs. 5,500; he made a further payment of Rs. 400 on 19th January 1918. On 27th September 1919 plaintiff applied to execute the decree for the balance remaining due, but it was objected that, as the whole sum due under the decree became payable in August 1916, by which date there had been a failure to pay six consecutive instalments, the application was barred by limitation. P. however contended that, on account of the payments of 1917 and 1918 a waiver should be inferred by the Court:

Held, that the application was barred by time and that from the mere fact of the payments it could not be inferred that the parties had come to an arrangement that there should be an agreement for a new period of limitation. *B HANSRAJ GODHAJI MARWADI v. BAPU KRISHNASWAMI PILLAI*, 25 Bom. L. R. 153; (1923) A. I. R. (B.) 207 275

Sale—Application for postponement of sale—Order declaring that if fresh postponement was applied for damages would be awarded, legality of—Order, whether executable.

One of several judgment-debtors applied for postponement of an execution sale. The Court granted the application on payment of costs and also directed that if a fresh postponement was asked for damages would be awarded to the decree-holder at a certain rate. Subsequently, another judgment-debtor applied for postponement of the sale in respect of one of the properties in which he was interested and this was granted. After several applications for execution had been made, two of the judgment-debtors again applied for postponement of the sale. This was granted on payment of costs but the Court made an order that damages at the rate mentioned in its first order should be incorporated in the account. This order was subsequently modified on the application of the two judgment-debtors who had made the last application and the Court directed that the decree-holder would be at liberty to recover the damages by a separate execution and that they should not be incorporated in the account. The decree-holder made an application for execution of the first order for realisation of the damages more than three years after the date of the order directing the inclusion of the amount of damages in the account, but within three years from the order modifying the previous order and directing separate execution for realisation of damages:

Held, (1) that the Executing Court had no jurisdiction to direct that in the event of a fresh ap-

Execution of decree—concl'd.

plication for postponement damages would be awarded to the decree-holder;

(2) that the order having been made on the application of one of the judgment-debtors was not binding on the other judgment-debtors;

(3) that the second application for postponement of the sale having been made by another judgment-debtor in respect of the property in which he was interested did not attract the operation of the order directing the award of damages;

(4) that none of the orders passed by the Court actually awarded damages to the decree-holder against all the judgment-debtors, so that none of the orders was capable of execution;

(5) that, assuming that the first order was capable of execution and that it came into operation when the second application for postponement was made the application for execution was barred by time having been made more than three years after the date of the second application for postponement;

(6) that the last order directing that the amount of the damages should be excluded from the account and that the decree-holder should be at liberty to realise the damages by a separate execution did not operate to give a fresh start of limitation to the decree-holder inasmuch as it was made on the application of two of the judgment-debtors and not of the decree-holder. *PAT JAMIL AHMAD v. KESHO DAS*, (1923) Pat 202; (1923) A. I. R. (Pat) 407 1035

Sale—Objection to jurisdiction, whether can be taken after sale.

An objection that the Executing Court had no jurisdiction to sell certain property, cannot be taken after the sale has taken place. *PAT HIRJI JIVRAJ BALDEO v. RAMJAS AGARWALA* 670

Satisfaction out of Court—Satisfaction not certified—Suit to restrain decree-holder from executing decree, maintainability of—Execution, if can be stayed. See CIVIL PROCEDURE CODE, 1908, s. 47, O. XXI, RR. 2(3), 29 38

Execution sale—Identification and sale of wrong property, effect of—Misdescription of property sold, effect of—Auction-purchaser, position of.

If the description of a piece of land in a Court sale is such that it identifies the land, for instance, if the description would apply to some other land than that which it was intended to sell, the purchaser at Court-auction can get no other land than that so identified. If, on the other hand, the land is clearly identified but wrongly described, the misdescription must be treated merely as an irregularity and the sale at the auction will stand good. *M VENKATARAMA IYER v. ELUMALAI NAICKER*, 44 M. L. J. 357; (1923) M. W. N. 217; 17 L. W. 402; 32 M. L. T. 246; (1923) A. I. R. (M) 442 464

Fatal Accidents Act (XIII of 1855), s. 1—Damages, ascertainment of.

Under section 1 of the Fatal Accidents Act, the person suing for compensation is not entitled to claim anything on account of the pain or suffering caused by the death, but only for the financial loss sustained by the death.

The proper way of assessing damages in such a case is to form some estimate of what the value

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of the continued life of the deceased would have been to the plaintiff and how long it was probable that it would continue.

The fact that the accident was an extraordinary or an unfortunate one is entirely irrelevant so far as the amount of damages to be awarded is concerned. *M. SOUTH INDIAN INDUSTRIALS LD. v. ALAMELU AMMAL*, 17 L. W. 495; (1923) M. W. N. 344; 45 M. L. J. 53; (1923) A. I. R. (M.) 565 **632**
Fraud—Fraud accomplished—Estoppel—Equity.

—*Defence of in pari delicto.*

In all cases where a plaintiff is relying upon a deed, the defendant is entitled as of course to give evidence of the circumstances under which the document came into existence. When those circumstances embrace and include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the Court to look into the matter, and if the Court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud; and that there is no difference in the degree of guilt of the plaintiff (who is asking the Court to give him some help) and that of the defendant the duty of the Court is not to assist either party: in other words, the duty of the Court is to dismiss the claim, because the Court having then in its knowledge that it has before it two persons equally guilty of fraud will not assist either of them. *A. VILAYAT HUSSAIN v. MISRAN*, 21 A. L. J. 303; 45 A. 356; (1923) A. I. R. (A) 504 **92**

—*Suit to set aside decree—Discovery of fraud—Cause of action. See LETTERS PATENT (MAD.) CL. 15* **982**

Frontier Crimes Regulation (III of 1901), ss. 8, 60—Proceedings under s. 8 during pendency of suit, legality of—Jurisdiction of Civil Courts, whether ousted.

There is nothing in section 8 of the Frontier Crimes Regulation or in the Regulation as a whole which makes any distinction between proceedings taken under the section between British subjects or between other persons.

No Officer exercising the powers of a Deputy Commissioner under section 8 of the Frontier Crimes Regulation can legally make a reference to a Council of Elders under that section if a civil suit is already pending between the parties regarding the dispute between them.

An illegal proceeding under section 8 of the Frontier Crimes Regulation cannot oust the jurisdiction of a Civil Court to continue the trial of a civil suit which has been legally instituted before it prior to any proceedings under section 8 of the Regulation. *PESH SHAM DAS-BHIM SAIN v. KALU RAM-BASHESHAR NATH* **927**

General Clauses Act (X of 1897), s. 10, applicability of. See EXECUTION OF DECREE **388**

Government of India Act (5 & 6 Geo. V, C. 61, s. 107—Madras Agency Rules, 1920, r. XIV—Transfer from Agency Commissioner's Court—Power of High Court—District Court, whether Court of superior or equal jurisdiction to that of Agency Commissioner.

Government of India Act—concl'd.

The general power of the High Court to transfer a proceeding from the file of a Court which is not subject to the Civil Procedure Code is conferred by section 107 of the Government of India Act, and is exercisable thereunder subject to the fulfilment of two conditions; (1) that the Court from which the transfer is made is subject to the High Court's appellate jurisdiction, and (2) that the transfer is made to another Court of equal or superior jurisdiction.

Under the Madras Agency Rules of 1920, the High Court has appellate jurisdiction over the Court of the Agency Commissioner and is, therefore, a Court of superior jurisdiction to that of the Agency Commissioner but a District Court is not of "equal or superior" jurisdiction to that of the Agency Commissioner.

Accordingly, under section 107 of the Government of India Act the High Court can transfer a case from the Court of the Agency Commissioner to its own file but not to the file of a District Court. *M. MAHARAJA OF JEYPORE v. CHETRU-CHERIA GANGARAJU*, (1923) M. W. N. 277; 17 L. W. 517; 37 M. L. T. 269; 45 M. L. J. 8; (1923) A. I. R. (M.) 604 **745**

Grant—Grant of village in inam—Grant, whether of both warams—Presumption—Occupancy rights, existence of—"Mauza," implication of—"Kadims," implication of.

The grant of a whole village in inam will not be presumed to be the grant only of a *melwaram* interest unless it is shown that the *hudwaram* interest was already in the hands of some one else than the donee.

Suryanarayana v. Patanna, 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 45 I. A. 209; 21 Bom. L. R. 547; (1919) M. W. N. 463 (P. C.), followed.

The word "Mauza" does not necessarily import the existence of occupancy *raiyats* on the land.

Subrahmanya Somayajulu v. Sestnayya, 70 Ind. Cas. 729; 16 L. W. 462; (1922) M. W. N. 614; 31 M. L. T. 347; (1923) A. I. R. (M) 1, followed.

The mention of there being "Kadmis" in a village does not convey anything as to the existence of occupancy rights. *M. JAVVADI SOORAYYA v. TAVVALA SURYA RAO NAIDU*, 17 L. W. 555; 45 M. L. J. 41; (1923) A. I. R. (M.) 623 **795**

—**Saranjam grant—Presumption—Grant for political services—Revenue, payment of, to grantees—Grant, nature of—Saranjam grant, presumption of, suit against—Civil Courts, jurisdiction of—Pleadings, construction of—Privy Council, practice of.**

A grant of *saranjam* may be either of the soil and the whole revenue derived from it or a grant of the royal share of the revenue only. Although it may well be that it is ordinarily a grant of the royal revenue only, there is no such presumption and in each case it must be determined upon the facts what was the quality of the original grant.

A *saranjam* grant was made by the British Government in respect of political services. The documents connected therewith contained no sugges-

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tion anywhere that what was conveyed was merely the royal share of the land revenue; on the contrary, they assumed that the revenue of the lands was conveyed to the grantees and the amount of the *nazrana* levied from time to time was based on the yearly revenue of the estate; there being no suggestion that the revenue derived by the occupant, as distinct from *saranjamdar*, was not liable to *nazrana*.

Held, that the original grant was a grant of the soil. The right of the Government to resume *saranjam* grants cannot be questioned in a Civil Court.

It has not been a practice of their Lordships of the Privy Council to construe the pleadings too strictly or to exclude a plea, which is not embodied in the plaint, from being made an issue in the case. **P C SECRETARY OF STATE FOR INDIA v LAXMI BAI**, (1923) A. I. R. (P. C.) 6; 17 L. W. 405; 44 M. L. J. 471; 32 M. L. T. 111; 25 Bom. L. R. 527 37 C. L. J. 464; 47 B. 327 **898**

Guardians and Wards Act (VIII of 1890), s. 19

—*Minor sons—Guardianship—Father, appointment of.*

Where the parties are not European British Subjects, a Court is not authorised to appoint or declare the father as the guardian of his minor children. The father is the natural guardian and does not require appointment. **U B RAMZAN KHAN v. MARIAN BIBI**, 4 U. B. R. (1922) 146; (1923) A. I. R. (R.) 120 **200**

Hazara Settlement Rules (Regulation I of 1872), s. 60—N.-W. F. P. Regulation (VI of 1901), s. 3, effect of—Settlement of 1871, entries in, value of—Adverse possession—Mortgagor and mortgagee.

It is straining language to speak of rights as having become vested or claims having become barred merely by reason of the existence of a law which invests certain evidence with a character different from that which attaches to similar evidence in other cases.

Section 60 of the Hazara Settlement Rules of 1872 did not lay down any thing more than a rule of evidence, and it was open to the Legislature to abrogate that rule and prescribe a fresh rule for the guidance of Courts.

The Legislature has unrestricted power to revive even a lapsed title, if it makes a special law which distinctly allows such a revival.

Section 3 of Regulation VI of 1901 has the full force of law and the Courts are bound to comply with its provisions and to regard the records of the Hazara Settlement of 1871 in exactly the same manner and as having exactly the same value as the records of any other Settlement in the Punjab or the N.-W. F. Province.

A mortgagee who comes into possession as a mortgagee, cannot force the mortgagor to come into Court and to sue for redemption merely by asserting a proprietary title.

No unilateral act by either party to a mortgage can prejudice the title of the other. **Fesh GHULAM HAJDAR SEAH v. BAZID SH H** **988**

Hindu Law v. custom—Thattan caste in Malabar—Impartibility of estate—Burden of proof—Illegitimate son—Inheritance.

There is no presumption of law in favour of impartibility of property amongst the members of the Thattan caste in Malabar. They are Hindus and the Courts have to apply to them the principles of Hindu Law unless and until proof of custom to the contrary has been established.

The Makkathayam Law which the Thattans follow corresponds in the main to the ordinary Hindu Law and *prima facie* involves partibility.

To prove a custom of impartibility, there must be established a uniform, continuous, and definite practice submitted to for so long a period that it should be accepted as an established governing rule of the caste.

An illegitimate Thattan son would be entitled to a share in the joint family property by showing either that he is a *Sudra* for the purposes of the Hindu Law, which *prima facie* applies to his caste or that his caste follows *Sudra* custom in the matter of the inheritance of an illegitimate child. **M KUNHI KUTTY v. RAMAN**, 44 M. L. J. 274; (1923) M. W. N. 173; (1923) A. I. R. (M.) 452; 46 M. 597; 18 L. W. 525 **145**

—Earnest money paid to father, recovery of—Personal decree against sons—Pious obligation.

In a suit for the recovery of earnest-money against the sons of a Hindu father with whom the contract for sale was entered into and who died prior to the filing of the suit, it is not improper to give a personal decree against the sons, inasmuch as the father having died the sons are under a pious obligation to discharge his debts. **A MUNNI BABU v. KOER KAMTA SINGH**, 21 A. L. J. 265; 9 O. & A. L. R. 429; (1923) A. I. R. (A) 32; 45 A. 378 **86**

Adoption—Age of adoption—Putreshti jag ceremony, whether necessary—Parent giving in adoption whether must sit on bedi—Widow, power of, to give in adoption—Motive for adoption—Public policy.

The passage attributed to the Kalika Purana, which lays down that a boy to be adopted must be below five years of age, cannot be relied upon as authentic, and the adoption of a child over five years of age, is permissible under Hindu Law.

Ganga Sahai v. Lekhraj Singh, 9 A. 253; 5 Ind. Dec. (N. S.) 604, relied upon.

The *putreshti jag* ceremony is not essential to the validity of an adoption even amongst the regenerate classes.

Once it is determined that an adoption is otherwise valid, provided the *upanayana* ceremony, the culminating point of the second birth, has not been performed, although the other initiatory rites, including tonsure, have already taken place in the natural family of the adopted son, the necessity for the *putreshti jag* ceremony disappears.

It is not necessary for the validity of an adoption that the person giving in adoption should actually sit upon the *bedi* during the *datta homa* ceremony.

Under the Hindu Law a widow can give her son in adoption if her husband has during his lifetime given his consent to it.

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A mother may give her son in adoption even without her husband's express consent, in cases where such consent cannot be obtained, as where he is dead or has joined a religious order.

The mere fact that an adoptor had mixed motives in making an adoption is not sufficient in law to render the adoption invalid. The presumption is that his motive was the ordinary one which operates in such cases. If in addition there were other motives of a worldly nature which also induced him to do that which he had an absolute right to do, this would not in any way affect the validity of his act.

Public policy does not concern itself with the motives which induce a person to exercise his lawful rights without risk of injury to any body. **PAT MAKUND DEB. v. JAGANNATH JENAMONE**, (1923) Pat. 97; 1 P. L. R. 201; 4 P. L. T. 427; 2 Pat. 469; (1923) A. I. R. (Pat) 423. **230**

Adoption—Invalid adoption—Subsequent adoption into another family.

An adoption must either be effectual for all purposes, or a nullity. An invalid adoption is no obstacle to the person who was taken in adoption from being validly adopted into another family. **B BHAIU ABaji DSHHPANDE v. HARI RAM-CHANDRA**, 25 Bom. L. R. 411; (1923) A. I. R. (B.) 301. **631**

Alienation—Sale by father—Consideration partly for necessity—Suit by son to set aside sale—Decree, form of.

In a suit by a Hindu son to set aside a sale by the father, if it be found that a part of the sale consideration was valid and a part invalid, the decree to be passed should be one for possession in favour of the plaintiff subject to his paying to the purchaser so much of the consideration as was required for legal necessity. **A DWARKA RAM v. JHULAI PANDE**, (1923) A. I. R. (A) 248; 45 A. 429. **134**

by widow—Legal necessity—Recitals in deed, value of.

In the case of an alienation by a Hindu widow the recitals in the deed assume greater importance by efflux of time, especially when proof of actual enquiry into the necessity justifying the deed becomes unavailable. But where the transferee from a Hindu widow happens to be alive and is examined and disbelieved on the existence of a necessity for the loan, no presumption in favour of such a necessity can be drawn from the mere fact of a recital to that effect in the deed.

The fact that a bond is taken by a Hindu widow in lieu of a portion of the consideration for an alienation by her negatives the existence of an immediate necessity for that money. **O QAMAR JEHAN BEGAM v. BANSIDHAR**, 9 O. & A. L. R. 341. **1046**

Bequest—Annuity charged in favour of daughter and then her son—Annuity, whether operative in favour of son born after testator's death—Annuity made payable out of estate—Charge, creation of.

An annuity charged on his estate by a testator and made payable to his daughter and after her death to her son, is operative under Hindu Law

Hindu Law—contd.

even though the son might be born after the death of the testator; a grant of this description does not violate the rule against remoteness.

A grant such as the above is a right of property, and as it is an incorporeal right, the test of validity in each case is whether, under the circumstances, the donor has sufficiently indicated an intention that the transfer should take effect as a corolary and with that intention has done all that is practicable by way of transferring such indicia of property as may be in existence.

Where under a Will an annuity is made payable out of the estate of the testator, it shows an intention to create a charge on the property. **C JATENDRA MOHAN P. GHANESYAM CHAUDHURY**, 37 C. L. J. 428; (1923) A. I. R. (C) 27; 59 (C.) 266. **1019**

Inheritance—Divided sons and grandsons.

The right of divided sons and grandsons and great-grandsons of the last male owner to succeed to his divided property, is the same as in the case of undivided sons. **B GANGADHAR NARAYAN v. IBRAHIM BAVA**, 25 Bom. L. R. 197; 47 B. 556; (1923) A. I. R. (B.) 265. **307**

Jains—Adoption; effect of—Civil Procedure Code (Act V of 1908), O. XXII, r. 3—Death of plaintiff—Substitution, time for, extension of—Appellate Court, interference by—Guardian and minor—Guardian, whether trustee—Power of guardian to charge property of minor.

There is no warrant for the proposition that Jains cannot adopt in the *Dattaka* form or that an adopted son among Jains can, in no case, become a member of the family of his adoptive father.

It is open to a Court to extend the time for the substitution of the representatives of a deceased plaintiff and, when it has so extended the time and effected such substitution an Appellate Court should not interfere with the exercise of its discretion.

A guardian of a minor may be a *quasi* trustee for certain purposes, for instance, in respect of money received by him on behalf of his ward, but he cannot incur expenses to any extent he likes without seeking the intervention of any Court, in the hope that he would be allowed to create a charge on the property of the minor to that extent. **L GORI MAL v. PANNA MAL**, **424**

Joint family—Agreement by manager to purchase immoveable property—Specific performance, whether can be enforced against surviving co-parceners. See SPECIFIC RELIEF ACT, 1877, s. 27. 42

Alienation, invalid, by co-parcener—Partition—Alienated property taken into account—Subsequent suit to recover property, whether maintainable.

It is only in his capacity as co-parcener that a member of a joint family can sue for joint family property unlawfully alienated. His suit must be in the nature of a partition suit. But once there has been a general partition in which the property in question and the sale of it has been taken into account, the parties to that partition cease to be co-parceners and none

Hindu Law—contd.

of them has any right to sue to recover the property alienated. **M DURAISAMI IYER v. SUBBARAYA IYER**, 17 L. W. 348; (1923) M. W. N. 242; 32 M. L. T. 277; (1923) A. I. R. (M.) 442 **322**

— **Joint family—Alienation—Necessity, absence of—Share of alienor, whether can be charged.**

Where a mortgagee or purchaser from the *karta* of a joint family enquires into the necessity for the loan or the sale and satisfies himself by an honest and *bona fide* enquiry that the necessity exists, the law completely protects him; for it is not a condition for his success in any litigation which may arise out of the transaction that he should prove the existence of the necessity. It is sufficient if he proves that he made an honest enquiry and was satisfied that the necessity existed. If he fails to make such an enquiry, the Court will not raise an equity in his favour, merely because the alienor made a representation to him that he had power to charge the joint family property. When, however, there is a further undertaking by the alienor that he would make good the representation by partition or otherwise, the Court has power to compel him to do that which he undertook to do. But where there is no such undertaking it is impossible for the Court to direct that the members of the joint family should hold the family properties in definite shares and that the share of the alienor should remain charged with the payment of any money to the mortgagor or the purchaser. **Pat JATADHARI SINGH v. DUKHI SINGH**, 4 P. L. T. 64; (1923) A. I. R. (Pat.) 197 **1053**

— **Debt incurred by manager on pro-note—Family, liability of—Pleadings—Suit on pro-note against manager of Hindu family—Claim on debt itself—Amendment of plaint.** Although the members of a joint Hindu family are not liable in a suit on a promissory note signed by one of the members of the family as manager in his own name, they would be liable in a suit for the debt which was due under the note.

A suit based on a promissory note signed by the manager of a joint Hindu family cannot be treated by the Court as a suit for the debt for which the promissory note was passed. The plaintiff, if he wishes to make other members of the family liable, must ask for an amendment of the plaint at the earliest opportunity. **B VITHALRAO SHESH-GIRIRAO MOKTESAR v. VITHALRAO SONDEKAR**, 25 Bom. L. R. 151; (1923) A. I. R. (B.) 244 **242**

— **Loan raised by adult members—Necessity, presumption of—Pre-emption decree, amount due under—Debt, nature of.**

Where all the adult members of a joint Hindu family join in raising a loan on the security of the joint property of the family, that is sufficient to raise a presumption of necessity.

The amount payable under a pre-emption decree is a debt for which the manager of a joint Hindu family is justified in borrowing money on the security of the family property. **O SHAMSHER DATT SINGH v. LALTA SINGH**, 9 O. & A. L. R. **259** **1000**

Hindu Law—contd.

— **Joint family—Mortgage by father in lieu of antecedent debts—Pious obligation of sons to pay—Oudh Civil Digest, para. 267—Legal Practitioner—Money-lending business—Professional etiquette—Contract, validity of.**

Where a mortgage is executed by the father of a joint Hindu family, in lieu of antecedent debts, the sons are under a pious obligation to pay the mortgage debt unless it is shown to have been tainted with immorality.

The disability which attaches to a legal practitioner under paragraph 267 of the Oudh Civil Digest in regard to doing money-lending business does not have the effect of rendering any contract, by which he lends money to a person belonging to the district in which he is practising, void and unenforceable. The question in such cases is really one of professional etiquette rather than of public policy and the contract cannot be regarded as invalid. **O RAM SINGH v. RAGHUBANSA**, (1923) A. I. R. (O.) 3; 9 O. & A. L. R. 29; 26 O. C. 201 **877**

— **Mortgage of joint property by manager—Necessity—Burden of proof.**

Where the manager of a joint Hindu family mortgages joint estate, it is incumbent on the parties supporting the mortgage to prove that the money raised on the mortgage was required for family purposes; and where the mortgage is for carrying on a family business, it is not sufficient for the mortgagee to prove by evidence that the mortgagor was carrying on such business. He must show that the money was required for such business. **B VITHAL, YESHWANT v. SHIVAPPA MALLAPPA HOSMANI**, 25 Bom. L. R. 323; (1923) A. I. R. (B.) 26; 47 B. 637 **659**

— **Partition—Adoption of divided member—Property, whether divested.**

Under the Hindu law where a member of a joint Hindu family has obtained an absolute right to a share in the family property on partition, the fact of his adoption subsequently into another family does not divest him of the property which had come to him on partition. **B MAHABALSHWAR NARAYANBHAT v. SUBRAMANYA SHIVRAM**, 25 Bom. L. R. 274; 47 B. 542; (1923) A. I. R. (B.) 297 **308**

— **property—Alienation by one co-parcener—Partition—Allotment of alienated portion—Alienee, right of.**

Under the Hindu Law, a purchaser from one member of a joint family of property which belongs to the family can enforce the sale only by a partition of the entire family property, and if in such partition the property sold can, with due regard to the interests of the other sharers, to the debts due by the family, and to the equitable allocation of the various items of family property to the shares of the several co-parceners, be wholly allotted to the vendor's share the purchaser will be entitled to the whole property which the vendor professed to convey to him.

This right of the alienee does not depend on whether a suit was first brought by him for a partition of the whole joint property or by the other co-parceners against him for a partition of a part.

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Even in a suit brought by the son for his share of the alienated property, it would be open to the Court on the application of the alienee to decree a general partition in which this principle of equity would be applied.

The principle applies not only to a case where the alienor purports to sell the property as his own but also where he sells it on behalf of himself and on behalf of the other co-parceners.

The mere fact that the alienee knew or must have known that the alienation was not for necessities does not affect his right in equity. *M. DAVID BEEVI AMMAL v. RAMAKRISHNA AIYAR*, 44 M. L. J. 309; 17 L. W. 332; (192) M. W. N. 202; 32 M. L. T. 263; (1923) A. I. R. (M.) 467 81

——— **Joint family—Separation in food, residence and worship—Partition—Presumption—Enjoyment of family properties by divided member—Ouster—Partial partition.**

From the separation of the members of a joint family in food, residence and worship, owing to the fact that in order to manage the family business and property at different places the members had to go to and to live in those places separately, it does not necessarily follow that the family had divided.

Where a member of a Hindu family who is divided in status from the other members is in enjoyment of a portion of the family properties, while other members enjoy other portions, he is not, in law, excluded and ousted from these other portions, so as to disentitle him to his share of those portions, however, long may be their enjoyment by others.

Kumarappa Chettiar v. Saminatha Chettiar, 52 Ind. Cas. 470; 42 M. L. J. 431; 36 M. L. J. 612; (1919) M. W. N. 328, relied on.

A family may remain joint with regard to some properties after a separation in regard to the others. Therefore, the mere fact that there has been a partial partition of the family property does not effect the rights of the parties to sue for partition in regard to other properties which remained undivided. *L. B. HAGWAN DAS v. PARBATI*, (1923) A. I. R. (L.) 569 742

——— **Separation, whether should be formally proved—Residence in same house and common purse—Inference.**

It is not necessary that definite evidence should be given of a formal agreement between the members of a joint Hindu family to enable a Court to hold that a separation has taken place. An inference of separation having taken place may be drawn from the acts of the members without any proof of a formal agreement. But where they are found living together in the same house and meeting their expenses out of a common fund it would require very strong evidence to lead to the conclusion that they had put an end to their state of jointness. *PAT TARINI PRASHAD SINGH v. NUNU PRASHAD SINGH* 1008

——— **Trade debts—Minor, share of, whether liable—Civil Procedure Code (Act V of 1908), s. 34—Interest at contract rate during pendency of suit—Discretion of Court.**

Hindu Law—contd.

Where the managing member or any other accredited agent of a Hindu trading family who carries on the family trade contracts debts for bona fide trading purposes, the creditors are entitled to proceed against the whole family property including the shares of minor members, and such liability is not confined to the assets of the business. In cases of such trading families, the trade assets are not limited to the good will, stock in trade and outstandings of the business but comprise the entire family properties, in the absence of evidence to show that the trade was carried on without reference to the family property.

Sanka Krishnamurthi v. Bank of Burma, 11 Ind. Cas. 79; 35 M. L. J. 692; (1911) 1 M. W. N. 385; 21 M. L. J. 620; 11 M. L. T. 56, *Ramlal Thakursidas v. Lakshminchandra*, 1 B. H. C. R. App. 11 (51) *Muthaya Pillai v. Tinnevely South Indian Bank*, 37 Ind. Cas. 230; 5 L. W. 341, *Raghunathji Tarachand v. Bank of Bombay*, 2 Ind. Cas. 173; 34 B. 72; 11 BOM. L. R. 255, *Thammanna Chinnal Lakshminarasimha v. Akarapu Venkanna Chinniah*, 55 Ind. Cas. 64; 38 M. L. J. 55; 11 L. W. 55; (1920) M. W. N. 112; 27 M. L. T. 83 and *Malai-perumal Chettiar v. Arumachella Chettiar*, 41 Ind. Cas. 224; 6 L. W. 417, followed.

Section 34 of the Code of Civil Procedure gives the Court a discretion in awarding interest at the contract rate from the date of the plaint to the date of decree. *M. SUBBARAYA MUDALI v. THANGAVELU MUDALI*, 45 M. L. J. 44 815

——— **Joint property—Partition—Separate acquisition—Exclusion from partition—Burden of proof—Sole occupation by one co-sharer, if constitutes ouster—Adoption, proof of—Judgments—Substance of pleadings narrated in judgment, whether evidence.**

The acquisition of a property in the name of one of the brothers forming a Hindu joint family is not even *prima facie* evidence that the property was obtained by that brother for himself. Where there has been a partition among the members of a Hindu joint family, the presumption is that no property was excluded from the partition; and the burden lies upon him who alleges exclusion to establish his assertion.

Separate possession of a property by one member of a Hindu joint family is not conclusive evidence of partition and must be interpreted in the light of all the circumstances of the case.

The sole occupation by one co-sharer, of a portion of joint property, does not constitute an ouster of the other co-sharers; and a co-sharer in possession of a portion of the common land, with the tacit or express consent of his co-sharers, cannot change the nature of that possession.

The onus of proving an adoption is on the party setting it up. But very slight evidence may be sufficient for this purpose, where the alleged adopted son has been treated as such for a long series of years.

Judgments narrating the substance of the pleadings of the parties to a litigation furnish evidence of the allegations made by them on that occasion. *C. KAILAS CHANDRA NAG v. BIJAY CHANDRA NAG*, 37 C. L. J. 434; (1923) A. I. R. (C.) 18 680

Hindu Law—contd.

Madras Presidency—Adoption by widow.

A Hindu widow in the Madras Presidency can adopt a son in order to carry on the line and provide for the due performance of the obsequies of her husband, either with the authority of the husband or with the consent of the husband's *sapindas*. This power of adoption can be exercised on the death of a son or adopted son as often as occasion arises.

Where, however, the son dies leaving a natural born or adopted son, or a widow to continue the line by means of adoption, the power of the mother to make an adoption is extinguished and can never afterwards be revived. *M. TRIPURAMBA v. VENKATARAMNAM* 44 M. L. J. 349; 46 M. 423; (1923) A. I. R. (M.) 157. 278

Joint family—Member, contract by—Share in family property, liability of.

A member of a joint Hindu family is the Madras Presidency cannot escape from liability to perform a contract entered into by him on the ground that the contract is not such as would bind the family and that he has no separate property. His share in the family property is liable for such a contract. *P. C. SADASIVA MUDALIAR v. HAJEE FAKHER MAHOMED SAIT & SONS*, (1922) A. R. (P. C.) 397; 17 L. W. 288; 44 M. L. J. 396; 32 M. L. T. 99; 27 C. W. N. 677; 37 C. L. J. 569. 48

Mitakshara—Gift by co-parcener—Consent of other co-parceners—Gift, validity of.

A gift by one co-parcener, with the consent, express or implied, of the other co-parcener, is recognised by the Mitakshara law and passes a good title to the donee. It is by no means void *ab initio*, and, in the absence of repudiation by any of the members of the family, cannot be regarded as voidable. *O. MAHABIR PANDE v. MATHURA PRASAD*, 9 O & A. L. R. 822. 470

Joint family—Mortgage by father—Liability of sons—Decree against father, whether can be re-opened—Debt without consideration, whether binding.

In a suit on a mortgage brought against the father in his representative capacity, the sons cannot re-open a decree against him except on the ground that the debt for which the mortgage was given was not binding on them under the Hindu Law.

Under the Hindu Law, the sons are not bound by a debt contracted by their father which is "illegal or immoral." The term "illegal or immoral" is used as a translation of the word *Avyavaharika* in the texts, and includes the various kinds of debts specified as coming within that category. These include debts which are without consideration.

If a debt contracted by the father of a joint Hindu family is without any consideration, it is illegal or immoral and is not binding on the sons. *N. ARJUN V. CHHAGAN LAL*, 1044

Manager, position of—Suit for rent by manager—Minor co-parceners, whether necessary parties—Landlord and tenant—Joint landlords—Suit for rent.

Hindu Law—contd.

The ordinary rule no doubt is that all persons in whom the right to any relief exists should be joined as plaintiffs. But this rule is not of general application. There are several statutory exceptions to the rule, and there is no reason why there should not be other exceptions based not on any legislative provision but on the substantive law applicable to the parties. The case of the manager of a Hindu joint family is such an exception.

A suit for rent instituted by the managing members of a joint Mitakshara family is not of necessity bound to fail, merely because the infant co-parceners have not been placed on the record as joint plaintiffs or *pro forma* defendants.

Where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit.

Where a suit is brought by or against a manager of a joint Hindu family in his representative capacity the other members of the family are not necessary parties to the suit, which will consequently not fail by reason of their non-appearance.

The tendency of modern decisions is in favour of recognition of the representative character of the manager, though the question must be decided in each individual case or special class of cases, subject to the operation of relevant statutory provisions if any, such as the one embodied in section 188 of the Bengal Tenancy Act. *C. KALIPADA DAS v. RAJA SATI PRASAD*, 30 C. L. J. 234; (1922) A. I. R. (C.) 498, 27 C. W. N. 372. 722

Mortgage by father or grandfather—Antecedent debt—Foreclosure decree—Omission to implead sons and grandsons, effect of—Redemption—Transfer of Property Act (I V of 1882), s. 85.

A son or grandson in a Hindu joint family, although not impleaded by name in a suit for foreclosure on foot of a mortgage executed by his father or grandfather, for purposes binding on the family estate, is nevertheless deemed in law to be properly represented by such father or grandfather and is, consequently, bound by a decree passed against them.

For the purposes of section 85 of the Transfer of Property Act it is not necessary to implead the sons by name in a suit against the father of a Hindu joint family, inasmuch as the latter sufficiently represents his sons in the litigation.

Hori Lal v. Nimman Kunwar, 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819, followed.

Drigpal Singh v. Sukhmandan Lal, 56 Ind. Cas. 299; 7 O. L. J. 164, 2 U. P. L. R. (O.) 96, and *Jadu Nath Singh v. Afzal Khanam*, 57 Ind. Cas. 52; 8 O. L. J. 191; 2 U. P. L. R. (O.) 118; 7 O. L. J. 362 dissented from.

It is open, however, to a son who is not made a party to such a suit to show that the debt was not antecedent or that if antecedent, it was for a purpose either illegal or immoral. *O. BHAGRATHI v. ONKAR NATH*, 9 O & A. L. R. 166; 10 O. L. J. 185. 142

Hindu Law—contd.

— **Mutt**—Debt incurred by head of mutt, whether binding on successor—Legal necessity—Expenses incurred on festivals.

A *shabait* or *malathipathi* cannot alienate mutt properties unless constrained to do so by unavoidable necessity. The same rule applies to the creation of debts binding on mutt properties, for the enforcement of such debts may result in the alienation of such properties through Court-sale.

In order to establish necessity for a debt it must be shown that the debt was incurred for a legitimate purpose and there was financial necessity to borrow to the extent to which the debt was incurred.

A *Malathipathi* is not justified in borrowing money for the performance of the *Pariyaya* or any other ceremonies or festivals unless it is shown that the amount borrowed is reasonably necessary for the performance of the ceremony and the *Malathipathi* has no funds in his hands to meet the expenses.

Per Krishnan, J.—A *Malathipathi* has a large dominion over his surplus income and he is not bound to account for it. His discretion to use it as he likes is unfettered.

Per Ramesam, J.—The Swamis have a wide power over their income, and Courts do not ordinarily scrutinise their manner of exercising it so long as they do not seek to bind their successors. If a successor is sought to be bound the borrowing must be for justifiable necessity.

A mutt is not bound by custom to feed every Brahmin that comes to the *Pariyaya*. *M. LAKSHMINDR A HIRTHA SWAMIAR v. VIBHUDA-PRIYA THIRTHASWAMIAR*, 44 M. L. J. 187; 17 L. W. 274. (1923) A. I. R. (M.) 288 109

— **Religious endowment**—*Malathipathi* borrowing money for temple necessities—Temple properties, liability of.

Where a *Pandarasanadhi*, the *ex-officio* trustee of a temple, borrows money on a bond for necessary purposes agreeing to re-pay the same out of the trust funds, a decree can be properly passed against the temple properties. *M. SUNDARESAM CHETTIAR v. VISWANATHA PANDARASANNADHI*, 31 M. L. T. 66; 16 L. W. 83. 43 M. L. J. 147. (1922) M. W. N. 444; 45 M. 703; (1922) A. I. R. (M.) 42 103

— **Religious office; share in, transfer of.**

The transfer of a share in the emoluments as well as the duties of a religious hereditary office by one member of a Hindu family to an outsider or to the original grantor of the office is invalid, but such a transfer to another member of the family is not open to objection. *B. RAGHUNATH VITHAL v. PURNANAND SARASWATI*, 25 Bom. L. R. 207; 47 B. 529. (1923) A. I. R. (B) 358 312

— **Widow**—Gift in favour of idol—

Ratification by reversioner, effect of—Estoppel—Reversioner, suit by—Decision, binding effect of.

Where in respect of a gift by a Hindu widow of a portion of her husband's estate, a reversioner, during the lifetime of the widow, executes a deed renouncing whatever rights and relinquishing whatever interest he may possess under the Hindu Law in respect of the property covered by the

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gift, and expressly covenants not to set up any right or claim to the property, he cannot, when the succession opens in his favour, be permitted to challenge the validity of the gift.

A decision in favour of one reversioner in a suit claiming a declaration that a transfer by a Hindu widow of her husband's estate is not valid beyond her lifetime, would, ordinarily, in the absence of fraud or collusion, bind the whole body of reversioners in respect of all matters actually decided in that litigation. *A. PATEL SINGH v. THAKUR RUKMINI RAWANJI MAHARAJ*, 21 A. L. J. 235; 45 A. 339; (1923) A. I. R. (A.) 387 8

— **Widow**—Mortgage by widow without necessity—Improvements by mortgagee—Mortgagee, whether entitled to compensation.

Where a Hindu widow mortgages property without necessity agreeing that the mortgagee should re-build a shop standing on the property which, at the time of the mortgage, was in a ruinous condition, and the mortgagee re-builds the shop, the reversioner of the widow cannot seek to obtain possession of the property without making compensation to the mortgagee, or to his successor. The mortgagee, at any rate, is entitled to remove what he has placed on the property at his own expense. *B. SHIDDAPIPA v. PANDURANG VASUDEV*, 25 Bom. L. R. 395; (1923) A. I. R. (B) 385; 47 B. 626 626

— **Hindutemple**—Idol, removal and replacement of—Worshipper, right of.

The removal of an idol from a temple in order to replace it by a new one is not an act of worship; such removal is an act of management, and a worshipper who claims the right to remove it, must prove that he has some right to manage the temple. *M. GOLLACHKKRAPANI v. KATENENI LAKSHMAPERUMALLUR*, 17 L. W. 62; 4 M. L. J. 90; (1923) M. W. N. 89; (1923) A. I. R. (M.) 369 328

— **Income Tax Act (XI of 1922), s. 46.** 954

— **Indian Soldiers Litigation Act (IX of 1918), s. 11, applicability of.**

Section 11 of the Indian Soldiers (Litigation) Act applies only to those cases where the plaintiff is an Indian Soldier on the date of the institution of the suit, and has no application to a case where the plaintiff has been an Indian Soldier but has ceased to be one on the date of the institution of the suit. *L. BARKHURDAR v. KARAM DIN*, (1923) A. I. R. (L.) 465. 107

— **Insolvency**—Joint Hindu family—One member declared insolvent—Debt due from family—Suit to recover—Venue—Provincial Insolvency Act (V of 1920), s. 28.

Where a member of a joint Hindu family has been declared insolvent, the Insolvency Court alone has jurisdiction in the matter of a debt due by him jointly with other members of the family, despite the fact that there are minors concerned who are not insolvents. Such a debt must be proved under section 28 of the Provincial Insolvency Act. It cannot be split up so as to render a suit competent for the recovery of a moiety of the debt from the non-insolvent members of the family in the ordinary Courts. *N. VITHAL v. RAMCHANDRA*, 19 N. L. R. 128; (1923) A. I. R. (N.) 257 327

Interpretation of Statutes—Intention of Legislature,

The meaning of a Statute is not to be interpreted with reference to what its framers intended to do, but with reference to the language which they did in fact employ.

The proceedings of the Legislature in passing a Statute cannot be taken into consideration in the judicial construction of the Statute. **L GHULAM MUHAMMAD v. PANNA RAM** 438

Rule of interpretation—Retrospective effect—C. P. Tenancy Act (I of 1920), s. 49 (1), whether retrospective.

Unless an intention to the contrary is clear, an Act is to be construed as operating only on cases or facts which come into existence after the Act, and not retrospectively to cases which had come in existence before the Act. As a general rule, mere alterations in forms of procedure are retrospective in effect and apply to pending proceedings.

The provisions in section 49 (1) of the C. P. Tenancy Act relating to the lapsing of the tenancy rights granted by an ex-proprietor in the *sir* land cannot have retrospective effect over tenancy rights created before the passing of the Act. **N HINDU SINGH v. MANGAL**, 19 N. L. R. 110; (1923) A. I. R. (N) 227 433

Jurisdiction—Decree conditional on payment within fixed time—Court, power of, to extend time.

Where a decree is passed conditionally on the decree-holder's making a certain payment within a fixed time, the Court has no power to extend the time so fixed. **O DORI LAI v. JAMAGA**, (1922) A. I. R. (O) 16 879

Jurisdiction of Civil Court to declare Revenue Court's decree invalid—Pre-emption decree—Decree-holder obtaining possession privately—Vendee's name not omitted from khewat—Vendee obtaining decree for profits from Revenue Court—Jurisdiction of Civil Court to declare decree inoperative.

When a decree has been passed by a competent Court of exclusive jurisdiction, a Civil Court cannot declare it to be invalid and incapable of execution.

A pre-emptor decree-holder deposited the pre-emption money in Court, but instead of taking possession of the pre-empted property through the Court, took it privately and did not care to have a mutation effected in his favour, with the result that, after a few years, the vendee, whose name continued to appear in the *khewat*, sued the pre-emptor in a Revenue Court for profits. Upon this the pre-emptor filed a suit in a Civil Court for a declaration that he was the owner of the property and that the vendee had no right to get a decree for profits. The vendee's suit for profits was decreed and about a week later the pre-emptor's claim was also decreed. Again, when the vendee put his decree in execution the pre-emptor filed another suit for a declaration that the vendee had no right to realize profits under the decree of the Revenue Court and that his (pre-emptor's) rights had become absolute under the Civil Court decree.

Held, that the pre-emptor's suit did not lie. **A SHABIR HUSAIN v. GHULAM HUSAIN**, (1923) A. I. R. (A) 437 276

Jurisdiction—conclld.

Municipal bye-law, violation of—Sanction for prosecution for one offence—Conviction for another, legality of.

When a Municipal bye-law contains disjunctive and alternative offences, it is incompetent for a Magistrate to convict a person of one of such offences, when sanction has been given by the Municipality to prosecute him in connection with another.

A Municipality sanctioned the prosecution of a person for "singing with a high sounding instrument" in violation of a bye-law forbidding persons to "beat a drum or tom-tom or blow any high sounding instrument." The accused was convicted for "beating a drum." On revision:

Held, that under no circumstances could the "beating of the drum" be regarded as "singing with a high sounding instrument," and as sanction had been given by the Municipality to the latter offence, the conviction of the accused for the former could not stand. **PAT RAHIM v. EMPEROR**, 1 P. I. R. 45 Cr.; 24 Cr. L. J. 478 894

Redemption suit—Valuation—Forum of appeal—Punjab Courts Act (V of 1918), s. 39 (1) (a).

The question of jurisdiction to hear an appeal in a redemption suit has to be determined with reference to the claim made and not to the decision on the claim.

Muhamamd Khan v. Ashak Muhammad Khan, 106 P. R. 1895 (F. B.), and **Chuni Lal v. Beli Ram**, 20 Ind. Cas. 473; 229 P. I. R. 1913, 196 P. W. R. 1913 followed.

Kishan Chand v. Taj-ud-din, 1 Ind. Cas. 879; 23 P. R. 1909; 37 P. W. R. 1909 and **Dyal Singh v. Ram Rakha**, 14 Ind. Cas. 78; 54 P. R. 1, 12; 122 P. W. R. 912, distinguished.

Plaintiff sued to redeem a bungalow on payment of Rs. 3,550. The defendant claimed Rs. 20,894. The suit was decreed on payment of Rs. 13,419. Plaintiff appealed to the High Court:

Held, that under section 39 (1) (a) of the Punjab Courts Act the appeal lay to the District Judge. **L UDHE RAM v. NARAIN SINGH**, (1923) A. I. R. (L) 284 389

Landlord and tenant—Assessment of rent, suit for—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 130, 131, applicability of.

In a suit for assessment of *mal* lands presumably liable to be assessed, the circumstance that rent has not in fact been paid for more than twelve years before suit, is not *per se* sufficient to support a decree of dismissal.

Art. 130 of the First Schedule to the Limitation Act does not apply unless and until the land is found to be rent-free; the mere non-payment of rent for a period does not bar the landlord's right to have the rent assessed and to recover rent from his tenant.

Kamini Sundari Chowdhurani v. Abdul Halim, 47 Ind. Cas. 420; 28 C. L. J. 234 and **Dhanajoy Manjhi v. Upendranath Deb**, 46 Ind. Cas. 428; 22 C. W. N. 685, relied on.

Under Art. 131 of the First Schedule to the Limitation Act the right to levy assessment, as a recurring right, accrues when there has been a demand

Landlord and tenant—contd.

and refusal only in those cases where the relationship of landlord and tenant or landlord and occupant has ever existed. Once that right is established, then the non-payment of rent or assessment would not be sufficient to enable the tenant to begin to set up a title by adverse possession. There must be some overt act, such as refusal to pay the rent or assessment, before time begins to run.

A suit to assess and recover rent of the plaintiff's *mal* land is not barred by limitation under Art. 131 of the First Schedule to the Limitation Act where the defendant repudiates the right of the plaintiff to assess and recover rent for the first time within 12 years of the suit.

Where a contract between the landlord and tenant contemplates that liability to pay rent should accrue only after assessment, the tenant should not be made liable for rent for a period anterior to the assessment. **C AKBAR SARCAR v. RAMESH CHANDRA**, (1923) A. I. R. (C.) 392; 38 C. L. J. 207 329

Person paying rents, whether necessarily tenant.

The question whether a person is a tenant depends on the original agreement between him and the landlord. The mere fact that he pays rent like an ordinary tenant does not necessarily show that he is a tenant. **N MANOHARLAI v. RAMRATAN** 1012

Rent suit, dismissal of—Relation of landlord and tenant not established—Subsequent suit for ejectment—Res judicata.

Where in a rent-suit by a landlord against an alleged tenant the latter sets up a title in himself, and the Court dismisses the suit, holding the relation of landlord and tenant to be not established, the decision is conclusive on one point and one point alone, namely, that the defendant was not the tenant of the plaintiff during the years for which rent was claimed. The decision cannot operate as *res judicata* on the question of title in a subsequent suit to eject the defendant as a trespasser. **C SYAM LAI v. BRINDABAN CHANDRA** 655

Right to timber—Record of Rights, entry in, value of.

The general law is that a landlord is entitled to half the value of the trees cut down by the tenant. If the tenant denies this right he must prove an exception to the general law in the form of a local custom entitling him to the timber on the holding. If he produces an entry in the Record of Rights in support of his claim, the burden is shifted to the landlord to prove the contrary. **PAT RAMPARICHAN SINGH v. BIRANJI PRASAD SINGH**, 4 P. L. T. 245; (1923) A. I. R. (Pat) 295; (1923) Pat. 69 157

Stipulation for exorbitant interest on rent in arrears—Sale of tenancy for arrears of rent—Purchaser without notice of stipulation, position of.

The purchaser of a holding at a sale for arrears of rent held at the instance of the landlord, purchases it with the ordinary incidents of a tenancy. A stipulation for the payment of interest at an unusual and an exorbitant rate on the rent in arrears is not an incident of a tenancy.

Landlord and tenant—contd.

Where a holding is put up to sale for arrears of rent at the instance of the landlord without any notice in the sale proclamation that there was a written contract for the payment of interest at a very high rate, a purchaser would be justified in purchasing the holding on the assumption that the ordinary rate of interest was payable, and the landlord is not entitled to recover from such purchaser the rate of interest stated in the written contract. **C ANNADAMOYI DEBI v. SAUDAMINI DEBYA**, 27 C. W. N. 502; 37 C. L. J. 333; (1923) A. I. R. (C) 559 719

Suit to eject transferee of tenant—Transferability—Burden of proof—Transfer of Property Act (I V of 1882), s. 108 (j).

In a suit by the landlord to eject a transferee from a tenant from homestead land, the burden is, in the first instance, on the plaintiff to prove that the tenancy was created before the Transfer of Property Act was passed, before the *onus* can be thrown upon the defendant to prove the custom of transferability. In the absence of such proof the case must be governed by section 108 (j) of the Transfer of Property Act. **PAT MAHADEO SARAN v. DHARAMNATH SAHAY** 662

Tenancy, permanent—Burden of proof—Origin of tenancy, meaning of—Improvements—Compensation.

The *onus* of proving the permanent nature of a tenancy lies upon the person asserting it.

The expression "origin of the tenancy" means something more than commencement, though it may also include that term. It means the circumstances in which the tenancy was created.

Long possession of a tenure by a tenant and his ancestors, and the landlord having permitted them to erect substantial structures, which have been added to by successive tenants, and the transfer of the tenure from time to time by succession and purchase, with the permission of the landlord, express or implied, may warrant a presumption that the tenure is of a permanent character.

A similar presumption may also arise when it can be definitely found that land had been leased for building purposes.

But in coming to a decision as to whether a tenancy is of a permanent nature in any particular case it is on the facts of that case alone that the decision must be arrived at.

As a general rule if a tenant-at-will chooses to erect buildings on land leased to him he does so at his own risk. **L MOTI SAGAR v. DHANNA MAL**, (1922) A. I. R. (L.) 329 177

Tenant, death of—Possession of tenancy by stranger—Payment of rent in deceased's name—Tenancy, new, creation of.

Where a landlord accepts rent tendered in the name of a deceased tenant by a person in possession of the holding, such acceptance has the effect of constituting the person paying the rent a tenant of the landlord, and the latter is not competent to eject him as a trespasser. **C BALI MOHAMMAD SAHA v. JANAKI NATH** 311

Trees planted by tenant, ownership in—Tenant's house—Transfer to one Zemindar—

Landlord and tenant—concl'd.

*Suit for possession by others, whether main-
tainable.*

The presumption about the ownership of trees planted by a tenant is that they belong to the tenant and he has a right to cut and sell the same.

Jaleewar Sahu v. Raj Mangai, 63 Ind. Cas. 437; 19 A. L. J. 616; 43 A. 506, followed.

A tenant illegally transfers his house to one of the *zemindars*, the others, even if they do not comprise the entire body of proprietors, are entitled to sue for joint possession with the transferee. *A. RAM NATH v. MATA SAHAI*, (1923) A. I. R. (A) 417. 198

Lease, construction of—"Thicca mokra," meaning of—Tenancy from generation to generation.

The use of the words "*thicca mokra*" in a lease in describing the rent fixed, indicates that the rent was fixed in perpetuity.

Raja Reshee Case Law v. Salish Chandra Paul, 61 Ind. Cas. 774; 35 C. L. J. 90; (1922) A. I. R. (C) 124, followed.

A lease described the rent fixed as "*thicca mokra*" and went on to say that the grantee would enjoy the land by reclamation and cultivation from generation to generation and that the *jama* mentioned would be paid to the landlord from year to year. It also contained a clause prohibiting the grantee from alienating his rights without the consent of the landlord;

Held, (1) that the covenants as to the enjoyment of the land and payment of the rent read together indicated that the rent was fixed in perpetuity; (2) that the use of the words "*thicca mokra*" strengthened that indication;

(3) that the covenant restraining alienation was inoperative in the absence of a clause for re-entry;

Ni Madhab Sikdar v. Narattam Sikdar, 17 C. 816; 8 Ind. Dec. (N. S.) 1035, and *Basmat Ali Khan v. Manirulla*, 2 Ind. Cas. 416; 36 C. 745; 19 C. L. J. 49, followed.

(4) that even if the covenant was valid it was not in itself a conclusive indication that the rent was not intended to be permanent. *C. KESHEE CASE LAW v. BHUBAN MOHAN PAI*, 1047.

Legal practitioner—Misconduct—Letter imputing improper motives to Magistrate—Instructions from client—justification.

A Magistrate passed certain structures against a defence witness in his judgment in a criminal case. Thereupon a Pleader acting under instructions from that witness sent a letter to the Magistrate which contained the following clause: "The tenor, tone and mould of your judgment clearly shows that you had a grudge and personal enmity against my client who is Brahmin by caste, and you thought that as the best opportunity to attack the character of my client under the garb of a judicial officer. My client still sincerely and honestly believe, that you had no material to make objectionable remarks against him in your judgment. Before proceeding to take any action against you, my client thinks it his humble duty to draw your attention to the judgment and objectionable remarks therein and

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to give you sufficient opportunity to withdraw them."

Held, (1) that the letter contained merely vulgar abuse of the Magistrate and that under no circumstances was it proper for a Pleader to write to a Magistrate in such terms;

(2) that the fact that the letter was written under instructions from the client was no justification for it and that its writing amounted to misconduct. *B. GOVERNMENT PLEADER v. G. K. TATKE*, 25 Bom. L. R. 264; (1923) A. I. R. (B) 244; 24 Cr. L. J. 353. 353

Legal Practitioners Act (XVIII of 1879), s. 13 (b).

Legal Practitioner—Fraudulent conduct—Representation of conflicting interests.

A legal practitioner cannot represent conflicting interests or undertake the discharge of inconsistent duties. When he has once been retained and received the confidence of a client, he cannot accept a retainer from or enter the service of those whose interests are adverse to his client in the same controversy or in matter so closely allied thereto as to be in effect a part thereof. The rule is rigid and is designed not alone to prevent the dishonest practitioner from fraudulent conduct but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interests which he should alone represent.

Proceedings under the Legal Practitioners Act were taken against a Mukhtear on the ground that he, while acting on behalf of the prosecution in a criminal case, had drafted a written statement on behalf of two of the accused persons in that case. The Mukhtear pleaded that he had acted in good faith and that he had not realised that his conduct was improper.

Held, that the Mukhtear was guilty of an offence against professional propriety and was liable to be punished. *EMPEROR v. KAJANI KANTA GHOSE*, 3 C. L. J. 48; (1923) A. I. R. (C) 16; 24 Cr. L. J. 294. 22

s. 14—Misconduct—Inquiry—Jurisdiction—"Such Court," meaning of.

Under section 14 of the Legal Practitioners Act, any Court in which a Pleader practises is competent to enquire into a charge of misconduct made against him.

The expression "such Court" in that section means the Court in which the Pleader practises, and not necessarily the Court in which the Pleader commits the offence charged against him. *L. B. MAUNG TUN AUNG GYAW*, *In the matter of*, 11 L. B. R. 111; 24 Cr. L. J. 409. 521

Lessor and lessee—Repairs of leased premises—

Obligations of lessor and lessee—Express obligation to make repairs on part of lessor—Failure to carry out repairs—Lessee, right of, to terminate tenancy—Damages—Lease premature termination of, consequences of—Accrual of damages—Holding over, effect of—Notice—Transfer of Property Act (I V of 1882), ss. 106, 108, 116.

Lessor and lessee—contd.

In the absence of a contract to do repairs or of an obligation imposed by Statute, there is no obligation on the part of a landlord to put premises into habitable condition or to do any repairs whatever upon them, though by neglecting to do so they become uninhabitable. In fact, the landlord has no right to go upon the premises if he desire to make repairs, and if he do so in the absence of an express power in the lease he will be guilty of a trespass and may be restrained by injunction, although the non-repair may cause a forfeiture of his own lease. On the other hand, the implied obligation of a tenant from year to year is to keep the premises wind and water-tight, and to make fair and tenantable repairs as by putting fences in order or replacing windows or doors that are broken during his occupation, of cleansing drains and sewers.

Where a lessor is under an obligation to effect repairs and fails to comply with the request of the lessee to do so, the latter is not entitled to terminate the tenancy. Under section 108 of the Transfer of Property Act the lessee can remedy the breach himself, after giving a reasonable notice to the lessor and recover the amount expended by him together with interest, either by deducting it from the rent or otherwise.

A suit for specific performance of a contract to take a lease lies when the lease essential for the completion of the contract has not been executed, and if there is a valid enforceable contract, either party is entitled to call upon the other to complete the transaction, by the execution and registration of the document of title.

Although an original lease of certain premises may be for a term of years, under section 116 of the Transfer of Property Act the effect of holding over after the expiry of the term upon payment of rent to the landlord is to create a tenancy from year to year or from month to month according to the purpose for which the property was leased as specified in section 106 of the Act.

A notice, though of a longer duration than 15 days, to terminate a monthly tenancy, but not expiring with the end of a month of the tenancy, is inoperative in law.

Where the term of a tenancy under which rent is payable periodically, is brought to a premature termination, the lessor is entitled to damages and not to rent for the unexpired term of the lease. Even the acceptance of surrender does not preclude the lessor from suing for damages for breach of the contract, as it does not destroy the existing cause of action. But the lessor is bound to let out the house after the lessee has vacated it and thereby to minimise the damage. *C. BEJOY CHANDRA SINHA v. HOWRAH AMTA LIGHT RAILWAY CO., LTD.*, (1923) A. I. R. (C.) 524; 38 C. L. J. 17. **98**

Letters Patent (Mad., cl. 12—Leave to sue—Balance of convenience—Civil Procedure Code (Act V of 1908), ss. 20, 120—S. 20, whether applicable to Original Side of High Court—Fraud—Suit to set aside decree—Discovery of fraud—Cause of action.

In an application to grant leave to sue under clause 12 of the Letters Patent, the Court has to

Letters Patent—contd.

exercise its discretion and the real question to be considered is the balance of convenience.

The application of section 20 of the Code of Civil Procedure to the High Court in the exercise of its original jurisdiction is expressly excluded by section 120 of the Code.

Per Schwabe, C. J.—In a suit to set aside a decree as having been obtained by fraud, the cause of action is the fraud itself and the discovery of fraud constitutes no part of the cause of action.

Obiter.—Clause 12 of the Letters Patent does not confer jurisdiction on the High Court when some only of the defendants reside or carry on business within the limits of its Original Civil Jurisdiction. *M. PARAMESWARA PATTAB. VIVATHAN MAHADEVI.* (1922) M. W. N. 841; (1923) A. I. R. (M.) 272. **982**

—(Pat.) cl. 8—*Criminal Law Amendment Act (XIV of 1908), s. 17, (2)—Legal practitioner, position and responsibilities of—Defiance of law and authority—Disciplinary jurisdiction of the High Court, exercise of.*

Advocates and Pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice, but also for giving professional advice for which they are entitled to be paid, to those members of the public who require their services. Their position, training and practice give them immense influence with the public and their example must necessarily have a much greater effect whether for good or for evil than the example of those who do not occupy this privileged position.

It is not necessary for the High Court to be able to exercise its disciplinary jurisdiction that a legal practitioner should have committed an offence or should have done something subjecting him to anything like general infamy or imputation of bad character.

A legal practitioner who takes the law into his own hands and sets up his own opinion in defiance of the opinion of constituted authority renders himself liable to the exercise of the disciplinary jurisdiction of the High Court. *Pat. Babu MADAHVA SINGH, In the matter of*, (1923) Pat. 42; (1923) A. I. R. (Pat.) 185; 1 P. L. R. 36. **875**

—(Pat.) cl. 27—*Divorce Act (IV of 1869), ss. 4, 7—“Matters matrimonial,” meaning of—Suit for declaration of validity of marriage, maintainability of—Jurisdiction of High Court.*

The expression “matters matrimonial” used in clause 27 of the Letters Patent of the Patna High Court is identical with that used in section 4 of the Divorce Act, and the meaning to be attached to it in the Act and the Letters Patent must be consonant and identical.

The jurisdiction of the High Court in matters matrimonial, therefore, is only such jurisdiction as is comprised within the provisions of the Divorce Act.

The High Court has, therefore, no jurisdiction to entertain a suit for a mere declaration that plaintiff's marriage with the defendant is lawful and valid.

Section 7 of the Divorce Act merely indicates the principles upon which the Court shall generally

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act and in no way enlarges the scope of the jurisdiction conferred upon the Court as defined in those sections of the Act where jurisdiction is expressly categorized. *PAT ADELAIDE CHRISTIANA LISH v. DAVID LISH*, 1 P. L. R. 129; (1923) Pat. 127; (1923) A. I. R. (Pat.) 301 657

License—Obligation of licensor—Breach of duty—Revocation of license—Damages—Presumption—Nominal damages—Exclusive possession—Licensee, right of.

* The grantor of a license is under an obligation to place the licensee in a position to enjoy the license.

An appropriation by the licensor of the land licensed, to any use inconsistent with the enjoyment of the license, works a revocation, and the licensee may maintain an action for damages against the licensor for breach of contract in unlawfully revoking it.

A license for valuable consideration and accompanied by the grant of a *profit à prendre*, is a license coupled with an interest and is not revocable.

Though every breach of duty arising out of contract gives rise to an action for damages, without proof of actual damage, the amount of damages recoverable is, as a general rule, governed by the extent of the actual damage sustained, in consequence of the defendant's act. In cases admitting of proof of such damage, the amount must be established with reasonable certainty. But this does not mean that absolute certainty is required; nor, in all cases, is there a necessity for direct evidence as to the amount.

Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement. Certainty to reasonable extent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof.

Where the defendant has, by his own wrong, put it out of the plaintiff's power to prove the quantum of damages exactly, the presumption is against the defendant, and the burden is upon him to reduce the amount from the highest possible estimate.

In actions for breach of contract, where there has undoubtedly been an infringement of a right, nominal damages are recoverable, even though no actual damage can be proved.

Where the grant of a license entitles the licensee to the exclusive right to catch elephants within certain defined tracts for a specified period, it does not follow as a matter of course that the licensee would be entitled to exclusive occupation of the entire territory, during such time. *KINGSLEY v. SECRETARY OF STATE FOR INDIA*, 30 C. L. J. 271; (1923) A. I. R. (C.) 41 270

Limitation Act (IX of 1908), s. 4, applicability of.
See EXECUTION OF DECREE 388

Limitation Act—concl'd.

ss. 4, 5—*Court holiday treated as working day by special permission—Last day for presentation of application—Application made next day if out of time—Delay, whether can be excused.*

Where a Court holiday is treated as a working day and not a public holiday, and with the special permission of the High Court, a Court sits on that day, the Court cannot be held to have been closed on that day; an application, therefore, which ought to have been filed on that day but is filed on the next working day is out of time.

Where, however, the publication of the order of the High Court was insufficient to put parties on notice, the delay in filing the application would be excusable under section 5 of the Limitation Act.

Section 4 of the Limitation Act is applicable only where the period of limitation expires on a day when the Court is closed. *M. KALYANASUNDARAPPA v. CHINNASAMI*, (1923) M. W. N. 211; 17 L. W. 413; (1923) A. I. R. (M.) 489 13

s. 5—*Appeal, delay in filing—Sufficient cause—Appeal filed in wrong Court—Bona fide mistake.*

Mere carelessness or oversight of the appellant or his Counsel in presenting an appeal in a wrong Court, which by the exercise of due diligence could have been avoided, cannot be recognised as a sufficient reason for excusing the delay in filing the appeal in the proper Court under section 5 of the Limitation Act.

Sant Singh v. Qarm, 118 P. R. 1908 and *Sarat Chander Bose v. Saraswati Devi*, 3 C. 216; 5 C. L. J. 380, relied upon.

A legal adviser's mistake in order to justify an extension of the period prescribed for presenting an appeal, must be a *bona fide* one, and nothing can be deemed to have been done in good faith which is not done with due care and attention. *UMRAO BAKSH v. NUR MUHAMMAD KHAN*, (1923) A. I. R. (L.) 612 732

s. 5—*Appeal filed in wrong Court—Negligence of Pleader—Extension of time.*

Negligence of a Pleader in advising his client to file an appeal in a wrong Court is not a sufficient cause for the extension of time under section 5 of the Limitation Act.

There are no hard and fast rules to control the discretion of a Court in the matter of extending time under section 5 of the Limitation Act, each case must be examined as to its own circumstances to see whether they make it fall within or without the terms of the general rule.

When a litigation has been settled in favour of a particular litigant, that litigant has, upon the termination of the time allowed for appealing, a vested interest in his favour, of which he ought not to be deprived in the absence of special circumstances. *N. ISHWAR DAS v. BISMILLA KHAN*, (1923) A. I. R. (N.) 133 158

ss. 5, 12—*Limitation for second appeal, computation of—Delay in despatch of copy of lower Appellate Court's judgment or decree—Exclusion of time—Time taken to obtain copy of Trial Court's judgment, exclusion of.*

In computing the period of limitation for a second appeal, the time taken in obtaining a copy of the decree as well as a copy of the judgment of the

Limitation Act—contd.

lower Appellate Court can be excluded under section 12 of the Limitation Act. And whether copies are not despatched until several days after they are ready, the appellant is entitled to the exclusion of those days. But the time taken in obtaining a copy of the Trial Court's judgment cannot be excluded under that section. Nor can such time be excluded under section 5 of the Act, where the copy of the Trial Court's judgment was, or could be, obtained before the expiry of the period of limitation. *L GURDIT SINGH v. CHARAN DAS*, (1922) A. I. R. (I.) 415 797

— s. 10, Sch. I, Arts. 49, 120, 145, applicability of— "Trust for specified purpose," meaning of— "Deposit," what is— Suit to recover property entrusted— Limitation.

Plaintiff gave certain jewels to the defendant, a co-parcener in the same family, to enable the latter to raise a loan by a pledge of the jewels. Subsequently, by a family arrangement, it was agreed that the plaintiff should get a life interest in the jewels and the defendant undertook to get back the jewels and return the same to the plaintiff in a few days. In a suit by the plaintiff for recovery of the jewels:

Held, that the defendant was constituted an express trustee in whom the jewels became vested for a specific purpose within the meaning of section 10 of the Limitation Act and the suit was, therefore, governed by that section.

Per Schwabe, C. J.— Assuming that there was no express trust under section 10 of the Limitation Act, the case would be governed by Art. 145, and if not covered by Art. 145, would be covered by Art. 120 of Schedule I to the Limitation Act.

The phrase "trust for a specified purpose" in section 10 of the Limitation Act connotes the same idea as "express trust" in English Law, and is used in the section in contradistinction to trusts arising by implication of law, trusts resulting and trusts constructive.

The word "vested", in section 10 of the Limitation Act means no more than properly having control of the property.

Bhurabhai v. Bai Rukmani 32 B. 394; 10 Bom. L. R. 540; *Soar v. Ashwell*, (1833) 2 Q. B. 390; 4 R. 622, 69 L. T. 585; 12 W. R. 165 and *Administrator-General of Bengal v. Kristo Kamini Dassee* 31 C. 519 8 C. W. N. 500, relied on.

The word "deposit" in Art. 145 of Schedule I to the Limitation Act is not confined to the strict meaning of "depositum" in Roman Law, but extends to all cases where one man's property is handed by that man to another, so that, the latter becomes a "depository" of it unless there is something in the terms of the handing over, which would prevent his being treated as a person with whom it was deposited at all.

Gopalsami Iyer v. Subramania Sasri, 12 Ind. Cas. 27; 15 M. 636; (1911) 2 M. W. N. 100; 10 M. L. T. 572; 22 M. L. J. 112, *Observation of Sadasiva Aiyer, J.*, in *Narayanasamy Thevar v. Aiyasamy Iyengar*, 18 Ind. Cas. 621 24 M. L. J. 184 and of *Hill, J.*, in *Administrator-General of Bengal v. Kristo Kamini Dassee*, 31 C. 519; 8 C. W. N. 500, not followed.

Limitation Act—contd.

Article 49 of Sch. I to the Limitation Act, deals not with suits for recovery of property deposited with another but only with those in respect of property wrongfully taken or wrongfully detained. *M. KISHAPPA CHETTY v. LAKSHMI AMMAL*, 44 M. L. J. 431; 1; L. W. 467; (1923) M. W. N. 284; 32 M. L. T. 217, (1923) A. I. R. (M.) 578 842

— s. 18— Civil Procedure Code (Act V of 1908), O. XXI, r. 90— Execution sale— Application to set aside sale— Fraud— Limitation.

Where a decree-holder fraudulently contrived not to serve the judgment-debtor with notice of the execution sale and kept him in ignorance of the sale itself, and the latter came first to know of the fraud only when an application was made for delivery of the property:

Held, that the judgment-debtor in seeking to set aside the sale was entitled to the benefit of section 18 of the Limitation Act for the whole period during which the fraud continued. *M. SHEIKH MUHAMMAD ROWTHER v. SUBBA NAICKER*, 17 L. W. 152; 32 M. L. T. 252; (1923) A. I. R. (M.) 353 46

— s. 19— Acknowledgment of liability— Payment of portion of debt under pro-note— Endorsement on pro-note by promisor— Endorsement, whether admission of liability as to balance.

An endorsement on a promissory-note by which the promisor records that he has paid a certain sum against the liability which stands against his name on the note, amounts to an admission of his liability to pay the balance, and will start a fresh period of limitation from the date on which it was made. The fact that the endorsement is below an account showing what has already been paid on the note, would make no difference. *B. GANESH NARHAR JOSHI v. DATTATRAYA PADURANG JOSHI*, 25 Bom. L. R. 144; (1923) A. I. R. (B.) 239; 47 B. 632 249

— ss. 19, 20— Borrowing fresh sum and signing old account— Promise to pay— Acknowledgment. *See CONTRACT ACT (IX OF 1872), s. 25 (3)* 692

— s. 20 (2)— Ijara lease— Ijaradar allowed to hold over after expiry of lease and to receive produce in lieu of interest— Limitation, whether extended.

After the expiry of an *ijara* lease the *ijaradar* was allowed to continue in possession of the land and to receive the produce in lieu of interest payable on the *zar-i-peshgi*. On being dispossessed from the land the *ijaradar* brought a suit to recover the *zar-i-peshgi*.

Held, that the receipt of produce in lieu of interest fell within section 20(2) of the Limitation Act and operated to save limitation. *Pat FOUJDA SINGH v. BAIJU MAHTON* 492

— Sch. I, Art. 1— Execution sale— Confirmation, application for— Possession, application for— Step-in-aid of execution— Sale of property— Execution, whether comes to end— "Poundage fee," meaning of.

An application for the confirmation of sale is not an application to take some step-in-aid of execution.

Limitation Act—contd.

Panchanan Chowdhury v. Nrisingha Prosad Roy, 6 Ind. Cas. 264; 11 C. L. J. 356 and *Umesh Chandra Dase v. Shib Narain*, 31 C. 1011; 9 C. W. N. 193, relied on.

Gobind Pershad v. Rung Lal, 21 C. 23; 10 Ind. Dec. (N.S.) 648, dissented from.

A decree-holder purchaser, though unable to obtain possession of the property sold in execution of his decree, is not entitled to take out further execution for that portion of his purchase-money which is represented by the property purchased by him. Execution comes to an end with the sale of the property and whether or not the auction-purchaser obtains possession of the property sold is wholly immaterial for the purpose of the decree and it does not in any way affect it. Consequently, an application by a decree-holder purchaser to be put in possession of the property is not an application to take some step-in-aid of execution.

Obiter.—A poundage fee is a fee calculated upon the price for which the property sells and is payable by the decree-holder after the sale and before taking delivery of the property. *PAT TRILOKE NATH JHA v. BANSMAN JHA*, (1923) A. I. R. (Pat) 22; 1 P. L. R. 6; 2 Pat. 240; (1923) Pat. 300 938

Sch. I, Art. 11—Civil Procedure Code (Act V of 1908), O. XXI, r. 63—*Claim proceedings—Order directing notification of claim, effect of—Title suit—Limitation—Procedure.*

Where a claim is preferred to property attached in execution of a decree it is the duty of the Executing Court to investigate the claim, and if it is satisfied that the claimant has made out his case to release the property from attachment, or if it arrives at a decision against the claimant, to disallow the claim. An order merely directing the notification of the claim to intending purchasers without investigating it is an improper order.

Machi Raju Venkataratnam v. Vadsevu Ranganayakanma, 48 Ind. Cas. 270; 4 M. 985; 35 M. L. J. 335; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292 (F. B.), followed.

Every order which is not in favour of a claimant is not necessarily an order against him.

Lakshmi Ammal v. Kadiresan Chelliar, 63 Ind. Cas. 431; 41 M. L. J. 118 14 L. W. 12; (1911) M. W. N. 495 and *Ayya Pattar v. Atupurath Manakkal*, 52 Ind. Cas. 938; (1919) M. W. N. 805, followed.

The combined effect of O. XXI, r. 63 of the Civil Procedure Code and Art. 11 of Schedule I to the Limitation Act is to cut down the usual period for a title suit, which in many instances is twelve years, to a year when the case falls within the terms of those provisions. The result is that, if a person whose property is attached takes no steps under the summary procedure available to him to get his right established, he has the usual period of limitation, but, if he prefers a claim and an order is made against him he is bound to file a regular suit within a year of the order. Therefore, unless an order is clearly against a claimant as contemplated by those provisions, the Court will not be justified in placing a forced construction upon it for the purpose of deciding that it is such an order.

Limitation Act—contd.

A claim was preferred against the attachment of certain properties in execution of a decree on the ground that the judgment-debtor had only a share in them and that the claimant was entitled to a moiety thereof, and the order of the Court was, "Whatever right the defendant has will pass by the sale. The claim put forward in the petition will be noted in the sale proclamation."

Held, that the order did not negative the claimant's right to a share and did not amount to an order against him under r. 63 of O. XXI of the Civil Procedure Code and that a suit for the recovery of his moiety against the decree-holder auction-purchaser more than a year after the date of the order was not governed by Art. 11 of Schedule I to the Limitation Act and was not, therefore, barred by limitation. *M. PARAMBIL SAHARABU ALI*, 44 M. L. J. 141; 17 L. W. 182; (1923) A. I. R. (M.) 295 857

Sch. I, Art. 61—Partnership—Debt paid by one partner—Contribution, suit for—Limitation.

A suit for contribution by a partner of a firm who has paid the whole or more than his share of the amount of a debt due from all the partners is governed by Art. 61 of Schedule I to the Limitation Act. *L. WALATTI RAM v. RAM KISHEN*, 3 L. L. J. 310 885

Arts. 62, 97—Contract for sale—Suit for specific performance, failure of—Subsequent suit for recovery of earnest money, whether barred—Limitation applicable

The proper Article of the Limitation Act to apply to a suit for recovery of earnest-money after a suit for specific performance of a contract for sale has failed is Art. 97 and not Art. 62. *A. MUNNI BABU v. KOER KAMTA SINGH*, 21 A. L. J. 265; 9 O & A. L. R. 429; (1923) A. I. R. (A) 341; 45 A. 378 86

Arts. 62, 120—Money wrongfully taken under bona fide claim—Suit for recovery—Limitation—Art. 62, interpretation of.

The plaintiff and the defendant were owners of two contiguous villages. There being a dispute between them with regard to the ownership of some lands, the latter were attached under section 146 of the Criminal Procedure Code, the profits pertaining thereto being deposited in Court. The defendant withdrew some of the amount deposited from Court as representing his share of the profits of the land attached. The plaintiff sued for declaration of his right to the land and for recovery of the sum withdrawn, on the allegation that the land attached being in his village the money deposited in Court was his. It was urged that it being a suit for money payable by defendant for money received by defendant for the plaintiff's use, it was governed by Art. 62 of the Schedule I to the Limitation Act.

Held, that it could not be said by any means that the defendant received the money for the use of the plaintiff and that as he withdrew it honestly believing that he was entitled to it, the plaintiff's suit to recover it was governed by Art. 120 and not Art. 62 of the Sch. I to the Limitation Act.

Limitation Act—contd.

Gurudas Pyne v. Ram Narain Sahu, 10 C. 860; 11 I. A. 59; 8 Ind. Jur. 322; 4 Sar. P. C. J. 548; 5 Ind. Dec. (N. S.) 575 (P. C.), relied on.

The plain meaning of the words in Art. 62 of the Sch. I to the Limitation Act should be given effect to without having recourse to any technical rules of English Law regarding forms of action. *GANANTARAM BHATTACHARJEE v. HEM CHANDRA KAR*, (1923) A. I. R. (C) 379; 50 C. 475 1041

—Sch. I, Art. 85—Mutual, current and open account, what is.

Defendants were in the habit of purchasing grain from the plaintiffs by means of letters through their *gomashia* and paid the price thereof from time to time. There was occasionally a balance in the defendants' favour. Plaintiffs sued defendants for a certain sum due on a balance of the account:

Held, that the account between the parties was not a mutual, current and open account and the suit was not, therefore, governed by Art. 85 of Schedule I to the Limitation Act. *PAT RAM SUNDAR v. AMRIT PAJIYAR*, 4 P. L. T. 424; 1 P. L. R. 288; (1923) A. I. R. (Pat) 242 135

—Art. 110—"When arrears become due," meaning of. See CAUSE OF ACTION 5

—Art. 116—Transfer of non-transferable interest—Covenants of title and quiet enjoyment, breach of—Suit to recover consideration, maintainability of—Limitation.

Plaintiff sued to recover possession of a certain share in a *jajmanka brit* sold to him by the defendant by a registered deed, or, in the alternative, for the recovery of the amount paid by him as consideration for the sale. It was found that the *jajmanka brit* was not saleable:

Held, (1) that the contract, although ineffective to transfer the *jajmanka brit* to the plaintiff owing to the unsaleable nature of the property, was not an illegal contract in the sense of being contrary to law or morals, and that, therefore, the claim for the recovery of the amount paid as consideration for the sale was maintainable;

(2) that there having been a breach of the covenants of title and quiet enjoyment, the suit was governed by Art. 116 of Schedule I to the Limitation Act; limitation having commenced to run either from the date when the plaintiff was dispossessed or from the date when the Court held that the *jajmanka brit* was not saleable. *PAT JHINCUR OJHA v. MEGHINATH PANDEY* 653

—Art. 120—Suits for village profits—Limitation.

Limitation for a suit by a person claiming to be a joint owner against the managing proprietor for his share of the village profits is six years. *M BHAGERATHIBAI v. KESHO GANPATRAO*, (1923) A. I. R. (N) 239 45

—Art. 164, meaning of.

The meaning of Art. 154 of Schedule I to the Limitation Act is, that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed against him, in a particular Court in favour of a particular

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person for a particular sum. *B BAPURAO SAKHARAM v. SADHU BHIVBA GHOLAP*, 25 Bom. L. R. 74; (1923) A. I. R. (B.) 193; 17 B. 485 130

—Sch. I, Art. 182 (5)—Application for execution naming dead person as guardian of minor judgment-debtor, whether step-in-aid of execution.

An application for execution of a decree in which a dead person is, under a *bona fide* mistake, named as the guardian of the minor judgment-debtor amounts to a step-in-aid of execution and operates to save limitation under clause (5) of Art. 182 of Schedule I to the Limitation Act. *PAT PURAN MALL v. DILWA*, 4 P. L. T. 54 1003

Madras Abkari Act (I of 1886), ss. 40 to 47, 55 175

Madras City Police Act III of 1888, s. 78, rule under—"Ride", meaning of—Person carried on bicycle, whether rides

The word "ride" in the rule made under the *Madras City Police Act* as to riding bicycles in any street or public place, does not necessarily imply that the person riding should propel the bicycle himself. A person, therefore, who is carried on a bicycle propelled by another, rides the bicycle. *M CROWN PROSECUTOR v. DURAISWAMI*, 44 M. L. J. 61; 17 L. W. 273; 32 M. L. T. 152; (1923) A. I. R. (M.) 364; 24 Cr. L. J. 358; 46 M. 476 353

Madras City Tenants' Protection Act (III of 1922), ss. 2 (3), 9—Tenant, whether entitled to enforce compulsory sale of trust property.

A tenant in occupation of trust land belonging to a temple or mosque is not entitled to enforce a compulsory sale of the land under section 9 of the *Madras City Tenants' Protection Act* and require the trustee to deliver the land to him on a valuation to be made by the Court.

The term "landlord" as defined by clause (3) of section 2 of the *Madras City Tenants' Protection Act* is comprehensive enough to include the trustee of a charitable endowment, but trust property is not "land" within the meaning of section 9 of the Act which can be conveyed "under any power."

Per *Venkatasubba Rao, J.*—"Land" in section 9 of the Act does not mean the full interest which a trustee can convey under the power possessed by him to convey trust property when necessity exists or when the alienation is for the benefit of the estate. *M PARTHASARATHI AITYANGAR v. DORAISAMI NAICKER*, 44 M. L. J. 91; (1923) M. W. N. 148; (1923) A. I. R. (M) 308 826

—s. 9, whether retrospective—Ejectment, decree for, passed before Act—Application under section, whether maintainable.

Section 9 of the *Madras City Tenants' Protection Act* has no retrospective effect, and where a decree has been passed before the Act came into force for the ejectment of a tenant, the latter cannot apply for an order under section 9 or the Act to direct the landlord to sell the land to him. *M LATIFA BIV. MOTTAI AMMAL*, 44 M. L. J. 271; 17 L. W. 341; (1923) M. W. N. 233; 32 M. L. T. 200; (1923) A. I. R. (M) 320 141

Madras District Municipalities Act (IV of 1884), s. 45—Lease of right to collect fees or tolls—

Written contract, absence of, effect of—Suit to

Madras District Municipalities Act—1884—concl'd.

recover money due by lessee, maintainability of—
Implied contract.

The right to collect fees or tolls for slaughtering cattle in a slaughter-house was leased by the plaintiff Municipality to the defendant and the latter enjoyed the right for the period of the lease but no written contract was executed as required by section 45 of the Madras District Municipalities Act of 1884. In a suit by the Municipality to recover the lease amount:

Held, that, although no claim could be made on the basis of a written contract, the plaintiff Municipality was entitled to a decree inasmuch as the defendant had enjoyed the right for the period contracted for and was liable as on an implied contract. **M SRIRANGAM MUNICIPAL COUNCIL v. BODI**, 18 L. W. 130; 45 M. L. J. 164. **703**

Madras District Municipalities Act (V of 1920), ss. 18, 28—"Chairman" in s. 28, whether includes Chairman delegate—Rules for Election of Chairman, r. 4—"Taking part in ballot," whether includes presiding at election meeting and acting as returning officer—Rules for decision of election disputes, r. 11—Election, when can be set aside—Sub-Judge, whether acts as Court.

By virtue of rule 4 of the Rules for Election of Chairmen of Municipalities under the Madras District Municipalities Act, a candidate whose name has been proposed and seconded for Chairmanship cannot himself preside at the meeting for election of Chairman or act as returning officer therein.

This rule has been framed to carry out the principle that no man shall be a Judge in his own cause.

The expression in the rule "to take part in the ballot" is not restricted to actual voting, but includes presiding at the meeting for election or acting as returning officer.

The word "Chairman" in section 28 of the Madras District Municipalities Act has been used so as to include a Chairman delegate who may be appointed by the Chairman under section 18 of the Act, when he is himself incapacitated from acting as Chairman.

Under rule 11 of the rules framed for the decision of election Municipal disputes, before an election can be set aside, it is necessary to find not only a non-compliance with rules but also that such non-compliance has materially affected the result of the election.

A Subordinate Judge in dealing with an election enquiry under the Madras Municipal Election Rules sits as a Court subordinate to the High Court and an order made by him is subject to revision under section 115 of Civil Procedure Code.

Where a Subordinate Judge in deciding an election petition set aside an election merely on the finding that there had been a breach of the election rules by the successful candidate and omitted to decide whether the breach of the rules established had materially affected the result of the election:

Held, that the Subordinate Judge had exercised his jurisdiction with material irregularity and his order was, therefore, liable to be set aside in

Madras District Municipalities Act—1920—concl'd.

revision. **M AHMAD THAMBI MARICAIR v. BAVASA MARACAYAR**, 16 L. W. 898; (1922) M. W. N. 813; 44 M. L. J. 69, (1923) A. I. R. (M) 254; 46 M. L. J. 123. **902**

ss. 250, 317—Applicability of s. 250—Old machinery installed in new room—Offence.

Section 250 of the Madras District Municipalities Act only applies when a person intends for the first time to construct or establish any Factory, workshop, etc., in which it is proposed to employ steam power, water power or other mechanical or electric power. It is not applicable to a case where the machinery has not been interfered with but only the shed in which the machinery was kept has been altered by changing the original room into a new room of brick and mortar. **M GARINE SATYANARAYANA v. EMPEROR**, 17 L. W. 24; (1923) A. I. R. (M) 375; 24 Cr. L. J. 435. **613**

Madras Estates Land Act (I of 1908), ss. 13 (3), 52 (3)—Waram rent—Muchilika for money rent for stated period—Ryot undertaking to cultivate under Amani rules—Tender of fresh pattah containing waram rent, whether necessary—Waram rent, whether enhancement of rent.

Under the Madras Estates Land Act, a landholder is always entitled to revert to the waram system unless the ryots establish that it has been superseded permanently by the cash system by contract, express or implied, between them and the landholder.

Ayyaperunai Odayan v. Ramasami Chettiar, 3 Ind. Cas. 933; 29 M. L. J. 362; 2 L. W. 610; (1915) M. W. N. 614, **Muthiah Chettiar v. Periyar Cone**, 5 Ind. Cas. 78; 11 L. W. 311; (1920) M. W. N. 1527 M. L. T. 226, followed.

The fact that for several years the ryots paid money rents under specific contracts in form pattas for stated periods on varying rates would only show the existence of special contracts remaining in force in particular years and not that the waram system was permanently given up.

Where in a muchilika providing for money rent for a period, the ryots undertook that, after the expiry of the period fixed under it, they would cultivate the land under the Amani Rules:

Held, that the landholder was entitled to revert to the waram system after the expiry of the period fixed without tendering a fresh pattah under section 52 of the Madras Estates Land Act providing for waram rent.

Under the Madras Estates Land Act, no prior tender or exchange of patta or muchilika is necessary to entitle a landholder to sue for rent.

The second part of clause (3) of section 52 of the Madras Estates Land Act is only a corollary to the first part and where the latter does not apply, the former is also inapplicable.

The phrase "Amani system" means waram tenure as opposed to rokha tenure.

Muthiah Chettiar v. Periyar Cone, 5 Ind. Cas. 78; 11 L. W. 311; (1920) M. W. N. 1527 M. L. T. 226, followed.

Under the waram system, the landholder is entitled to a share in all the produce of the land unless there is a special contract to the contrary exempting any particular crop, and his claim to share in all the crops does not amount to an en-

Madras Estates Land Act—concl'd

hancement of rent and section 13 (3) of the Madras Estates Land Act does not apply to such a case. A landholder is, therefore, entitled to *waram* even in second crop on the lands though raised by the tenants with the aid of their own well water without taking the landholder's water. **M VARADA REDDY v. SRINIVASA MUDALIAR**, (1923) M. W. N. 357; 18 L. W. 169; 45 M. L. J. 199 **683**

s. 26, applicability of—Claim by tenant to hold at lower rent—"Lawful rate payable," meaning of.

Section 26 of the Madras Estates Land Act deals with cases where there has been an actual prior rent greater than therent claimed by the tenant and does not deal with a case where a *raiyyat* is setting up that *ab initio* the rent payable was the lower rent and that the terms of tenancy always had been the lower rent, to be, increased to the higher rent in certain eventualities.

Karuppa Goundan v. Narayana Chettiar, 45 Ind. Cas. 406; 7 L. W. 376; (1918) M. W. N. 188; 24 L. T. 35, **Palani v. Paramasiva**, 13 M. 479; 4 Ind. Dec. (N. S.) 1046, dist. ngush. d.

Per **Wallace, J.**—"The lawful rate payable" in section 26 (3) of the Madras Estates Land Act is not necessarily or invariably the *faisal* rate fixed by the Government, but may be a contract rate on which the occupancy is based. **M PARA DEKKAN v. AMBERUDDIN SAHIB**, 17 L. W. 160; (1923) A. I. R. (M) 306 **181**

Madras Local Boards Act (XIV of 1920)—Local rules—Rule 4 (1)—Election petition—Failure to make deposit within time, effect of—Delay due to party's neglect.

Sub-rule (1), r. 4 of the rules framed by the Local Government for the conduct of election enquiries under the Madras Local Boards Act, requiring a deposit of Rs. 200 to be made within the time prescribed, is mandatory in character and, unless the direction contained in the sub-rule is complied with, the Court has no jurisdiction to proceed to enquire into the petition.

In the case of an objection petition against an election under the Madras Local Boards Act filed on the very last day allowed for its presentation, the Vakil who was entrusted with the petition, stated to the Court that he had Rs. 200 to pay, but did not actually tender the money, nor did he ask the Judge to take the deposit himself. In accordance with the usual practice, he went to the *challan* clerk to obtain a *challan* to pay his money into the Imperial Bank. That being the luncheon interval, the *challan* clerk was not there. He returned soon after, and issued the *challan* for payment of the money into the Bank. The money was forthwith sent to the Bank, but it reached too late and could not be deposited on that day. It was deposited on the next day. In these circumstances, the question was, whether the maxim *actus curie neminem gravabit* (the act of the Court should not prejudice any one) applied so as to make the deposit a valid one.

Held, that the maxim had no application, for as the Vakil only went to the *challan* clerk at a time when the latter was allowed to go for his tiffin, it could not be said that the failure to pay the

Madras Local Boards Act—concl'd.

money in time was due to any action taken by the Court. **M KRISHNAJI REDDIAR v. MUTHUVEERA REDDIAR**, 44 M. L. J. 344; (1923) M. W. N. 99; 18 L. W. 299; (1923) A. I. R. (M) 490 **449**

s. 221—Criminal Procedure Code (Act V of 1898), ss. 435, 439—Government of India Act, 1915 (5 & 6 Geo. V., C. 61), s. 107—Magistrate acting under s. 221, Local Boards Act, whether "inferior Criminal Court"—Revision—Order directing payment of fees—Fine, whether can be imposed.

A Magistrate taking action under section 221 of the Madras Local Boards Act of 1920 is an "inferior Criminal Court" within the meaning of section 435 of the Criminal Procedure Code, and an order made by him under section 221 is subject to the revisional jurisdiction of the High Court under section 439 of the Criminal Procedure Code or section 107 of the Government of India Act.

Under section 221 of the Madras Local Boards Act of 1920 the imposition of a fine in addition to directing the payment of the fees due is illegal. **M PUNIYA SVAMALO, In re** (1922) M. W. N. 840; 17 L. W. 155; (1923) A. I. R. (M) 275; 24 Cr. L. J. 461 **624**

Madras Original Side Rules, App. II, Nos. 35, 36—Decision in contentious Probate suit, whether "final judgment"

The decision of a Judge sitting on the Original Side in the High Court in a contentious Probate suit is a "final judgment," so that a memorandum of appeal from it comes under Serial No. 35 of the Appendix II of the Original Side Rules as being from a "final judgment" and not under Serial No. 36 as being from "any other judgment or order". **M PERUMALLI CHETTY v. KANDASWAMI CHETTY**, 44 M. L. J. 146; 17 L. W. 238; (1923) M. W. N. 160; 3 M. L. T. 122; (1923) A. I. R. (M) 362; 46 M. 592 **925**

Mahant—Denial of wakf nature of property, effect of—Removal of Mahant.

The denial by a *Mahant* of the *wakf* nature of the property attached to the temple and the setting up of an adverse claim to it is sufficient to render him an unfit person to continue in the office of *Mahant* and liable to removal in a properly constituted proceeding. **L AJUDHIA DAS, v. LOKU MALIK**, (1923) A. I. R. (L) 131 **803**

Malabar Law—Tarwad—Maintenance of junior members—Principles applicable—Decree against karnavan, form of.

The junior members of a Malabar *tarwad* are entitled to receive maintenance out of the *tarwad* house, when there is no room for them in that house, and if the *karnavan* makes an insufficient allowance, they are entitled to apply to the Court to determine what allowance is sufficient having regard to the circumstances of the family.

The general principle governing such cases is that, *prima facie*, the junior members living out of the *tarwad* house should be treated equally, but the circumstances of each particular member can be taken into consideration and it is for the *karnavan* to judge how much each particular member should get. He may take into account, circumstances like the health of a particular child, or the education of a particularly intelligent child

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for a child with small intelligence, or the earning capacity of the junior member or apparently even a rich marriage connection by him. Property given to a *karnavan* while he was junior member before he became *karnavan* can also be taken into account.

To some extent, this discretion of the *karnavan* can be controlled by the Court and if a junior member is aggrieved, he can apply to the Court for fixing his rate of maintenance. On such application very great weight should be given to the decision of the *karnavan* and it should not be slightly interfered with. What is a reasonable amount of maintenance is a question of fact. *Ekanat Thayu Kunji Ama v. Ekanat Srungunni Valia Kymal*, 5 M. 471; 2 Ind. Dec. (N. S.) 50, relied on.

Ordinarily, a decree in favour of a junior member for maintenance against the *karnavan* should not, in the absence of special circumstances, be a personal one; but must direct him to pay maintenance out of the income and corpus of the *tarwad* properties. *M. KOTTAL KUNHALIKUTTY HAJI KARNAVAN v. MALIKKARAVIDAKOTTAL KUNHAMAYAN*, 44 M. L. J. 212; 17 L. W. 536; (1923) M. W. N. 247; 32 M. L. T. 366; (1923) A. I. R. (M) 280; 46 M. 567. **833**

Malabar (Restoration of Order) Ordinance (I of 1922), s. 4 (2) (b)—Special Magistrate—Retired Magistrate, appointment of—Trial by such Magistrate—Illegality—Criminal Procedure Code (Act V of 1898), ss. 12, 26, 41.

Under section 4 (2) (i) of the Malabar (Restoration of Order) Ordinance only a person who is already a Magistrate is eligible for appointment as "Special Magistrate." The powers of a Magistrate terminate on his retirement from service and a retired Magistrate is, therefore, incompetent to be appointed a Special Magistrate under the Ordinance. A conviction on trial by such a Magistrate is illegal and must be set aside. *M. KOTTATHORI HAMED HAJI v. EMPEROR*, 44 M. L. J. 428; 17 L. W. 426; (1923) M. W. N. 285; 32 M. L. T. 195; 24 (r. L.) J. 381; (1923) A. I. R. (M.) 595. **381**

Malicious prosecution—Conviction in first instance—Acquitted on appeal—Presumption—Reasonable and probable cause.

Where it is found that a plaintiff in a suit for damages for malicious prosecution was convicted on the first instance and was ultimately acquitted on appeal, the presumption is against the absence of reasonable and probable cause for the prosecution unless the original conviction is proved to have proceeded on evidence known by the defendant to be false or on the wilful suppression by him of material information. For this purpose, the plaintiff is entitled to produce evidence, and a dismissal of his suit, without giving him the opportunity to produce such evidence, is liable to be set aside in appeal.

Shama Bibi v. Chairman of Baranagore Municipality, 6 Ind. Cas. 675; 12 C. L. J. 410, relied upon.

The question in every case of a suit for malicious prosecution as to who was the real prosecutor must

Malicious prosecution—contd.

depend upon all the circumstances of the case. *PAT JAGNARAYAN DUBEY v. BAI DAPAT DUBEY*, 4 P. L. T. 202; (1923) A. I. R. (Pat) 344; 1 P. L. R. 332. **409**

Defamation—Privilege—Malice—Reasonable and probable cause—Qualified privilege, elements of.

As a rule an action lies for the malicious publication of statements which are false in fact and injurious to the character of another within certain limits and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In the latter class of cases, the occasion prevents the inference of malice which the law draws from unauthorised communications; and a qualified privilege attaches to the statements so made, if fairly warranted by any reasonable occasion or exigency and honestly made, or made in good faith for the common convenience and welfare of society.

There are three elements necessary to make the defence of qualified privilege good, namely, (1) the occasion must be fit, (2) the matter must have reference to the occasion and (3) it must be published from right motives.

Clerk and Lindsell on Torts, 7th Edition, p. 580, referred to and relied upon.

For the sake of public justice, charges and communications which would otherwise be slanderous, are protected, if *bona fide* made in the prosecution of an enquiry into a suspected crime. *O KISHAN LAL v. MOORI RAZA*, 9 O. & A. L. R. 302. **17**

Reasonable and probable cause, absence of—Malice, what is—Burden of proof—Test.

In order to succeed in an action for damages for malicious prosecution the plaintiff must allege and establish both absence of reasonable and probable cause and malice and must fail altogether if he fails to establish both.

Reasonable and probable cause means an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

The malice necessary to be established in a case of malicious prosecution does not mean malice in law, such as may be assumed from the intentional doing of a wrongful act, but malice in fact; *malus animus* indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody.

Hicks v. Faulkner, (1882) 8 Q. B. D. 167; 51 L. J. Q. B. 268; 30 W. R. 545, followed.

If there was an honest belief in the accused's guilt, neither anger nor hastiness on the part of the accuser would evidence malice. Anger, so far from being a wrong or indirect motive, is one

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of the motives on which the law relies to secure the prosecution of offenders, while hastiness in the accuser's conclusion as to the accused's guilt, although it might account for his coming to a wrong conclusion, would not show the presence of any indirect motives.

Brown v. Hawkes, (1891), 2 Q. B. 718; 61 L. J. Q. B. 151; 65 L. T. 108; 55 J. P. 823, followed.

The test as to the burden or onus of proof is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the Tribunal will have to say that if the case stops there it must be decided in a particular manner. *L. ABDUL SHAKUR v. LIPTON & Co.* 411

Mesne profits, suit for—Plaintiff's failure to establish right to immediate possession, effect of.

In execution of a decree for recovery of possession of a land on declaration of the plaintiff's title thereto it was held on objection by the judgment debtor that the decree was incapable of execution on the ground that it was so vague that it could not be determined what the land was of which possession was to be given to the plaintiff. There was no appeal against the order of the Executing Court with the result that the plaintiff was never put in possession. Thereafter the plaintiff decree-holder instituted a suit against the judgment-debtor for recovery of mesne profits in respect of the land.

Held, that the plaintiff must show that he was entitled to possession of the land which had yielded the mesne profits that he claimed and as he was unable to do that in view of the decision in the execution proceedings, he was not entitled to a decree for mesne profits. *C. SHEIKH KARIM v. SOBEDAR SHEIKH*. 47

Minor—Lease—Benefit.

A lease granted to the guardian of a minor acting on behalf of the latter which is proved not to be for the benefit of the minor, is not binding on the minor. *PAT HAFIZAN v. AKHALESWARI PRASAD* 36

—specific performance against.

A Court will not decree specific performance against a minor unless it is satisfied that such act is for the benefit of the minor. It is not sufficient to show that it is not detrimental to him; if there is any possibility of there being a detriment, the Court will require to be satisfied that the possibility no longer exists before it takes action. *M. BAPPU v. ANNAMALAI CHETTIAR*, 44 M. L. J. 226; (1923) M. W. N. 218; 17 L. W. 364; 32 M. L. T. 253; (1923) A. I. R. (M.) 313 42

Mortgage—Redemption—Covenant giving mortgagee power to prevent redemption—Clog on equity of redemption.

A term in a mortgage-deed which invests the mortgagee with power to prevent redemption altogether amounts to a clog on the equity of redemption and is unenforceable.

Durga Singh v. Muhammad Raza Husain Khan, 25 Ind. Cas. 912, 17 O. C. 313, relied on.

Mortgage—cont'd.

A mortgage with possession, which also carried interest, provided for redemption after the expiry of ten "abad" years, that is to say, ten years during which at least one-third of the mortgaged land should be cultivated.

Held, that it being entirely within the hands of the mortgagee to cultivate all or any portion of the land or not, he could, by cultivating just less than one-third of the mortgaged land in each year, deprive the mortgage of his right of redemption altogether, and that, therefore, the term in the mortgage-deed postponing redemption till after the expiry of ten "abad" years amounted to a clog on the equity of redemption and was unenforceable. *PESH RAM CHAND v. GHULAM HASAN* 941

—Redemption, suit—Decree for possession on payment of specified amount—Payment to be made in particular month in any year—Relation of mortgagor and mortgagee, if determined—Application for execution beyond time—Application, whether may be treated as redemption suit—Civil Procedure Code (Act V. of 1908), s. 47—Limitation Act (IX of 1908), Sch. I, Art. 148.

In 1886, a consent-decree was passed in a redemption suit to the following effect:—"The plaintiff do pay to the defendants Rs. 55 in respect of the debt on mortgage in the month of Chaitra of any year and the plaintiff do obtain possession of the lands in suit, considering the same to have been redeemed from the mortgage. It should be understood that the plaintiff is not entitled to take possession of the lands in dispute in any other month except the month of Chaitra." In 1919 the plaintiff sought to execute the decree and was met by the contention that execution was barred by limitation.

Held, (1) that the effect of the decree was not to put an end to the mortgage, but only to settle the mortgage amount, and to direct that if that amount be paid in any following year the defendant should give back possession;

(2) that as the relationship of mortgagor and mortgagee continued after the decree was passed, there was nothing in it which barred the plaintiff's right to redeem;

(3) that it was open to the Court under section 47, Civil Procedure Code, to treat the application for execution as a suit for redemption, for which the period of limitation was sixty years, under Art. 148, Schedule I. to the Limitation Act. *B. HANMANT v. SHIDU SAMBHU*; 25 Bom. L. R. 358; (1921) A. I. R. (B.) 300; 47 B. 692 556

—Sale to mortgagee of mortgaged property—Mortgagee, liability of, to pay mortgage-debt, whether extinguished—Contract Act (IX of 1872), s. 62.

Where a mortgagor sells a part of the mortgaged property to the mortgagee, intending thereby with the sale-proceeds to pay off the mortgage-debt, the sale and the mortgage are entirely unconnected, and the effect of the sale is not to relieve the mortgagor of his liability to pay the mortgage-debt under section 62 of the Contract Act. *N. NARAYAN v. VENKATRAO*, (1923) A. I. R. (N.) 213. 422

Mortgage—concl'd.

—Sub-mortgage—Redemption of mortgage, effect of—Decree between stranger and sub-mortgagor—Sub-mortgagee, whether bound.

A sub-mortgagee, after redemption of the mortgage, has no further right against the mortgaged property and his remedy, if any, is against the sub-mortgagor, but he can pursue his rights against any property in the hands of the sub-mortgagor into which the security was converted.

A sub-mortgagee can, as against a stranger, subrogate himself only to such rights as his sub-mortgagor can have as against the stranger and is bound by any decree between his sub-mortgagor and the stranger and cannot, except on the ground of fraud or collusion, get rid of it merely by showing the decree was erroneous. *M. RARICHAN v. DAMAYANTI*, (1923) M. W. N. 87; 44 M. L. J. 363; 17 L. W. 380; 32 M. L. T. 273; (1923) A. I. R. (M) 440 **638**

—Sub-mortgagee, rights of—Sale of mortgaged property.

A sub-mortgagee can ask for a sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief.

Muthu Vijiya Raghunatha Ramachandra v. Venkatchallam Chetti, 20 M. 35; 6 M. L. J. 235; 7 Ind. Dec. (N. S.) 25, followed.

One of the objects which a Court of Equity ought always to have in view is to minimise the number of cases which may arise out of the relation between the parties to a mortgage. *N. SINGHAI KANCHHEDILAI v. SHRIDHAR*, 19 N. L. R. 64; (1923) A. I. R. (N) 222 **427**

Mortgage-bond—Money payable by instalments—Entire sum payable on default—Default in payment—Suit to recover instalments in default only—Subsequent suit for remaining instalments—Cause of action—Limitation Act (IX of 1908), Sch. I, Art. 132—Civil Procedure Code (Act V of 1908), O. II, r. 2.

On 22nd October 1902 A executed a mortgage-deed in favour of B, which provided for payment of the mortgage-money by twelve annual instalments, and that in case of default of any one instalment the whole amount remaining due would be paid at once. Default having been made in payment of the first two instalments, B instituted a suit in 1905 to recover the amount of these instalments and obtained a decree. No further instalment was paid, so B on 20th May 1917 instituted another suit for the remaining ten instalments:

Held, that the right of action to sue for the whole amount of the mortgage having accrued to B in 1905, the suit was barred by limitation under Art. 132 of Schedule I to the Limitation Act and, further, that as B only sued for two instalments in 1905, instead of for the whole of the relief to which he was entitled the suit was also barred under O. II, r. 2, of the Civil Procedure Code. *B. SHRINIVAS LAXMAN NAIK v. CHANNASATA GOWDA BASANGOWDA GOWDUR* 25 Bom. L. R. 203. (1923) A. I. R. (B.) 201 **290**

Mortgage, simple—Possession obtained by mortgagee—Right to remain in possession.

Once a simple mortgagee gets into possession of the property mortgaged to him, the property is security for his debt and he is entitled to remain in possession, until the mortgage-money is paid off though, as a matter of fact, if he endeavoured to recover the mortgage-money by suit, he might find himself barred by the Statute of Limitation. *B. RANGAPPA KONDAPPA KORPE v. VITHU KRISHNAJI WAIKAR*, 25 Bom. L. R. 278; (1923) A. I. R. (B.) 193, 47 B. 652 **404**

Mortgage-suit—Persons acquiring interest subsequent to mortgage not impleaded, effect of—Decree, form of.

Where a mortgagee sues for the recovery of the full amount of the mortgage-debt by sale of the mortgaged property, but omits to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit, so much only of the claim should be decreed as is proportionate to the interests of the persons who are before the Court. *N. HIRASA v. ONKAR*, (1923) A. I. R. (N) 234 **458**

Mortgage, usufructuary—Further charge—Stipulation to convert mortgage into sale—Clog on redemption—Foreclosure decree—Redemption decree, whether included—Transfer of Property Act (I V of 1882), ss. 58, 67.

Where a deed creates a further charge on a property usufructuarly mortgaged and provides, among other things, that if, after the expiry of a certain period, the principal amount together with interest and compound interest due under it is not paid, the original deed shall, by virtue of the deed of further charge, be deemed to be an absolute sale-deed and the case provided for actually occurs, that is, the debt as stipulated is not paid, the original deed becomes, not indeed, an absolute sale-deed, for "once a mortgage, is always a mortgage," but a deed in which the right of foreclosure is added to the rights already possessed by the usufructuary mortgagee.

An agreement in a deed of further charge that as long as the debt due under the deed is not paid off, the mortgagor shall not be entitled to redeem the property mortgaged under the original deed, is binding and not to be regarded as coming under the doctrine of adding a clog on redemption. The doctrine of clog relates only to dealings which take place between the parties at the time when the original contract of mortgage is entered into. Parties are at liberty to deal subsequently with each other, so as to vary the terms upon which redemption of the original mortgage can be had. *O. SANGAT BAKHSH SINGH v. KAWAT DIJDEO BAKHSH SINGH*, 9 O. L. J. 511; (1923) A. I. R. (O) 143 **233**

Muhammadian Law—Legitimacy—Acknowledgment.

Acknowledgment has the effect of legitimization according to Muhammadian law, where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty.

Muhammadan Law—contd.

Where, however, the finding is that there could not have been a valid marriage between the parents the question of acknowledgment does not arise
PAT MAN MOHAN SAW v. MUHAMMAD HUSSAIN KHAN, 1 P. L. R. 328 152

— **Shia Law**—Wakf, essentials of—Change in character of possession—Limitation Act (IX of 1908), Sch. I, Art. 91, applicability of—Suit for possession and declaration of instrument void—Admissibility of document in evidence—Objection not taken—Waiver—Forgery—Opinion of Court—Commission to examine witnesses—Commissioner, power of, to restrict cross-examination.

According to the Shia Law there are four essential requisites on which the validity of a wakf depends:—(1) The wakf must be perpetual; (2) it must not be contingent; (3) possession must be given of the thing dedicated, or, in other words the properties should cease to be the properties of the donor, and (4) the right of the donor should be entirely divested therefrom.

It is, however, lawful for the donor to constitute himself the mutwalli, and in such a case a formal change of possession being out of the question, all that is required is not actual delivery of possession, but a change in the character of possession. If the donor continues to exercise his right over the wakf property and makes no change in the character of his possession, the wakf will not take effect.

A change in the character of possession is essentially a matter of evidence and can only be decided on the evidence in each case.

Article 91 of Schedule I to the Limitation Act applies to a suit to cancel or set aside an instrument not otherwise provided for. It has no application to a suit for possession and a declaration that an instrument under which the defendant claims is void.

Where no objection is taken in the Trial Court to the admissibility of a document it must be assumed that any objection as to the mode of proof of the document adopted by the party producing it has also been waived.

The question of the mode of proof of a document is a question of procedure and is capable of being waived.

It is unsafe to hold that a document is a forgery on the personal inspection of the document by the Court.

A Commissioner appointed by the Court to examine witnesses has complete power to stop proceedings and to take the direction of the Court whenever it appears to him that the Pleader cross-examining a witness is abusing his position and exceeding the limits of propriety.

A Court in appointing a Commissioner should, in each case, give him instructions so as to make it clear to him that he is not so powerless as it is imagined and that he should exercise his power and stop the proceedings for the purpose of taking the direction of the Court whenever he should think that it is necessary to do so. **PAT BIR KANT ZAINAB v. MOBARAK HOSSAIN** 748

— **Wakf**—Mutwalli, appointment of—District Judge, powers of—Civil Procedure Code (Act

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V of 1908), s. 92, suit under, whether necessary.

A District Judge has the powers of a Kazi under the Muhammadan Law in such matters as the appointment of a Mutwalli, etc.

Where a deed of endowment provides that a vacancy in the office of Mutwalli should be filled by a proper person being appointed to the office by a competent Court, the District Judge has power to make the appointment in accordance with the terms of the deed of endowment on application being made to him on the occurrence of a vacancy in the office, and a suit framed under section 92 of the Civil Procedure Code is not necessary for the purpose.

Jamila Khatun v. Abdul Jahl Meah, 49 Ind Cas. 799; 23 C. W. N. 138, distinguished.

Quære:—Whether the order of the District Judge in such a case is a judicial or an administrative order. **O MOHTUDDIN CHOWDHURY v. AMINUDDIN CHOWDHURY** 930

Negligence—Duty of person carrying on dangerous operation—Damages, suit for—Volenti non fit injuria, applicability of.

If persons choose to carry on dangerous operations, it is their duty, not only to the public but also to their servants to take adequate precautions that those operations shall not cause injury to any person. They ought to exercise ordinary care, caution and skill to prevent an accident happening. The mere fact that an accident has happened is strong evidence, in a case of this kind, that the ordinary care, caution and skill required for preventing the happening of an accident have not been exercised.

A mere warning to persons working in the neighbourhood does not amount to taking sufficient precautions.

For a defence based on the maxim *volenti non fit injuria* to succeed it is necessary to prove that the person injured knew of the danger, appreciated it and voluntarily took the risk.

A man cannot be said to have voluntarily undertaken a risk the extent of which he does not appreciate. **M SOUTH INDIAN INDUSTRIALS L.D. v. ALAMELU AMMAL**, 17 L. W. 495; (1923) M. W. N. 344, 45 M. L. J. 53; (1923) A. I. R. (M) 565 632

Negotiable Instruments Act (XXVI of 1881), ss. 45-A, 64, 76 (a)—Hundi, loss of—Non presentment, effect of—Duplicate, when can be demanded.

The loss of a bill or note does not dispense with presentment under section 64 of the Negotiable Instruments Act.

Where a hundi payable at sight is lost, it cannot be said that it is lost before it is overdue within the meaning of section 45-A of the Negotiable Instruments Act. The holder of such a hundi is not, therefore, as of right entitled to demand a duplicate from the drawer under that section.

The right to obtain a duplicate in case of loss is, however, a part of the mercantile laws of countries and a duplicate may be demanded on equitable principles where a bill is lost whether before or after maturity.

Where owing to the refusal of the drawer of a hundi to supply a duplicate none is presented to

Negotiable Instruments Act—concl'd.

the drawee, no presentment for payment is necessary as against the drawee under section 76 (a) of the Negotiable Instruments Act. **L UDHO RAM CHANDI RAM v. HEM RAJ-TEJ BHAN 777**
N.-W. F. P. Law and Justice Regulation, s. 79—
Further appeal—Finding of fact, whether can be questioned.

Although it is the practice of the Judicial Commissioner N. W. F. P. to be slow in disturbing the concurrent findings of fact of the lower Courts, there is no legal bar in that Province to the reopening of an issue of fact on further appeal. **Pesh. MIR AHMAD SHAH v. MUSHARRIF SHAH 996**
Oudh Rent Act (XXII of 1886) as amended by Oudh Rent (Amendment) Act (I V of 1921), s. 119 B—
Appellate decree by District Judge—Revision.

The power of the Court of the Judicial Commissioner to interfere in appeals from the decrees of Revenue Courts is defined by and limited to the cases provided by section 119 B of Act XXII of 1886 as amended by U. P. Act IV of 1921, and no power of revision from the appellate decrees of the District Judge is reserved to the Court. **O KALI BAKSH SINGH v. BHAGWAN DAS, 10 O. L. I. 191 1023**

Parties—Some of several executors, whether can sue—Non-joinder of necessary parties—Dismissal of suit—Civil Procedure Code (Act V of 1908), s. 99, applicability of.

Some of several joint executors of a Will cannot maintain a suit against a debtor of the estate. The mere fact that the executors who are suing hold a power-of-attorney from the other executors will not cure the defect unless the suit is on behalf of all the executors.

If a defendant is sued by one only of two persons with whom he has contracted or by one only of two persons who have a joint cause of action against him, he has a right to have the action dismissed unless the other is joined.

If a defendant takes objection to the non-joinder of necessary parties at a proper time he has a right to have them joined as plaintiffs, and if after objection has been taken the plaintiff proceeds with the suit without taking steps to add the person or persons whose non-joinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed.

Some of several executors under a Will holding a power-of-attorney from the others brought a suit on behalf of the estate in their own names. Objection as to non-joinder of the remaining executors was taken by the defendant at the earliest opportunity but no application was made by the plaintiffs to have the remaining executors added as parties. The suit was decreed by the Courts below which held that the plaintiffs by reason of the power-of-attorney could sue in their own names without joining the other executors. On second appeal:

Held, that the action was wrongly conceived and must fail for non-joinder of necessary parties in spite of the provisions of section 99 of the Civil Procedure Code. **M MOHNAVELU MUDALIAR v. ANNAMALAI MUDALIAR, 44 M. L. J. 249; 17 L. W. 211; (1923) M. W. N. 89; (1923) A. I. R. (M) 337 63**

Partition decree, exemption of—Delay in furnishing stamped paper—Limitation, operation of—Limitation Act (IX of 1908), Sch. I, Art. 182.

Although a decree in a partition suit is not formally drawn up until paper bearing the stamp prescribed by Art. 45 of Sch. I to the Stamp Act is supplied to the Court, limitation for the execution of such a decree runs, under Art. 182 of Sch. I to the Limitation Act, from the date of the decree, i.e., the date on which the judgment is pronounced, and not from the date on which the Court receives the requisite stamped papers. **G KISHORI MOHAN PAL v. PROVASH CHANDRA 646**

Partition suit—Preliminary decree—Dismissal of suit after preliminary decree, legality of—Value for purposes of jurisdiction—Suits Valuation Act (VII of 1887), s. 8.

After a preliminary decree has been passed in a partition suit, it is not open to the Court to dismiss the suit altogether on the ground that the Commissioner appointed for carrying out the partition has effected partition of property different from the property ordered to be partitioned under the preliminary decree.

The value for purposes of jurisdiction of a suit for partition pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share, is the value of the whole of the property sought to be partitioned.

Dukhi Singh v. Harihar Sah, 58 Ind. Cas. 226; 1 P. L. T. 595; 5 P. L. J. 540; (1921) Pat. 89, distinguished.

Where, however, the plaintiff seeks for an adjudication of his title or extent of share and for partition after such adjudication, it is the value of his share which will determine the jurisdiction of the Court and not the value of the entire property. **PAT RANJIT SAHI v. QASIM 4 P. L. T. 257; 1 Pat. 432, (1922) A. I. R. (Pat) 342 916**

Penal Code (Act XLV of 1860), ss. 34, 323—Assault with deadly weapons—Offence—Common intention.

In a quarrel over a turn of water, four persons armed with *chhavis* made an assault upon another man in which injuries were caused to the latter resulting in his death. Out of all the injuries, there was only one that was fatal and it was uncertain by whom the same had been caused. The assailants were convicted under section 326 of the Penal Code read with section 34 of the Code and given equal punishment. On appeal:

Held, that considering the nature of the assault and the nature of the weapons used, it could not be said with regard to any one of the accused that he did not intend to cause serious injuries and that section 34 of the Penal Code had rightly been applied in the case. **L INDER SINGH v. EMPEROR, 24 Cr. L. J. 401 513**

ss 99, 100—Right of private defence, extent of.

Under section 100 of the Penal Code, the right of private defence of the body extends, subject to the restrictions contained in section 99 of the Code, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is such an assault as may reasonably cause the apprehension

Penal Code—contd.

that death or grievous hurt will otherwise be the consequence of such assault.

Accused, with three companions, who were unarmed, was proceeding to a threshing floor in order to claim a share of certain produce to which he alleged, he was entitled. On the way they met the deceased who asked them to stop. They did so. The deceased rushed to his house and returning with a *dang* struck a blow on the head of the accused. The accused retaliated by striking a blow at the head of the deceased which killed him;

Held, that the accused had acted in the exercise of the right of private defence of the body and was entitled to the benefit of section 100 of the Penal Code, and that it was immaterial that he intended to proceed to the threshing floor and enforce his right to a share of the produce. *L. MUHAMMAD AKBAR v. EMPEROR*, 24 Cr. L. J. 408 520

— ss. 100, 304, 325—*Fatal blow, doubtful which of two accused struck—Offence—Private defence, when Court to give effect to plea.*

Where it is impossible to decide which of two accused struck the fatal blow, the offence committed by them falls under section 325 of the Penal Code, and not under section 304.

Agra v. Emperor, 27 Ind. Cas. 83; 37 P. R. 194 Cr. 16 Cr. L. J. 209; 219 P. L. R. 1915, *relied on*.

If on the record a right of private defence can be clearly raised, the Court should give effect to it, even although not pleaded by the accused. *L. WARVAM SINCH v. EMPEROR*, (1922) A. I. R. (1) 394; 24 Cr. L. J. 451 611

— s. 146—"Violence," meaning of.

The word "violence" in section 146 of the Penal Code is not restricted to force used against persons only but extends also to force against inanimate objects. *M. VENKATASUBBIE, In re* 44 M. L. J. 407; 17 L. W. 535, 32 M. L. T. 190; 24 Cr. L. J. 156; (1923) A. I. R. (M) 603 356

— s. 149—"Offence," if includes offence under special Act.

The definition of "offence" in section 149, Penal Code, does not include offences under special Acts. *M. AYDROOS v. EMPEROR*, (1922) M. W. N. 860; 17 L. W. 21; (1923) A. I. R. (M) 187; 24 Cr. L. J. 360 360

— s. 193—*Perjury—Essentials necessary for conviction—Intention.*

The intention to commit perjury must be clearly present before a person charged with that offence can properly be convicted of it, and a statement capable of being construed in any reasonable way in such committing, that it does not show a clear intention of committing perjury, or a deliberate attempt to make a false statement does not *per se* contain the elements of the offence. *PAT RAMGOBIND RAM v. EMPEROR*, 1 P. L. R. 17 Cr.; 24 Cr. L. J. 471 887

— s. 193—*Perjury—Proof.*

In order to sustain a successful charge of perjury it is not enough to show that the statement in question is probably not true, it must be shown that it is certainly false. It is necessary for the prosecu-

Penal Code—contd.

tion to prove either that on its face the statement must be necessarily regarded as deliberately perjured or that it is so from extrinsic circumstances. It must be proved beyond any reasonable doubt that the statement is deliberately false. *PAT LALMONI NONIA v. EMPEROR*, 1 P. L. R. 142 Cr.; 24 Cr. L. J. 321 161

— s. 211—*False charge of offence, what amounts to.*

The failure of a complainant to prove his case is not the same thing as the institution of a maliciously false case, so as to sustain a charge of an offence under section 211 of the Penal Code. *PAT CHHEDI UPADHYA v. EMPEROR*, 1 P. L. R. 50 Cr.; 24 Cr. L. J. 36 76

— s. 216—*Harboursing proclaimed offender—Giving warning, whether amounts to harbouring—Sentence.*

A person who deliberately gives warning to a proclaimed offender of the approach of the Police, with the intention to assist him to escape, is guilty of an offence under section 216 of the Penal Code. *Emperor v. Husain Baksh*, 15 A. 261; A. W. N. (1903) 29, dissented from.

An outlaw, especially in the North-West Frontier Province, is a menace and an enemy to the public at large, and any person who conspires to assist him must be held to be also an enemy of the public and should be severely dealt with. *PESH, AKBAR ALI v. EMPEROR*, 24 Cr. L. J. 485 949

— s. 225B—*Arrest on civil warrant—Rescue from custody—Surrender next day—Offence, if complete*

Where a person is arrested on a civil warrant and while in the custody of the peon, he is rescued by a number of friends, though without offering any resistance himself and disappears until he surrenders himself the next day, he is guilty of an offence under section 225B of the Penal Code, as he took advantage of his release from custody and got out of the way of the peon. *L. B. D. M. ATTIVA v. EMPEROR*, 11 L. B. R. 449; (1923) A. I. R. (R.) 134; 2 Bur. L. J. 19, 21 Cr. L. J. 307 67

— ss. 304, 323, 325, 366—*Abducting woman to compel marriage—Ingredients of offence—Culpable homicide—Death caused owing to enlarged spleen—Simple hurt.*

In order to fall under section 366 of the Penal Code an abduction must be accompanied by the intention or knowledge specified in the section.

Where a woman was abducted by a man whom she had not married but with whom she had lived willingly for a couple of months as his wife before the abduction and whom she probably intended to marry:

Held, that an offence under section 366 of the Penal Code had not been established.

Where a person dies as the result of simple injuries owing to the fact that his spleen is diseased and it is not shown that the accused had knowledge of this fact, he can only be convicted of causing simple hurt. *L. BHAIJAN DAS v. EMPEROR*, 24 Cr. L. J. 421 533

— ss. 323, 325—*Alteration of conviction by Appellate Court—Prejudice to accused.*

Penal Code—contd.

The petitioners and one K were convicted by the Trial Court under section 325, Indian Penal Code, for having broken the knee-cap of the complainant. The Appellate Court found that, so far as the injury to the knee-cap was concerned, that had been caused by the accused K and it came to the conclusion that the petitioners had been guilty of the offence under section 323, Indian Penal Code, inasmuch as they had inflicted other injuries on the complainant:

Held, that the alteration of the conviction of the petitioners from section 325 to section 323 by the Appellate Court was unauthorised, inasmuch as they had not been given any opportunity of answering the charge in the first instance of inflicting injuries other than the injury to the knee-cap. **O PATAL GHOSE v EMPEROR**, 24 Cr. L. J. 312 72

— s. 353—*Income Tax Act (XI of 1922), s. 46—Jurisdiction of Income Tax Collector to issue distress warrant—Resistance to constable executing such warrant.*

A Collector, acting under section 46 of the Income Tax Act, has no authority to issue a distress warrant to a Police Officer, and a Police Officer executing such a warrant cannot be said to be acting in the execution of his duty as a Police Officer within the meaning of section 153 of the Penal Code. **PAT JAIRAM SAHU v. EMPEROR**, 4 P. L. T. 171; 1 P. L. R. 68 (1923); Pat 111; (1923) A. I. R. (Pat) 338; 24 Cr. L. J. 490 954

— s. 366, offence under—*Consent of woman, effect of.*

In a prosecution under section 366 of the Penal Code the fact that the girl concerned, at the time she was enticed away from her home by the accused, had the intention of having illicit intercourse with him, is no defence to the charge under that section. The intention of the accused (and not that of the girl) is the material matter in the case. **EMPEROR v. SAIFAR REZA**, 49 C. 905; (1922) A. I. R. (C.) 508; 24 Cr. L. J. 379 379

— s. 379—*Theft—Bona fide belief of title—Offence.*

Accused and complainant owned adjoining fields. Accused removed certain crops from the field belonging to the complainant under the bona fide belief that the crops had been sown by him and belonged to him:

Held, that the accused could not be convicted of theft. **PAT BODH KISHEN GOALA v. EMPEROR**, 4 P. L. T. 608; 24 Cr. L. J. 454 614

— s. 378—*Theft—Dishonest removal—Wrongful gain or loss.*

In order to constitute theft there must be dishonesty.

Certain articles belonging to the accused were attached and secured in his own shop, but possession was transferred to the decree-holder under a bond in Form No. 15-A, Appendix E to O. XLI, r. 3 of the Civil Procedure Code. The accused preferred a claim to the articles which was allowed. The accused thereupon took forcible possession of the articles in the absence of the decree-holder;

Held, that the act of the accused did not amount to theft inasmuch as there was no intention to cause wrongful loss to the complainant or

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wrongful gain to the accused. **M. LAKSHMI-NARAYANA CHETTIAR, In re**, 42 M. L. J. 490; 16 L. W. 15; (1922) A. I. R. (M) 405; 24 Cr. L. J. 414 526

— s. 397—*“Such offender”, meaning of—Grievous hurt caused by one of several offenders—Others, whether liable to enhanced punishment.*

The words “such offender” in section 397 of the Penal Code, refer to the offender who uses a deadly weapon or causes grievous hurt to any person, and do not include those who jointly commit robbery or dacoity with him. **L. ILAHIA v. EMPEROR**, 24 Cr. L. J. 405 517

— s. 403—*Marriage negotiations, break down of—Bona fide intention to marry—Refusal to return presents—Criminal misappropriation.*

Where there is a bona fide intention on the part of an accused to give his girl in marriage and certain presents are delivered to him as a preliminary, if the negotiations break down on account of certain unfortunate disagreements, and the accused refuses to return the presents, he is not guilty of criminal misappropriation. In such a case, a Civil Court is the proper tribunal for the parties to seek a settlement of their dispute.

It cannot be laid down as a general proposition that whenever marriage negotiations break down, the relatives of the girl have a right to retain the presents made with a view to marriage. But before any action can be taken against them, it is necessary to prove dishonesty on their part. **G. NASIR KHAN v. FYAZ HUSSAIN**, (1922) A. I. R. (C) 57; 24 Cr. L. J. 348 348

— ss. 403, 406—*Goods delivered in pursuance of contract—Denial of receipt—Offence—Judgment of Civil Court, admissibility of.*

Where goods are delivered to a person in pursuance of a contract for their purchase, there is no entrustment which would give rise to a trust and the mere fact that the person denies receipt of goods delivered does not render him guilty of an offence either of criminal misappropriation or criminal breach of trust.

Obiter.—A decision of a Civil Court is admissible in evidence to disprove an allegation on the truth of which the guilt of a person in a criminal case depends. **M. VELAYUTHAM CHETTI, In re**, 24 Cr. L. J. 332 172

— ss. 406, 420—*Criminal breach of trust—Cheating—Ingredients of offences.*

Accused had pledged certain promissory-notes with the complainant as security for a loan. Subsequently, he dishonestly induced the complainant to hand over the promissory-notes to him by pretending that he required them to collect money from his debtors with the aid of which he would pay cash to the complainant. He then disposed of the pro-notes and himself appropriated the proceeds:

Held, that the accused was guilty of criminal breach of trust under section 406 of the Penal Code inasmuch as there was both entrustment and dishonest misappropriation.

Obiter, that the facts disclosed the offence of cheating under section 420 of the Penal Code. **M. VENKATAGURUNATHA SASTRI, In re**, 17 L. W. 580; 32 M. L. T. 234; (1923) M. W. N. 313; 45 M. L. J. 133; (1923) A. I. R. (M) 597; 24 Cr. L. J. 452 612

Penal Code—contd.

s. 411.
It is of the essence of an offence under section 411 of the Penal Code to show that the person who is in possession of the stolen property knew or had reason to believe it was stolen property. *M. RAMJUDU AIYAR v. EMPEROR*, 41 M. L. J. 243; 17 L. W. 370; 32 M. L. T. 318; (1923) A. I. R. (M.) 365; 24 Cr. L. J. 426 538

s. 430—*Mischief—Absence of finding that property does not belong to accused, effect of.*
A conviction under section 430 of the Penal Code, in the absence of a finding based upon evidence that the property belonged to any one other than the accused himself, is bad in law, and cannot be sustained, because no person can commit mischief in respect of property which belongs exclusively to himself. *O. KESHO SINGH v. EMPEROR*, 9 O. & A. L. R. 10; 24 Cr. L. J. 467 883

s. 499, Excep VII—*Interdict issued by head of mutt—Defamation—Caste—Swamis, powers of—Principles of natural justice.*
Accused the head of a mutt, on receipt of a formal accusation signed by several members of the caste stating that complainant had taken part in a dinner which disqualified him from taking part in caste functions, issued a temporary interdict against the complainant which was *prima facie* defamatory pending the issue of a final order after enquiry. It was found that, although the complainant was aware that the accusation had been preferred against him, no formal notice of the matter was given to him before the issue of the provisional interdict.
Held: that the interdict having been issued *bona fide* to meet the urgency of the case was covered by Exception VII to section 499 of the Penal Code.

Per Oldfield, J.—A caste is an autonomous association, the powers vested in its constituted heads being, subject to any special custom, those necessary for the protection of the interests committed to their charge. When a dispute arises as to the proper exercise of those powers the only duty of the Court is to see whether those powers are exercised in accordance with the principles of natural justice; that is, in the majority of cases, after the person to be affected by their exercise has been heard and his defence has received fair consideration.

Per Ramesam, J.—It is not for the Courts to dictate the details of procedure to persons in the position of heads of a caste.

Though an interdict issued by the head of a caste against a member of the caste who is not guilty of any moral offence savours of tyranny and oppression from the point of view of an advancing community and becomes almost intolerable as the community becomes more catholic, so long as submission to the headship of a *Swami* remains the usage of the caste and the members of the community do not shake themselves off from such headship, the *Swami* is perfectly within his rights to resort to the orthodox methods of conventional discipline and of vindicating caste usage, provided principles of natural justice are not violated. The advancing community is not

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justified in expecting its own progressive opinions to be reflected in the immutable minds of the *Swamis* or their faithful followers, nor can they be coerced to change with the times by fear of criminal prosecution. *M. SUKRALENDRA THIRTHA SWAMI OF KASIMUTTA PRABHU*, 17 L. W. 500; 45 M. L. J. 116; 24 Cr. L. J. 325; (1923) A. I. R. (M.) 587 165

s. 508—*Criminal intimidation—Self-constituted Court—Notice to appear—Ex parte decree to be passed on failure to appear—Offence.*
Accused issued a notice, signed by himself as President of a self-constituted Arbitration Court, to complainant calling on him to appear on a certain date and answer a claim brought against him, failing which an *ex parte* decree would be passed against him:

Held, that the statement in the notice that a decree would be passed in the event of the complainant failing to appear as directed amounted to a threat to harm his person, reputation or property, and amounted to criminal intimidation punishable under section 506 of the Criminal Procedure Code. *C. PRIYANATH GUPTA v. LALJHI CHOWKIDAR*, 27 C. W. N. 479; 37 C. L. J. 526; 24 Cr. L. J. 396; (1923) A. I. R. (C.) 596 508

Pleadings—Appeal, second—Question of limitation—Question of law, when not entertainable.

Although questions of limitation, being questions of law, are not excluded from being heard in second appeal when they have not been raised in the lower Courts, where a question of law depends upon a finding of fact or evidence, and that evidence has not been led in the Trial Court, the High Court in second appeal will not deal with the question. *B. DIGAMBAR GOVIND v. LAHYADEO BEAU*, 25 Bom. L. R. 245; (1923) A. I. R. (B.) 254 326

Genuineness of document not challenged in First Court—Document, whether may be attacked in appeal.

If the genuineness of a document is not challenged when it is produced in the Court of first instance, and no evidence is adduced to rebut the evidence given in proof of the document by the party producing it, it is not open to the opposite party to attack the document in appeal, nor is it open to the Appellate Court to ignore it. *A. SHIB LAL v. BIDHA SINGH*, 21 A. L. J. 329; (1923) A. I. R. (A.) 503 140

Omission to object to admissibility of document in Trial Court—Objection, whether may be taken in appeal.

Although an erroneous omission in the Trial Court to object to an admission which is irrelevant does not make it relevant and admissible in evidence, still an objection that a document, which *per se* is not admissible in evidence, has been improperly admitted in evidence, cannot be entertained in the Court of Appeal, when, if the objection had been taken in the Trial Court, it might have been met and the proceedings regularized. *C. SAVERUDDIN AKONDA v. SAMURUDDIN AKOND*, (1923) A. I. R. (C.) 3 895

Pro-note, suit on—Claim on original debt—Amendment of plaint.

Pleadings—concl'd.

In a suit on a pro-note for money due under a loan where there is difficulty in enforcing the note, the plaintiff is entitled to fall back on the original consideration where the claim based on it is not barred by limitation and have the plaint amended accordingly. **M SUNDARA IYER v. ARUMUGAM PILLAI**, 44 M. L. J. 361; 17 L. W. 374; 32 M. L. T. 118. 325

Specific performance of contract, suit for—Pleading and proof, variance between, effect of—Part performance.

The plaintiff in a suit for specific performance of an alleged contract embodied in a certain document cannot, after the case made by him in the plaint has completely broken down, be permitted to abandon the case made in the plaint and to invite the Court to examine whether a completed agreement may or may not be spelt out of correspondence antecedent to the document. The Court would not, in a case of this description, permit the plaintiffs to depart from the case made in the plaint, as the Court discourages, as a rule, variance between pleading and proof. The test applied in such cases is, whether, if the variance were permitted in favour of the plaintiff, the defendant would not be taken by surprise and be prejudiced thereby. This rule is applied with special strictness in cases of specific performance of contracts. But where there has been a part performance, the Court may struggle with apparently conflicting evidence rather than dismiss the suit. **G GONESH RAM v. GANPAT RAI** 651

Practice—Criminal trial—Convict on uncorroborated testimony of complainant.

In a case of grievous hurt the Magistrate disbelieved the whole of the prosecution evidence except the statement of the complainant. It was found that there was serious enmity between the complainant and the accused:

Held, that it was unsafe, under the circumstances, to base the conviction on the uncorroborated statement of the complainant. **PAT BHANGI DORRY v. EMPEROR**, 1 P. L. R. 151 Cr.; 4 P. L. T. 503; 24 Cr. L. J. 360. 360

Criminal trial—Weakness of defence—Conviction, whether justified.

It is the duty of the prosecution to establish by its own evidence that the accused is guilty. The weakness of the defence evidence is no ground for finding the accused guilty. **M RAMUDU AIYAR v. EMPEROR**, 44 M. L. J. 243; 17 L. W. 370; 32 M. L. T. 318; (1923) A. I. R. (M.) 365; 24 Cr. L. J. 426. 538

Local inspection before hearing of case—

Inspection restricted to situation and features of disputed property—Magistrate, jurisdiction of.

Where in a proceeding under section 145, Criminal Procedure Code, the Magistrate, before beginning to hear the case, goes to the spot in order to see the exact land in dispute and the features of the disputed property and does not take any evidence on the spot or direct his enquiry to any matter which can be proved by oral evidence and places on record a note of his inspection, he acts within his jurisdiction. **PAT LACHMI NARAIN v. MUKHRAM**, (1923) A. I. R. (Pat.) 31; 24 Cr. L. J. 507. 97

Practice—concl'd.

Witness for defence—Attendance, enforcement of—Magistrate, duty of.

A Magistrate having once issued process against a witness for the defence is bound to enforce his attendance and grant an adjournment of the trial for that purpose. **C MIHIR LAL ROY v. EMPEROR**, 24 Cr. L. J. 370. 370

Precedents—Obiter dicta of Privy Council, value of.

An obiter dictum, even of their Lordships of the Judicial Committee of the Privy Council on a point which was not before them and did not arise in the case cannot be treated as an authority. When the point directly arises for decision, it is the duty of the Court to consider the point for itself giving due weight to any words which fell, although obiter, from their Lordships. **M TRIPURAMBA v. VENKATARAM NAM**, 44 M. L. J. 340; 46 M. 423; (1923) A. I. R. (M.) 157. 278

Pre-emption—Pre-emptor, whether bound by personal covenant between vendor and vendee.

A pre-emptor stands in the shoes of the vendee and is bound by all the conditions and obligations by which the vendee is bound, but these conditions and obligations must be found in the deed of sale and cannot be looked for in any subsequent document (though entered into immediately after the execution of the sale-deed) which does not create any interest in the land sold.

A pre-emptor is not, therefore, bound by a personal agreement to re-convey, entered into by the vendee in favour of the vendor after the execution of the sale-deed. **L ALI BAKHSH v. GHULAM MUHAMMAD** 484

Suit by co-sharer—Sale by vendee to co-sharer after institution of suit—Pre-emption, right of, whether lost—Appeal, second—New plea.

A plaintiff in a suit for pre-emption must show that he is entitled to pre-empt not only on the date of the suit but also on the date of the decree.

Where, therefore, the vendee, who is a stranger, sells the property sought to be pre-empted to a co-sharer after the institution of the suit but before the decree, the plaintiff's right to pre-empt is lost.

Behari Lal v. Mohan Singh, 55 Ind. Cas. 71; 18 A. L. J. 220; 2 U. P. L. R. (A.) 48; 42 A. 268 and **Shib Lal v. Bidha Singh**, 72 Ind. Cas. 140; 21 A. L. J. 329, followed.

A plea cannot be considered in second appeal, if it is neither taken in the first two Courts nor in the memorandum of appeal to the High Court. **A HIR KISHI v. MEWA RAM**, (1923) A. I. R. (A.) 294. 247

Gift to defeat pre-emption—Vendee becoming co-sharer before decree—Suit, maintainability of.

A suit for pre-emption cannot be maintained where the vendee, though a stranger on the date of the institution of the suit, obtains a gift of some property in his favour and becomes a co-sharer in the village before the date of the decree even though the gift be obtained with a view to defeat the right of pre-emption. **A SHIB LAL v. BIDHA SINGH**, 21 A. L. J. 329; (1923) A. I. R. (A.) 508. 140

Presidency Small Cause Courts Act (XV of 1882), ss. 41, 43, 47, 49—Ejection suit, stay of.

When proceedings of a summary nature are taken under section 41 of the Presidency Small Cause Courts Act the occupant whom it is proposed to eject is entitled as of right to a stay of the suit, pending a suit in the High Court where he is prepared to bind himself with sureties to institute a suit for compensation for trespass.

The application under section 47 of the Presidency Small Cause Courts Act may be made at any time during the currency of the proceedings and need not necessarily be supported by an affidavit.

M. KRISHNA AIYAR v. SUBRAMANIA AIYAR, 17 L. W. 179; 44 M. L. J. 386; 32 M. L. T. 294; (1923) A. I. R. (M.) 323. 154

Presidency Towns Insolvency Act (III of 1909), s. 103—Order for summary adjudication—Appeal—Leave of Court—Refusal of leave—Appellate Court, power of.

An order under section 106 of the Presidency Towns Insolvency Act, directing an estate to be administered in a summary manner is not appealable except with the leave of the Court, and where such leave is refused, the proper course is to apply to the Appellate Court for special leave. Where in such a case a question of principle is involved, the Appellate Court has inherent jurisdiction to hear the appeal, but it will not interfere with a finding on a question of fact. **B. PANACHAND NARSEY v. STANLEY DOBSON**, 25 Bom. L. R. 161; (1923) A. I. R. (B.) 245. 261

Prisons Act (IX of 1894), s. 42 (3)—Penal Code (Act XLV of 1860), s. 107—Communicating with prisoner—Abetment by prisoner.

A prisoner who by his active co-operation aids a stranger outside the jail in communicating with himself abets the former in the commission of an offence under section 42 (3) of the Prisons Act and is himself guilty of an offence under the section.

Second accused sent a written message to first accused, a prisoner, through a Warder. First accused wrote an answer on the back of the paper containing the message and sent it back to the second accused.

Held, (1) that the second accused was guilty of communicating with a prisoner within the meaning of section 42 (3) of the Prisons Act;

(2) that the first accused was guilty of abetment of the same offence. **M. SREENIVASA CHETTY v. EMPEROR**, (1913) M. W. N. 274; 44 M. L. J. 585; 18 L. W. 80; (1923) A. I. R. (M.) 596; 24 Cr. L. J. 449. 609

Probate and Administration Act (V of 1881), s. 21—Residue of testator's property left to idol—Residuary legatee—Shebait puohit—Shebaitship, how determined—Benefaction to existing endowment—Benefactor, position of.

Where a Will directs that, after payment of obsequious ceremonies of the testator, and certain legacies to specified persons, the residue is to be devoted to the maintenance of the worship of an idol, the residuary legatee under section 21 of the Probate and Administration Act, is the shebait of the idol, and not the priest appointed by the shebait to conduct the worship, as such appointment has not the effect of transferring the

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management of the debutter estate from the shebait to him.

Maharane Indurjeet Kooer v. Chundehum Misser, 16 W. R. 99, relied on.

Where the appointment of a *puohit* or priest of a temple has been at the Will of the founder, the mere fact that the appointees have performed the worship for several generations will not confer an independent right upon the members of the family so appointed and will not entitle them as of right to be continued in office as priest.

Nanobhai v. Trimbak, (1878) P. J. 195 and **Narayana v. Ranga**, 15 M. 183; 2 M. L. J. 19; 5 Ind. Dec. (N. S.) 477, followed.

When the worship of an idol has been founded, the shebaitship is vested in the founder and his heirs, unless he has disposed of it otherwise there has been some usage or course of dealing which points to a different mode of devolution.

Gossami Sri Griaaharaji v. Bomanlalji Gossami, 16 L. A. 137; 17 C. 3; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350; 8 Ind. Dec. (N. S.) 541; **Jagadindra Naik Roy v. Hemanta Kumari Devi**, 3 L. A. 203; 32 C. 19; 8 C. W. N. 809; 6 Bom. L. R. 765; A. L. J. 585; 8 Sar. P. J. 698 (P. C.) and **Mohan Lalji v. Tikait Sri Gordhan Lalji**, 19 Ind. Cas. 337; 40 L. A. 47; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27; 35 A. 283; (P. C.) relied on.

A person who makes a benefaction to an existing endowment cannot be regarded as its founder, where such benefaction is nothing more than an accretion or addition to the existing foundation. **C. KALI KRISHNA ROY v. MAKHAN LAL**, 36 C. L. J. 441; 27 C. W. N. 411; (1923) A. I. R. (C.) 169; 50 C. 233. 686

Procedure—Commissioner's report, appeal against—Application for further directions—Trial Court, jurisdiction of.

While the hearing of exceptions to the report of a Commissioner are pending in an Appellate Court, the Trial Court is not competent to hear any application for further directions on the Commissioner's report, but if it does hear such an application and pass a decree, the plaintiff's remedy is to get rid of the decree by an appeal. **B. ELIA SHAJI AHMED v. HAJI ESMAIL SAIT**, 25 Bom. L. R. 237; (1923) A. I. R. (B.) 200. 401

Joint and separate trials—Evidence recorded once only—Irregularity.

Where several cases were being tried separately but the evidence of those witnesses who were common to all the cases was recorded only once, it being merely read out in the other cases, with the consent of the Counsel for the accused:

Held, that the procedure adopted was irregular, but that in the absence of any prejudice having been caused to the accused, the irregularity did not affect the validity of the trial. **L. NARAIN SINGH v. EMPEROR**, 24 Cr. L. J. 415. 527

Provincial Insolvency Act (III of 1907), s. 6 (4) (c)—Provincial Insolvency Act (V of 1920), s. 78

General Clauses Act (X of 1897), s. 6—Limitation Act (IX of 1908), ss. 5, 14—Petition presented under old Act—Delay, whether can be excused.

Provincial Insolvency Act—1907—contd.

A petition of insolvency presented more than three months after the date of the act of insolvency on which it is grounded is incompetent under section 6 (4) (c) of the Provincial Insolvency Act of 1907. Neither section 5 nor section 14 of the Limitation Act is applicable to a petition presented under the Provincial Insolvency Act of 1907.

Kopparthi Lingayya v. Araveti Chinnarayana, 44 Ind. Cas. 805; 41 M. 169; 33 M. L. J. 566; 7 L. W. 443 (P. B.), followed.

Section 78 of the Provincial Insolvency Act of 1920 has not the effect of empowering the Court to extend the period of limitation in respect of a petition presented under the Act of 1907 more than three months after the date of the act of insolvency on which it is grounded.

Per Spencer, J.—The provision contained in section 6 (4) (c) of the Provincial Insolvency Act of 1907 is quite independent of the Limitation Act and is absolute.

Per Venkatasubba Rao, J.—The intention of the Law of Limitation is not to give a right where there is none, but to interpose a bar after a certain period to a suit to enforce an existing right. *M. AIYAPURAJU v. VEEVA VENKATAKRISHNAYYA*, 44 M. L. J. 303; (1923) M. W. N. 195; 18 L. W. 35; (1923) A. I. R. (M) 462 488

ss. 16—Provincial Insolvency Act (V of 1920), s. 31, whether retrospective—Insolvent, undischarged, under old Act—Immunity from arrest.

A person who was adjudicated insolvent under the Provincial Insolvency Act of 1907 and has not been discharged, is immune from arrest in execution of a decree and the provisions of the new Act of 1920 do not affect his position.

Under the Provincial Insolvency Act of 1907, an insolvent was normally immune from arrest and his arrest could only be obtained, if at all, by special leave of the Court which might put the creditor to terms and in which the burden of showing the special circumstances for departing from the general rule would be on the creditor. Under the Act of 1920, a creditor can proceed as if no adjudication had taken place. It lies on the debtor to move the Court to obtain protection from arrest and the order may be refused if any act of bad faith on the part of the debtor is shown or so framed as to apply only to certain debts or to be operative only for a limited time. *O RADHEY SHIAM v. MOHAMMAD TAQI*, (1923) A. I. R. (O) 36; 9 O. & A. L. R. 37 911

ss. 16 (6), 36—Transfer made more than two years before order of adjudication, whether can be annulled.

Section 16 (6) of the Provincial Insolvency Act does not govern section 36 of the Act and, therefore, a transfer effected more than two years before the order of adjudication but within two years of the date of the presentation of the petition cannot be annulled under the section. *L. GHULAM MUHAMMAD v. PANNA RAM* 438

ss. 24, 26, 37—Adjudication on validity of secured debt—Insolvency Court; power of.

Under section 24 of the Provincial Insolvency Act of 1907, an Insolvency Court has a general

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power to inquire into the validity of a secured debt; independently of the provisions of sections 36 and 37 of the Act; those sections being merely rules of evidence or special rules of substantive law applicable to particular kinds of transfer by the insolvent.

Official Receiver, Tinnevely v. Sanharalinga Mudaliar, 62 Ind. Cas. 495; 44 M. 524; 40 M. L. J. 2; 9; (1921) M. W. N. 2; 6; 14 L. W. 505, *In re Sparke, Ex parte, Cohen*, (1872) 7 Ch. 20; 41 L. J. Bk 17, 25 L. T. 473; 20 W. R. 69 and *Fillis v. Silber*, (1873) 8 Ch 83; 42 L. J. Ch. 666; 28 L. T. 156; 21 W. R. 346, followed.

Per Venkatasubba Rao, J.—Under the Provincial Insolvency Act of 1907, the Court in the exercise of its insolvency jurisdiction has no power to decide questions relating to adverse claims by or against third parties. *M. DOONADULA SRIRAMULA v. PONAKAVIRA REDDI*, (1923) M. W. N. 306; 45 M. L. J. 116; 18 L. W. 426 805

Provincial Insolvency Act (V of 1920), s. 4, sub-ss.

(1), (3)—Question of title—Sale of insolvent's property.

Although under sub-section (1) of section 4 of the Provincial Insolvency Act an Insolvency Court has full power to decide a question of title, yet when it does not deem it expedient or necessary to decide any question of the nature referred to in sub-section (1) but has reason to believe that the debtor has a saleable interest in any property, it may follow the course laid down in sub-section (3) and may without further enquiry sell such interest in such manner and subject to such conditions as it may think fit. *C. JITENDRA NATH v. FATEH SIEGH*, 26 C. W. N. 921 820

ss. 5, 56, 57, 75, 79—Rules framed under s. 79—Official Receiver, removal of—Review, power of—Appeal—'Person aggrieved,' meaning of—Special Receiver, when to be appointed.

The Official Receiver is one of the persons who have a right of appeal under section 75 of the Provincial Insolvency Act, if they are aggrieved by the order of a Court acting in its insolvency jurisdiction.

Official Assignee of Madras v. Rama Chandra Iyer, 5 Ind. Cas. 974; 33 M. 134; 7 M. L. T. 214; (1910) M. W. N. 147, relied upon.

The expression "person aggrieved" in section 75 of the Provincial Insolvency Act means a person who has suffered a legal grievance, that is, a person against whom a decision has been pronounced, which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

Ex parte Sidebotham, In re Sidebotham, (1886) 14 Ch. D. 458; 49 L. J. Bk. 411; 42 L. T. 788; 28 W. R. 715, *Ex parte Official Receiver, In re Reed, Bowen and Co.*, (1887) 19 Q. B. D. 174; 56 L. J. Q. B. 447; 56 L. T. 876; 35 W. R. 866; 4 Moore 225, relied upon.

Although the Provincial Insolvency Act does not contain any provision for reviewing orders already passed, such power must be implied from the provision contained in section 5 of the Act.

No Court has the power to remove an Official Receiver from his office. But where the appoint-

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ment of an Official Receiver to take charge of a particular insolvency is concerned, the proviso to r. 11 of the rules framed by the Madras Government under section 79 of the Act allows the party to apply to the Court to set aside the appointment of the Official Receiver and to ask that a Special Receiver may be appointed in his place.

It is of general importance that all insolvencies should be kept within the control of the Official Receiver, unless very exceptional reasons, such as reasons connected with the personality of the Receiver, are put forward to deprive him of that control.

The words "otherwise directs" in section 57 (2) of the Provincial Insolvency Act, refer not only to the point of time when the appointment of a Receiver under section 56 is made, but also to the period subsequent to the appointment. That is to say, the Court may not at the initial stage appoint a Special Receiver, but it may, if good grounds are shown, remove the Official Receiver appointed originally at any time whatever. **M OFFICIAL RECEIVER OF TANJORE v. NATARAJA SASTRIGAL**, 44 M. L. J. 251; (1923) M. W. N. 212; (1923) A. I. R. (M) 355; 46 M. 405 225

s. 24 Prov. (a)—Application for insolvency—Court, duty of, to enquire into present value of property—Application for insolvency by firm—Application, form of.

In dealing with an application for adjudication of insolvency the Court should enquire into the present value of the properties which are available for meeting the liabilities of the debtor and decide whether, having regard to proviso (a) to section 24 of the Provincial Insolvency Act, the debtor has proved inability to pay his debts.

Where the debtor is a firm the application for insolvency must be in the name of the firm, and must be signed in the manner laid down in rules 19, 22, 24 framed by the High Court under section 79 of the Act. **C SATISH CHANDRA v. FIRM RAJ NARAIN PAKHIRA-RASIK LAL PAKHIRA** 60

s. 28 sub-ss. (3), (6)—Insolvency of mortgagor in possession—Mortgagee, position of.

Having regard to the provisions of section 28, clause (6) of the Provincial Insolvency Act, the reputed ownership clause in sub-section (3) of that section can have no operation to affect the power of a secured creditor. Consequently, the principle that if goods have been mortgaged, the mortgagee is the true owner, and if he allows the mortgagor to continue in possession of the goods until his bankruptcy the goods pass to the trustee, is not applicable to a case under the Act. **G SHAMAL DAS v. PHANINDRA NATH ROY**, (1923) A. I. R. (C) 532 467

Provincial Small Cause Courts Act (IX of 1887),

s. 17—Application to set aside ex parte decree—Application for chalan—Delay in issuing chalan—Deposit, delay in making, whether can be excused.

Where on an application to set aside an *ex parte* decree under section 17 of the Provincial Small Cause Courts Act on the last day of limitation, the defendant applied for a *chalan* and on account

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of the delay of the officer of the Court, the *chalan* was issued some days later and the decree amount was deposited immediately on the issue of the *chalan*:

Held, that the application for the *chalan* in those circumstances was equivalent to the deposit; and the provisions of section 17 must be deemed to have been complied with.

Mahomed Akbar Jaman Khan v. Sukhdeo Ponday, 10 Ind. Cas. 51; 13 C. L. J. 467, *Munna Lal v. Radha Kishan*, 30 Ind. Cas. 186; 37 A. 591; 13 A. L. J. 793, followed.

A Court has power to excuse a delay in making the deposit under section 17 of the Provincial Small Cause Courts Act. **M KOILPILLAI SAMBAN v. SAPPARINUTHU SAMBAN**, 17 L. W. 187; 44 M. L. J. 247; (1923) A. I. R. (M) 354 220

s. 17, whether mandatory—Security, personal, whether can be accepted.

Section 17 of the Provincial Small Cause Courts Act is mandatory and the Court has no power to dispense with the security required by that section.

Assan Mahomed Sahib v. Rahiman Sahib, 55 Ind. Cas. 977; 43 M. 579; 11 L. W. 543; 38 M. L. J. 539; 28 M. L. T. 17; (1920) M. W. N. 375; 27 M. L. T. 273, followed.

The section does not prevent personal security being accepted if the Court is satisfied of its sufficiency but it will not ordinarily do so. **M ARCHAKAM v. KATHIRAMANGALAM**, 17 L. W. 579; 32 M. L. T. 316 900

Sch. II, Art. 18—Trusts Act (I of 1882), s. 3—"Trust," meaning of—Suit for recovery of property entrusted to goldsmith—Court of Small Causes, jurisdiction of.

The meaning of the word "trust" occurring in Art. 18 of the Second Schedule to the Provincial Small Cause Courts Act is analogous to the meaning assigned to it in section 3 of the Trusts Act.

Where a person brings a suit to recover certain property entrusted by him to a goldsmith for work to be done on it, the suit is not one relating to a trust within the meaning of Art. 18 of the Second Schedule to the Provincial Small Cause Courts Act. **U B MA TIN v. MA CHIT**, 4 U. B. R. (1922) 154; (1923) A. I. R. (R) 129 212

Art. 35 (ii)—Misappropriation of money paid—Suit for recovery—Jurisdiction of Court of Small Causes.

A suit to recover money paid to a person and misappropriated by him is, in substance, a suit for compensation within the meaning of Art. 35 (ii) of Schedule I to the Provincial Small Cause Courts Act and, therefore, not triable by a Court of Small Causes. **O UTTAM PRASAD v. KODAI**, (1923) A. I. R. (O) 38; 9 O. & A. L. R. 23; 26 O. C. 200 918

Public Demands Recovery Act (I B. C. of 1895), s.

10—Omission to serve notice of sale—Sale, whether nullity.

When notice has not been served under section 10 of the Public Demands Recovery Act, 1895, a sale under the Act must be deemed to be a nullity, a sale wholly without authority. In such circumstances, the plaintiff in a suit to recover possession need not ask that the sale be set aside; he is

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entitled to recover possession upon the footing that the sale has not affected his title. **O LALIT MOHAN v. MANORANJAN GHOSH CHAUDHURI**, 36 C. L. J. 208; (1923) A. I. R. (C) 13 698

Public Demands Recovery Act (III B C of 1913), ss. 3 (1), 36, 37—Retrospective effect.

There is abundant indication in the provisions of the Public Demands Recovery Act, 1913, that it was not intended to have retrospective operation so as to extinguish or modify causes of action which might have already accrued by reason of failure to serve the notice issued under section 10 of the Public Demands Recovery Act, 1895, for section 36 of the new Act must be read along with section 3 (1). **C LALIT MOHAN v. MANORANJAN GHOSH CHAUDHURI**, 36 C. L. J. 208; (1923) A. I. R. (C) 13 698

Punishment—Daily fine, sentence of—Illegality.

The infliction of a daily fine until the accused complies with the order passed against him is illegal, as no person can be punished for a thing he has not done but may possibly do in the future or is even likely to do in future. **N BABURAO v. MUNICIPAL COMMITTEE**, 24 Cr. L. J. 318 78

Punjab Colonisation of Lands Act (V of 1912), s. 19—Agreement by tenant to sell proprietary rights when acquired, legality of.

An agreement by a Government tenant to transfer proprietary rights in the lands comprising the tenancy as soon as those rights are acquired; does not offend against the provisions of section 19 of the Punjab Colonisation of Lands Act and is in no way illegal. **LINDER SINGH v. DYAL SINGH** 1032

Punjab Courts Act (VI of 1913), s. 39 (1) (a)—Redemption suit—Forum of appeal—Jurisdiction.

The value of a redemption suit is the amount of the charge on the property.

The value of a redemption suit as stated in the plaint cannot be altered by the plea of the defendant whether it be true or false.

The forum of appeal in a redemption suit must be determined with reference to the claim made and not to the decision upon it.

In a suit to redeem certain property on payment of Rs. 3,000, the Trial Court decreed redemption on payment of Rs. 8,620. Defendant appealed claiming a further sum of Rs. 1,860:

Held, that the appeal lay to the District Judge and not to the High Court. **L FATEH CHAND v. JOWAHAR DEVI**, 5 L. L. J. 143; (1923) A. I. R. (L) 569 405

s. 41 (3)—Erroneous decision on custom—Appeal, second—Certificate, whether necessary.

Where a question of custom is involved, a second appeal is not competent without a certificate under section 41 (3) of the Punjab Courts Act notwithstanding that the view taken by the lower Court of the case was erroneous. **L JITA v. HAR CHAND**, 5 L. L. J. 298; (1923) A. I. R. (L) 589 403

Punjab Excise Act (I of 1914), s. 81 (1) (a), (2) (a)—Possession and sale of liquor.

Accused No. 1, a licensee for liquor, brought a certain quantity of liquor to the house of accused No. 2 who was his father. On a purchaser asking

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for liquor accused No. 2 called to accused No. 1 to bring the liquor. The price for the liquor was handed over to accused No. 2:

Held, that it could not be said, either, that accused No. 2 was in joint possession of the liquor with accused No. 1, or that he had joined in the sale of the liquor within the meaning of section 81 (1) (a) and (2) (a) of the Punjab Excise Act. **L KISHEN SINGH v. EMPEROR**, 24 Cr. L. J. 381 381

Punjab Pre-emption Act (I of 1913), s. 5 (a)—"Shop," what is.

A "shop" within the meaning of section 5 (a) of the Punjab Pre-emption Act denotes a building or an apartment which is primarily used for buying and selling goods.

Bhamba Ram v. Allah Bakhsh, 31 Ind. Cas. 191; 69 P. R. 191; 156 P. W. R. 1915, followed.

A building used for the purpose of storing sleepers or grain in which no goods are sold cannot be regarded as a "shop" within the meaning of section 5 (a) of the Punjab Pre-emption Act. **L WADHAWA MAL v. LACHMAN DAS** 591

ss. 15, 21—Sale of occupancy rights—Landlord, right of, to pre-empt.

The landlord of an occupancy tenancy is not entitled to sue under section 21 of the Punjab Pre-emption Act for pre-emption of that tenancy against a person having a right of pre-emption under section 15 (a) or (b) of the Act. **L AHMAD KHAN v. JANGBAZ KHAN** 316

Railway Company—Goods consigned under Risk Note, B—Loss of goods in transit—Liability of Railway Company—Wilful neglect.

Certain goods were entrusted to a Railway Company for carriage. The goods were placed in a Road Van. According to the usual practice of the Company the doors of the Van were not locked but were secured by bolts, which it was the duty of the guard to examine at every intermediate station. On arrival at destination it was found that a package of the consignment was missing. In a suit by the consignor against the Railway Company for damages:

Held, (1) that the securing of the doors of the Road Van with bolts only was inconsistent with the security which the Company was bound to provide for the goods entrusted to its custody in transit;

(2) that although the burden of proving wilful neglect by the Railway Administration or its servants lay on the plaintiff, in the circumstances of the case, wilful neglect might be inferred from the fact that the steps taken to secure the goods against loss by theft were inadequate. **O ROHIL-KHANDAN v. CUMAON RAILWAY CO. v. BIJ RAJ**, 10 O. L. J. 3; 9 O. & A. L. R. 421 428

Railways—Carriage of goods—Risk-note, exempting Railway from liability except in certain cases—Burden of proof.

Where goods are consigned to a Railway Company for carriage under a Risk-note under which the Company is not to be held liable for the loss of any article consigned to it unless the loss is due to the Company's wilful neglect or theft by or the wilful neglect of its servants, and the goods are not delivered and the consignor sues the Company

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for damages, the Railway Company cannot escape liability by merely admitting the loss; they must lead evidence to show that the goods were lost. After the loss is proved it is for the claimant to prove the exceptional circumstances mentioned in the Risk-note making the Railway Company liable for damages, such as wilful neglect on the part of the Railway servants or theft by them. **L. GREAT INDIAN PENINSULAR RY. CO. v. PANNA LAL GOPALJI**, (1923) A. I. R. () 609 779

Railways Act (IX of 1890), s. 72—Non-delivery of consignment—Suit for damages—Risk Note, B—Loss of consignment—Burden of proof.

Under section 72 (1), Indian Railways Act, 1890, the responsibility of a Railway Administration for the loss, destruction or deterioration of animals or goods delivered to the Administration to be carried by Railway is that of a bailee under sections 151, 152, and 161 of the Contract Act. But this responsibility might be limited by special contract as provided by clause (2) of the section. Risk Note B is one form of such contract, which exempts the Railway Administration from liability, unless for the loss of a complete consignment under particular circumstances.

Where in a suit against a Railway Company for damages caused by non-delivery of goods consigned to it under a Risk Note B executed by the consignor, the Company admit non-delivery, such admission does not exonerate them from liability; they must plead and prove that the circumstances in which the Risk Note was intended to operate and exempt them from liability have occurred. A mere allegation of loss by the Company or an admission of non-delivery by the consignor is no proof of such loss. **N. HANUMANTRAO v. G. I. P. RAILWAY CO.**, 19 N. L. R. 56; (1923) A. L. R. (N) 223 333

s. 72—Risk-Note Form B—Contract Act (IX of 1872), ss. 151, 152, 161—Liability of Railway—“Loss,” meaning of—Burden of proof.

Under sections 151 and 152 of the Contract Act, read with section 72 of the Railways Act, the liability of a Railway Administration for the loss, destruction, or deterioration of goods delivered to the Administration to be carried by Railway is that of an ordinary bailee; that is to say, if the Railway Administration take as much care of the goods bailed to them, as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed, they will not, in the absence of special contract, be responsible for the loss, destruction or deterioration of the goods.

The onus is, however, on the bailee to show that he is exonerated from liability for loss to the bailor.

Under the Risk-Note Form B the burden of proof lies in the first instance upon the Railway Administration to prove that there was such loss as is contemplated by the first part of the Risk-Note and when they have done so, the onus is shifted upon the bailor to show that the loss is due to the wilful neglect of the Railway or their servants as provided in the latter part of the Risk-Note.

The loss referred to in section 72 of the Railways Act is the loss suffered by the consignor or the true

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owner whether such loss occurred by reason of misd livery or non-delivery.

Hill, Sawyers, & Co. v. Secretary of State, 61 Ind. Cas. 96; 2 L. 133; 3 L. L. J. 297, relied upon.

The Risk-Note Form B applies not only when the goods have been lost by the bailee in the sense that he cannot trace them but also when they are lost to the owner because the bailee fails to deliver them to him in breach of his contract for any reason whatsoever.

A bailor cannot, by merely suing for compensation for non-delivery, take the case out of the Risk-Note. **Pat G. I. P. Ry. Co. v. Jitan Ram Nirmal Ram**, (1923) Pat. 82 4 P. L. T. 173; 1 P. L. R. 169; (1923) A. I. R. (Pat) 285; 2 Pat. 442 440

s. 72—Risk-Note—“Package,” meaning of. The word “package” in a Railway Risk-Note means both that which is packed and that in which it is packed, that is, its covering or receptacle. **Pat Bhagwan Das v. East Indian Railway Company**, 4 P. L. T. 302 133

ss. 77, 140—Suit against Railway Company for compensation for non-delivery of goods—Notice, service of—Notice on Traffic Manager, if sufficient—“Loss,” if includes non-delivery.

Where a person sues a Railway Company for damages on account of the non-delivery of goods consigned to it for carriage, he must give notice as provided in section 77 of the Railways Act, and where the head-quarters of the Railway Company are in England, such notice should be given to the Agent of the Company in India. A notice served on the Traffic Manager of the Company is not sufficient in law.

A claim for compensation for non-delivery of goods includes the case of the loss of the goods just as much as the case of the detention of the goods.

Where detention is not pleaded or put in issue a claim *simpliciter* for compensation for non-delivery of goods against a Railway Company must be understood as including or involving a claim for the “loss” of the goods within the meaning of section 77 of the Railways Act.

Per B. B. Ghose, J.—The word “loss” used in section 77 of the Railways Act is wide enough to include all cases where the goods are not forthcoming and, therefore, includes a case of non-delivery. **C. Assam Bengal Railway Co., Ltd. v. Radhika Mohan Nath**, (1923) A. I. R. C) 397 714

s. 109—Reserved accommodation—Railway Company, powers of—Reservation, nature of.

By virtue of section 109 of the Railways Act, a Railway Company has a general power of reserving compartments for the use of passengers who have already booked their seats, or for prospective passengers who the Company anticipate will travel, and the Company are entitled to reserve either individual seats, or whole compartments. But such power ought not to be exercised so as to give an undue preference, or to cause an undue prejudice to any particular passenger traffic, whether individual or collective. **B. Emperor v. Narayan Krishna Gogate**, 25 Bom. L. R. 26; (1923) A. I. R. (B.) 1; 47 B. 465; 24 Cr. L. J. 297 25

Registration—Sale-deed—Endorsement by Registrar—Proof of document—Registration Act (XVI of 1908), s. 60.

In a suit on a registered sale-deed, the endorsement by the Registrar that the executant admitted execution before him is not by itself sufficient evidence to prove that document. The endorsement merely shows that a certain person admitted execution and although one is entitled to presume that the person who admitted the execution was the person who signed the deed, that does not show who signed the deed, nor that the person so signing was the person who could give title to the plaintiff. **B MARUTI BALJI PATIL v. DATTU MUKUNDA SAVANT**, 25 Bom. L. R. 192; (1923) A. I. R. (B.) 253. **304**

Registration Act (XVI of 1908), s. 17—Construction of document—Agreement to sell—Registration.

In order to decide whether a document requires registration under section 17 of the Registration Act, the document should be considered as a whole and due weight should be given to the general tenor and sense of the document.

A bilateral agreement to sell immoveable property which does not create or declare any rights in the property does not require registration. **LINDER SINGH v. DYAL SINGH**. **1032**

s. 17—Receipt evidencing part payment towards mortgage-debt—Registration, if compulsory.

A receipt which states that the mortgagor had paid a certain sum on account of a mortgage but which does not recite that this sum was all that was due under the mortgage and that the effect of the payment was to extinguish the security, is not compulsorily registrable under section 17 of the Registration Act and is consequently not inadmissible in evidence for want of registration. **C JOGENDRA NATH v. SAFI UDDIN**. **454**

ss. 17, 49—Compromise deed acknowledging title to immoveable property—Registration, whether necessary.

A deed of compromise which recites that a house belonging to a person and in his possession and enjoyment shall be enjoyed by him with power to make a gift or sale of the same, does not purport to create or modify title to immoveable property since it contains only a statement of fact. Such a document does not require registration under section 17 of the Registration Act and is admissible in evidence either as a contract to acknowledge an existing title or as evidence in the nature of an admission. **M RANJANAYAKI AMMAL v. VIRUPAKSHEE RAO NAIDU**, 17 L. W. 533; 32 M. L. T. 312; 45 M. L. J. 100, (1923) A. I. R. (M.) 61. **450**

ss. 17, 49—Unregistered document—Admissibility in evidence—Collateral purpose—Oral evidence, whether admissible.

A Court must decide whether the purpose for which it is sought to use an unregistered document is really a collateral one or is to establish directly title to the property sought to be conveyed by the document.

An unregistered deed of lease is not admissible in evidence to prove that the property to which it relates was let for a term of years, nor can the

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terms of the lease be proved in such a case by oral evidence. **L MOTT SAGAR L. DHANNA MAI**, (1922) A. I. R. (L.) 329. **177**

s. 32—Document, registration of—Presentation by person signing on behalf of executant, validity of—Pleadings.

Whether a person signs a document expressly as agent or whether he is expressed to sign on some other person's behalf, that makes no substantial difference. In each case he signs *prima facie* as agent and has a right to present the document for registration. **B SHRIDHAR AXMAN v. JANARDHANBAPUJI**, (1923) A. I. R. (B.) 37. **993**

ss. 32, 72, 77—Delay in presenting document for registration—Refusal by Registrar to condone delay—Subsequent refusal to revise order—Suit to compel registration, maintainability of.

Where a Registrar, acting under section 34 of the Registration Act, refuses to sanction the acceptance of a penalty for a belated admission of execution, and to condone delay in presenting a document for registration, in consequence of which registration is refused by the Sub-Registrar, an application made to the Registrar to revise his previous order is equivalent to an appeal under section 72 of the Act, and an order by him refusing such application is in substance an order under that section refusing to direct the registration of the document, and a suit for a decree directing the registration of the document is maintainable under section 77 of the Act. **B FATTECHAND ANANDRAM MARWADI v. UMAJI VALUJI MAHAR**, 25 Bom. L. R. 45; (1923) A. I. R. (B.) 187; 47 B. 290. **118**

Remand—Inherent power of Court—Remand on second appeal—Order, whether can be attacked in appeal from decree.

The validity or propriety of a remand order made on second appeal cannot be questioned, on a subsequent second appeal. The party dissatisfied with the order of remand should either apply for a review of judgment or get the decision set aside by an appeal to a superior Tribunal. Where recourse is not taken to either of these possible methods for contesting the validity of the order of remand, its propriety is not open to consideration in second appeal against the decree made after remand.

The power of an Appellate Court to direct a remand is wider than that indicated in O. XXI, r. 23, of the Civil Procedure Code. The Appellate Court has inherent power to direct a remand where such remand is needed in the ends of justice.

The policy of the Legislature as indicated in the Civil Procedure Code is in favour of finality of orders of remand. **C BISAI NATH v. TARA NATH** (1923) A. I. R. C. 1335. **588**

Res judicata—Execution proceedings—Mortgage—Redemption decree—Final decree not passed—Sale of certain items allowed without objection—Application for sale of other item—Objection as to non-existence of final decree, maintainability of.

In a suit for redemption, pending an appeal against the preliminary decree a final decree was passed. The Appellate Court varied the preliminary decree by enhancing the amount to be paid to the mortgagee. After the variation, no fresh final

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decree was passed. The decree-holder, however, applied for sale of certain items of property, which was ordered without objection by the judgment-debtor. On a later application to sell certain other items of property, on objection being taken by the judgment-debtor to the executability of the decree on the ground that there was no subsisting final decree:

Held, that though the Executing Court did not, on the prior occasion, expressly hold that the decree was executable, in spite of the absence of a final decree, yet as that objection should have been taken, and as the sale was ordered in execution of the decree as it stood, the effect of the order was to decide in favour of the executability of the decree, and that the judgment-debtor was barred by the rule of *res judicata* from raising the objection that there was no final decree in respect of the items now sought to be sold, and the mere fact that the previous application was for the sale of other items did not make any difference. **M PALANCHERI GOVINDA v. POOKOTE KUNTI KRISHNA**, 17 L. W. 566; (1923) M. W. N. 299; 45 M. L. J. 71 397

Incidental observations.

Observations in a judgment in a suit in which the nature of the tenure of certain lands arose only incidentally and the real issue was, whether a prior decree was properly obtained, are not *res judicata* in a subsequent suit regarding the nature of the tenure of the lands; **M MATHOOR GRAMAN v. MANUKURISI VARJATH LAKSHMI**, 17 L. W. 514; (1923) M. W. N. 313; 32 M. L. J. 399; (1923) A. I. R. (M.) 572 327

Rent-decree—Presumption.

While a decree for rent finally decides the rent payable for the years in suit, it is merely presumptive evidence of the rent of future years and the presumption may be rebutted. **PAT PARMESHWAR PRASAD SINGH v. NARSINGH RAI**, 1 P. L. R. 109 138

Revision—Civil Procedure Code (Act V of 1908), s. 115.

The general principle which governs interference with an order under section 115 of the Civil Procedure Code, is, that when a Court has taken up a point of fact or law for decision and has decided that point wrongly, it has acted with full jurisdiction regularly and legally and no revision lies against its order, unless that order itself affects the Court's own jurisdiction. But when, having jurisdiction, the Court has failed or refused to take up a point for decision, it has exercised its jurisdiction irregularly, and the more the failure or refusal affects the exercise of its jurisdiction, the greater the irregularity will be. **M AHMAD THAMBI MARICAIR v. BAVASA MARACAYAR**, 16 L. W. 898; (1922) M. W. N. 813; 44 M. L. J. 69; (1923) A. I. R. (M.) 254; 46 M. L. J. 123 902

Specific Relief Act (1 of 1877), ss. 8, 9—Suit for possession based on title—Title not proved—No decree for possession can be given.

In a suit for possession of a certain plot of land based on title, the plaintiff cannot succeed on the ground of possessory title, if he fails to prove his real title. **A WALI MUHAMMAD v. ANTOO KOERI**, (1923) A. I. R. (A.) 117 924

Specific Relief Act—cont'd.**ss. 19, 29, applicability of.**

Sections 19 and 29 of the Specific Relief Act do not apply, where the claim is for the recovery of earnest-money. **A MUNNI BABU v. KOER KAMTA SINGH**, 21 A. L. J. 265; 9 O. & A. L. R. 429; (1923) A. I. R. (A.) 321; 45 A. 378 86

s. 22—Specific performance—Unfair advantage—Discretion of Court.

Under section 22 of the Specific Relief Act, a Court may properly exercise its discretion where the circumstances under which the contract was made are such as to give the plaintiff an unfair advantage over the defendant though there may be no fraud or misrepresentation on the plaintiff's part.

Where it was found that at the time when the contract was entered into the plaintiff held an unfair advantage over the defendant owing to the fact that the latter's faculties were enfeebled but that there was no fraud or misrepresentation and the bargain was not unequitable:

Held, that specific performance should not, under the circumstances, be decreed. **L SHERR SINGH v. UDHAM SINGH**, 5 L. L. J. 507 586

s. 27—Hindu Law—Joint family—

Agreement by manager to purchase immoveable property—Specific performance, whether can be enforced against surviving co-parceners—Minor, specific performance against—Necessity—Proff.

The Specific Relief Act is an exhaustive Code and section 27 thereof defines every class of persons against whom specific performance may be enforced, and under that section contracts for purchase are not included among the contracts which can be enforced against persons other than the contracting party himself.

An agreement for purchase of immoveable property entered into by the manager of a joint Hindu family cannot, after his death, be specifically enforced against the surviving co-parceners, inasmuch as the latter do not, in such a case, fall within the class of persons defined in section 27 of the Specific Relief Act.

Venkateswara Aiyar v. Raman Namhudri, 33 Ind. Cas. 696; 3 L. W. 435; 19 M. L. T. 329, distinguished.

Bhagwan v. Krishnaji, 58 Ind. Cas. 335; 22 Bom. L. R. 997; 44 B. 967, dissented from.

A Court will not decree specific performance against a minor unless it is satisfied that such act is for the benefit of the minor. It is not sufficient to show that it is not detrimental to him; if there is any possibility of there being a detriment, the Court will require to be satisfied that the possibility no longer exists before it takes action.

Under the Hindu Law there is no presumption that every purchase of immoveable property is for the benefit of the family. It is a question of fact in each case which must be proved by evidence by the party relying upon it.

A member of a joint Hindu family does not inherit under his father but takes by survivorship, for on his birth he obtains a right in the whole family property and not merely in a portion of it. No doubt, when one member of the co.

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parcenary dies, his share passes to the others, but it is more a question of lapse of the title of the deceased person rather than an acquisition of title in the survivors, for even before the death of the deceased co-parcener they had a right in the whole of the property, including the share of the deceased member. *M. BAPPU v. ANNAMALAI CHETTIAR*, 44 M. L. J. 226; (1923) M. W. N. 218; 17 L. W. 364; 32 M. L. T. 253; (1923) A. I. R. (M.) 313. 42

s. 35—Decree for specific performance, form of.—Time fixed for payment, effect of.—Failure to pay within time fixed—Procedure—Delay in suing, effect of.

A decree in a suit for specific performance of a contract for sale of land, directing conveyance on payment of an amount by the plaintiff and fixing a time for such payment, is in the nature of a preliminary decree and after the original judgment, the action is not ended but remains under the control of the Court. It is competent both to the Original and the Appellate Courts on suitable application; to extend the time fixed for payment, and the plaintiff's rights under the decree are not lost merely by non-payment within the time fixed.

A decree for specific performance must not make payment of the purchase-money by a certain date a condition of the continuance of the rights under the judgment.

Ramaswami Kone v. Sundara Kone, 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26; *Moideen Kuppai v. Ponnuswamy Pillai*, 26 Ind. Cas. 63; 1 L. W. 832; 16 M. L. T. 430, distinguished.

Observations of Srinivasa Iyengar, J., in *Gopala Aiyar v. Sannasi*, 32 Ind. Cas. 401; 3 L. W. 29; 19 M. L. T. 137, dissented from.

Where a purchaser offers to pay the purchase-money without actually tendering it, but the vendor refuses to accept the offer, there is a waiver and actual tender of the amount is dispensed with.

Polglass v. Oliver, (1831) 2 Cr. & J. 15; 149 E. R. 7; 2 Tyr. 89; 1 L. J. (N. S.) Ex. 5; 37 R. R. 623, followed.

In a suit for specific performance of a contract, the fact that certain persons entitled to the benefit of the contract refused to join the plaintiff and were, therefore, joined as defendants, is not a bar to a decree for specific performance.

Persons who desire the assistance of a Court in obtaining an equitable relief must come quickly, but the question whether a Court should grant an equitable relief is one of fact to be decided on the circumstances of each case.

Where a suit for specific performance of a contract of sale is brought some two years after the time fixed for its performance and it appears that the plaintiff was put off by the defendant himself who is not shown to have been prejudiced by the delay in bringing the action, the Court ought not to refuse to exercise its powers of decreeing specific performance.

Per. Wallace, J.—Where specific performance of a contract of sale has not been effected within the period laid down by the decree, it is open to the purchaser to apply to the Court for an extension

Specific Relief Act—concl.

of time for payment of the purchase-money, and to the vendor to apply either for a final and pre-emptory order for specific performance, or for an order rescinding the contract either immediately or to follow automatically on the expiry of the period pre-emptorily granted. *M. ABDUL SHAKER SAHIB v. ABDUL RAHMAN SAHIB*, 44 M. L. J. 107; (1923) M. W. N. 117 L. W. 216; (1923) A. I. R. (M.) 284; 46 M. L. 148. 868

s. 35—"In the same case," meaning of—Decree for specific performance of contract—Default in payment under decree—Rescission of contract—Separate suit, if necessary.

The words "in the same case" in the last paragraph of section 35 of the Specific Relief Act refer to case (c) in that section. Where, therefore, a default in payment has been made in a case under that clause, the Court can make an order to rescind the contract in the same suit in which the decree has already been made, instead of putting the opponent to file another suit for rescission. *B. KURPAL HEMRAJ v. SHAMRAO RAGHUNATH*, 25 Bom. L. R. 234; (1923) A. I. R. (B.) 211; 47 B. 589. 321

Statutes, interpretation of.—Reference to history of Statute, if permissible.

Reference is not permissible to the Report of a Select Committee in aid of the interpretation of a statutory provision. *ODINA NATH PAL v. SATI PRASAD*, 36 C. L. J. 220; 27 C. W. N. 115; (1923) A. I. R. (C.) 74. 663

Succession Act (X of 1865), ss. 204, 225—Joint administration, whether desirable—Practice—Persons equally entitled—Selection how to be made.

Section 204 of the Succession Act does no more than state that those who are in equal degree of kindred to the deceased are all, from that point of view alone, equally entitled to be appointed administrators, but the section nowhere says that they are all entitled to be appointed jointly. Under section 225 of the Act the Court is given very wide powers, where it considers it necessary or convenient to appoint some person to administer the estate other than the person who in ordinary circumstances would be entitled to the grant.

There is nothing in the Succession Act which makes it obligatory upon the Court to grant Letters of Administration to all the persons who may be entitled thereto, merely by reason of their equal nearness of kinship to the deceased.

It is well-settled that the Court should prefer a sole to a joint administration and even where several persons stand in the same degree of kinship to the deceased, it is the rule to select one only, the selection being made according to certain recognised principles. The interest of the estate which has to be administered and the interests of the parties entitled thereto must be primarily looked to and, other things being equal, a person with business experience and capacity will be preferred to one who has none.

Warwick v. Greville, (1809) 1 Phill. Ecc. 123; at p. 125; 161 E. R. 934, relied upon.

Again, where two persons are equally entitled by reason of consanguinity, preference will frequently be given to the one chosen by the majority.

Succession Act—contd.

of those entitled to distribution of the assets, although other considerations may be sufficient to overrule the wishes of the majority of those interested.

A son, as a rule, will be preferred to a daughter and where none of the usual tests can be applied the Court frequently appoints the applicant who is first in the field.

Cordaux v. Trasler, (1865) 4 Sm. & Tr. 43; 34 L. J. P. 127; 11 Jur. (N. S.) 58; 16 E. R. 1433, relied upon.

The Court never forces joint administration on unwilling parties. *PAT STONEY v. STONEY*, 4 P. L. T. 251; (1933) Pat. 130; 2 Pat. 508, (1923) A. I. R. (Pat.) 348. 811

Suits Valuation Act (VII of 1887), s. 8 916

Tort—Joint tortfeasors, liability of—Suit against several tortfeasors—Death of one of them—Procedure.

The liability of wrong-doers in tort is joint and several.

Where a suit is brought to recover damages in respect of a tort and it is discovered that one of the defendants had died before the institution of the suit, the proper procedure is to strike out the name of the defendant who is dead and to allow the suit to proceed against the others. *L. PHILLO v. GÓPI* 670

Transfer of Property Act (IV of 1882), s. 3—Succession Act (X of 1865), s. 187—Owner under voidable title, whether can pass good title—Bona fide purchaser for value—Person in possession of property, rights of, notice of—Constructive notice, doctrine of, limits of—Will—Probate not taken—Executor, whether can pass possessory title.

A person who has acquired property under a voidable title can himself give a good title to that property to a bona fide purchaser or mortgagee from him who deals for value and has no notice of the defects in the title.

Constructive notice of all the rights of a person in possession will be imputed to a purchaser or mortgagee who makes no inquiry of the person in occupation, on the principle that where another is in exclusive possession of property and such possession is *prima facie* inconsistent with the full right of the vendor or mortgagor and the purchaser does not choose to ask what that possession is, he must be taken to have got the information that he would have obtained if he had asked.

It is not, however, the duty of a proposed purchaser or mortgagee to inquire of every person who may be on the premises or any part thereof, nor does the unknown occupation of a part of the premises put him on inquiry as to the possible rights of the occupier of that portion over the remainder of the premises.

Hunt v. Luck, (1901) 1 Ch. 45; 70 L. J. Ch. 30; 83 L. T. 479; 49 W. R. 155; 17 T. L. R. 3; *Kunt v. Luck*, (1902) 1 Ch. 428; 71 L. J. Ch. 239; 86 L. T. 58; 50 W. R. 291; 18 T. L. R. 265; *Hunter v. Walters*, (1872) 7 Ch. App. 75 at p. 83; 41 L. J. Ch. 175; 25 L. T. 765; 20 W. R. 218 and *Manji Karimbhai v. Hoorba*; 8 Ind. Cas. 752; 35 B. 342; 12 Bom. L. R. 1044; followed.

Transfer of Property Act—contd.

In the case of tenement houses, there may be on the premises the actual sub-tenants, their wives, families, friends, guests and so forth. To suggest that it is the duty of the proposed mortgagee or purchaser to attend on these premises and examine narrowly every one of these persons would be to him an intolerable burden and to hold that he was affected by constructive notice of all these persons possible equitable rights over any part of the premises would be an extension of the doctrine of constructive notice, which must be kept within the limits which have already been fixed.

Under section 187 of the Succession Act a person who in Court has to prove title deduced from a Will, whether he is plaintiff or defendant, cannot do so, without producing Probate.

But a Will of which Probate has not been granted cannot be treated as non-existent nor can the property pass by intestacy. The Will is a perfectly valid document and the executor under it can deal with the property and give a perfectly good title though it may be that to complete that title it requires Probate to be taken out at a later date.

Section 187 of the Succession Act is no bar to a transferee from an executor who has not taken out Probate but who was in possession and who has given a possessory title-deed, suing on that title-deed to eject a trespasser and the lack of Probate is insufficient to bar the ejectment of such a trespasser. *M. PARTHASARATHY AIYAR v. SUBBAROYA GRAMONY*, (1923) M. W. N. 763; 45 M. L. J. 175 569

s. 6—Assignment of rent of future renewals of lease, validity of.

An assignment of rent cannot operate in respect of future possible leases that may come into existence as a result of renewal. *M. RAMA PATTAR v. KUMURAN CHIDAYATH KASHAVAN*; 44 M. L. J. 236; 32 M. L. T. 136; (1923) M. W. N. 250; (1923) A. I. R. (M) 316 139

s. 53—Bona fide purchaser for valuable consideration from fraudulent transferee, whether protected.

A bona fide purchaser for valuable consideration from a fraudulent transferee without notice of the fraud is protected under the proviso to section 53 of the Transfer of Property Act. *M. POTANE PUTHAN VITTI v. ADRASSERI RARU NAIR*; 44 M. L. J. 527; 17 L. W. 517; 32 M. L. T. 372; 40 M. 478; (1923) A. I. R. (M) 558 727

s. 53—Partition, whether transfer—Limitation Act (IX of 1908), Sch. B, Art. 120—Suit to set aside transfer of property by stranger—Limitation.

A partition signifies the surrender of a portion of a joint right in exchange for a similar right from the other co-sharers and, therefore, is a "transfer" of property within the meaning of section 53 of the Transfer of Property Act.

A suit to set aside a transfer of property under a document to which the plaintiff was not a party is governed by Art. 120 of Schedule I to the Limitation Act. *M. RASA GOUNDAN v. ARUNACHETLAM GOUNDAN*, 44 M. L. J. 513; 17 L. W. 613; (1923) M. W. N. 320; 32 M. L. T. 344; (1923) A. I. R. (M) 577 978

Transfer of Property Act—contd.

ss. 80, 76, 83, 91—Mortgage—Mortgagee becoming owner of part of mortgaged property—Redemption by assignee of portion of equity of redemption—Tender, effect of—Account, basis of—Redemption suit—Decree—Deposit of mortgage-money—Withdrawal by mortgagee—Acquiescence—Appeal.

The assignee of a share only of the mortgagor's interest is a person entitled under section 91 of the Transfer of Property Act to redeem the whole mortgage and to deposit the whole of the mortgage-debt notwithstanding that the mortgagee has become owner of part of the mortgaged property. This statutory right is not taken away by recognition in section 60 of the Act of the right of partial redemption in certain cases.

A tender or deposit by the assignee in such a case must be of the whole amount of the mortgage-debt without any proportionate reduction in respect of the part of the mortgaged property purchased by the mortgagee where such reduction has not been ascertained either by agreement or by Court.

Though in such a suit for redemption, the mortgagee has no right to retain possession after the tender, having regard to practical convenience and the scheme of the Transfer of Property Act, the proper course for the Court to adopt is to determine the amount of the mortgage-debt for which the properties purchased by the mortgagees are liable, and to allow the redemption of the rest only, on payment of the proportionate amount and settle all the questions arising between the parties so as to obviate the necessity for a fresh suit to adjust the rights of the owners of the equity of redemption.

The effect of a lawful tender or deposit of the mortgage-money is to determine all the mortgagee's rights including his right of retaining possession and transfer them to the redeeming mortgagor, and this principle is equally applicable to a case where part of the mortgaged property has been purchased by the mortgagee.

In taking account of the liability of a mortgagee remaining in possession after a lawful tender or deposit for the gross receipts of the mortgaged property under section 76 (1) of the Transfer of Property Act, the mortgagee is entitled to credit for amounts paid after tender to meet the revenue demands on the mortgaged property, for necessary repairs and collection charges.

Per *Krishnan, J.*—The right to deposit the mortgage-money in Court under section 83 of the Transfer of Property Act is co-extensive with the right to sue for redemption. Once a decree is passed settling the rights of parties on redemption, what is thereafter done should be referred to that decree. The payment of the mortgage-money thereafter can only be under that decree and not under section 83 of the Transfer of Property Act which no longer applies. Where the mortgagee draws out the money deposited in Court after the decree, there is no acquiescence in the decree so as to render an appeal from it incompetent. *M. TADEPALI SUBBA RAO GARU v. BALUSU BUCHI SARVARAYUDU*, 44 M. L. J. 534; 1 I. W. 61; (1923) M. W. N. 533; (1923) A. I. R. (M) 533. 292

Transfer of Property Act—concl'd.

s. 72 (b)—Mortgage with possession—Rent of mortgaged land to be paid by mortgagee—Covenant to pay rent along with principal—Redemption, suit for—Mortgagee's right of.

Apart from any express contract, it is incumbent on a mortgagee in possession to pay arrears of rent in respect of the mortgaged property, in default of payment of which the property is liable to be sold. When he has made such payment he has a statutory right, in the absence of any contract to the contrary, to add it to the principal.

In a mortgage-deed the property was stated to be hypothecated for the principal sum but the mortgagee was authorised to pay arrears of rent and the mortgagor covenanted to pay any such amount paid by the mortgagee along with the principal at the time of redemption. It was urged that the stipulation as to the repayment of rent was a separate contract independent of the mortgage security and that if it was an integral part of the agreement, it was a clog on redemption.

Held, (1) that it was the statutory right of the mortgagee to add the amount of the arrears of rent paid by him to the principal, and the mortgagor was bound to pay the same at the time of redemption;

(2) that there was nothing in the contract to take the case out of the Statute; it merely acknowledged the statutory right and gave effect to it. *PAT HIRA RAUT v. FAKIRCHAND MAHTON*, 1 P. L. R. 167. 91

s. 109—Lease—Transfer of lessor's interest—Notice to lessee, absence of, effect of.

Section 109 of the Transfer of Property Act provides no penalty for want of notice to the lessee of the transfer of the lessor's interest except the loss of rent paid by the lessee to the original lessor. The want of notice does not absolutely debar the transferee from recovering rent from the lessee. *L. BHOLA NATH v. SUPPER*, (1923) A. I. R. (L.) 389. 86

Trusts Act (II of 1882), s. 3. 212

Vendor and purchaser—Re-sale, when can be effected—Reasonable time.

Where a right of re-sale is given by the contract between the parties it is not necessary that the property in the goods should pass to the purchaser to enable the seller to re-sell the goods and claim the difference between the price of the goods as originally contracted for and the price fetched at the re-sale.

Moll Schulte & Co. v. Luchmi Chand, 25 C. 505; 2 C. W. N. 283; 13 Ind. Dec. (N. S.) 335 (P. C.), relied upon.

Yule & Co. v. Mahomed Hossain, 24 C. 1241; 1 C. W. N. 711; 12 Ind. Dec. (N. S.) 748, dissented from.

Angulia and Co. v. Sassoon & Co. 13 Ind. Cas. 705; 39 C. 568; 16 C. W. N. 593, distinguished.

A seller electing to exercise the right of re-sale is not only bound to wait a reasonable time after giving notice of his intention before actually re-selling, but he is bound to exercise the right within a reasonable time after the date of the

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breach, otherwise the price obtained on such re-sale, if it has been unreasonably delayed till the market has fallen, will not be a true criterion of the damage. **L. ABAUL, HAKIM MUHAMMAD SADIK v. JOHO JAUTZEN** 772

Wajib-ul-arz, construction of—Custom or contract.

A *wajib-ul-arz*, *prima facie*, is to be construed as embodying a record of custom, but this presumption must give way if the language of the document itself indicates that the record is not one of custom but of contract.

The introduction to a *wajib-ul-arz* contained the following recital, "The agreement between us proprietors and *Lambardars* is that so long as this Settlement lasts the following conditions shall be binding on us"

Held, that whatever usages were recorded in the *wajib-ul-arz* were recorded as usages of contract and not of custom. **A HARI SINGH v. HARBANS LAL** 491

Will—Burden of proof—Forged document—Finding of Court.

The burden of proving a Will is on the party who sets it up, and if the Court finds that an alleged Will is not a genuine document, it ought to record a finding that the alleged Will is not proved. To record a finding that the Will is a forgery is to go beyond what the law requires.

P. C. BAIKUNTHA RATH CHATTORAJ v. PRASANAMAOYI DEBYA, (1922) A. I. R. (P. C.) 469; 44 M. L. J. 699; 27 C. W. N. 797 286

—, construction of—Property devised for performance of *sradh* ceremony—Ceremony performed by volunteer, effect of.

A testator devised certain property to the defendants for the purpose of defraying the expenses of the performance of his *sradh* ceremony. The defendants being minors, the *sradh* ceremony of the testator was performed by a volunteer:

Held, that, under the circumstances, the defendants took the property free from the burden and that it could not be said that there was an intestacy with regard to the devised property. **PAT MOTI LALL v. RAMKHELAWAN DAS** 400

—"Kindred Roll and Names of Heirs"—maintained by the Military, whether Will.

Will—concl'd.

The "Kindred Roll and Names of Heirs" maintained by the Military Authorities in respect of a soldier can only be used for the limited purpose of ascertaining who are the next-of-kin in case the soldier dies, and cannot be treated as a Will. **B. BHAGURAI TUKARAM JOGDUNDE v. APPAJI SITA RAM CHARATHE**, 25 Bom. L. R. 157, 47 B. 552; (1923) A. I. R. (B) 260 277

—Testamentary capacity—Sense or consciousness, existence of, if sufficient.

The mere fact that at the time of the execution of an alleged Will the testator had sense or consciousness, or that he was able to answer a question or two put by the Doctor about his illness, is not sufficient evidence of his testamentary capacity. **C. JOGESH CHANDRA SHAHA v. BHIKU SAU PARAMANIK** 88

Workman's Breach of Contract Act (XIII of 1859).

s. 1, enquiry under—Criminal Procedure Code (Act V of 1898), s. 247, applicability of—Order of acquittal purported to be passed under s. 247—Order of dismissal of complaint—Review.

The proceedings of a Magistrate under the Workman's Breach of Contract Act up to the stage of the passage of an order by the Magistrate for re-payment or performance under section 2 are not criminal proceedings at all.

Hussaina Beari v. Emperor, 59 Ind. Cas. 45; 43 M. 443; 22 Cr. L. J. 13 and **Emperor v. Dhondu**, 1 Ind. Cas. 378; 33 B. 22; 6 Bom. L. R. 255; 1 Cr. L. J. 263, followed.

Therefore, an inquiry under section 1 of the Workman's Breach of Contract Act cannot be held to be governed by Chapter XX of the Criminal Procedure Code and an order of acquittal of an accused person on account of the non-appearance of the complainant on the day of hearing even though purported to be made under section 247 of the Code, cannot be considered to have been passed under that section. Such an order is merely one of dismissal of the complaint which the Magistrate can review if he sees cause to do so. **M. RAMAMMA v. GURUNATHAM**, 32 M. L. T. 347; (1923) M. W. N. 402; 45 M. L. J. 36; 18 L. W. 111; 46 M. 723; 24 Cr. L. J. 465 881